

PERMANENT COURT
OF ARBITRATION

OPTIONAL RULES
FOR CONCILIATION OF DISPUTES RELATING TO
NATURAL RESOURCES AND/OR
THE ENVIRONMENT

CONTENTS

Introduction	213
Scope of Application (Article 1)	215
Commencement of Conciliation Proceedings (Article 2)	215
Number of Conciliators (Article 3)	216
Appointment of Conciliators (Article 4)	216
Submission of Statements to Conciliator (Article 5)	218
Representation and Assistance (Article 6)	219
Role of Conciliator (Article 7)	219
Communication Between Conciliator and Parties (Article 8)	220
Disclosure of Information (Article 9)	220
Co-operation of Parties with Conciliator (Article 10)	220
Suggestions by Parties for Settlement of Dispute (Article 11)	220
Settlement Agreement (Article 12)	221
Confidentiality (Article 13)	221
Termination of Conciliation Proceedings (Article 14)	222
Resort to Arbitral or Judicial Proceedings (Article 15)	222
Competence of the Conciliation Commission (Article 16)	223
Costs (Article 17)	223
Deposits (Article 18)	224
Role of Conciliator in Other Proceedings (Article 19)	224
Admissibility of Evidence in Other Proceedings (Article 20)	224

INTRODUCTION

The Rules are based primarily on the PCA Conciliation Rules and UNCITRAL Conciliation Rules¹ with changes in order to:

- (i) reflect the public international law element which pertains to disputes which may involve States, utilization of natural resources and environmental protection issues, and international practice appropriate to such disputes;
- (ii) reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component;
- (iii) indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration (PCA) at The Hague; and
- (iv) provide freedom for the parties to choose to have a conciliation commission of one, three, or five persons.

The Rules are optional and emphasize flexibility and party autonomy. For example:

- (i) The Rules, and the services of the Secretary-General and the International Bureau of the PCA, are available for use by private parties, other entities existing under national or international law, international organizations, and States;
- (ii) The Rules may be used in relation to disputes between two or more States parties to a multilateral agreement relating to access to and utilization of natural resources concerning the interpretation or application of that agreement;
- (iii) The parties are free to choose conciliators from the PCA Panel of Arbitrators constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, or Members of the PCA;

¹ Other procedures consulted were the WIPO Mediation Rules, the ICSID Conciliation Rules, conciliation procedures in the United Nations Convention on the Law of the Sea, the United Nations Convention on Biological Diversity, and the Rotterdam Convention. The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment also provided guidance for the development of these rules. See the Introduction to the PCA Optional Conciliation Rules at pages 151-153, for additional general information on the use of conciliation procedures.

- (iv) The parties are free to choose expert witnesses from the PCA Panel of Scientific and Technical Experts constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment;
- (v) The choice of conciliators or experts is not limited to PCA Panels;
- (vi) The parties have complete freedom to agree upon any individual or institution to make appointments. In order to provide a failsafe mechanism to prevent frustration or delay of the conciliation, the Rules provide that the Secretary-General will make appointments if the parties do not agree upon such a person or institution, or if that person or institution chosen does not act.

Mindful of the possibility of multiparty involvement in disputes having a conservation or environmental component, these Rules provide specifically for multiparty choice of conciliators and sharing of costs. In the case of multiparty conciliation, all other articles should be interpreted in an analogous fashion. The framers of existing and future agreements may need to determine the relationship between these Rules and such agreements, and may modify them as necessary. Modifications to these Rules or such agreements as to jurisdiction *ratione personae* may be especially necessary to allow for the participation of non-state actors.

In some places these Rules refer to an ‘obligation to conciliate.’ This reference was intended to ensure harmony between these Rules and existing agreements that might require compulsory conciliation, or court decisions requiring parties to conciliate.

Consideration should be given to the method of implementing and enforcing a settlement agreement. UNCITRAL has recently considered various methods in the Report of the Working Group on Arbitration on the work of its thirty-fifth session (A/CN.9/506 2001). One method is that the settlement agreement could be stipulated to be binding and enforceable as a contract. Another is for an arbitral tribunal to be appointed to record the settlement agreement in the form of an arbitral award on agreed terms. Parties could also adapt the present rules to stipulate that the settlement agreement be binding and final as an arbitral award, however consideration must first be given to possible legislative changes necessary to render settlement agreements final and binding as arbitral awards.

Parties may choose to include a clause allowing for the option of referring the dispute being conciliated to arbitration; a model clause for this purpose is set forth at page 243.

**PERMANENT COURT OF ARBITRATION OPTIONAL RULES
FOR CONCILIATION OF DISPUTES RELATING TO
NATURAL RESOURCES AND/OR THE ENVIRONMENT**

Effective April 16, 2002

Scope of Application

Article 1

1. These Rules apply to conciliation of disputes relating to natural resources and/or the environment. For the purposes of these Rules, ‘conciliation’ means a process whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute relating to natural resources and/or the environment. The characterization of the dispute as relating to the environment or natural resources is not necessary for application of these Rules, where all the parties have agreed to settle a specific dispute under these Rules.

2. Such disputes shall be conciliated in accordance with these Rules subject to such modification as the parties may, at any time, expressly agree upon in writing, unless such modification is excluded by the agreement under which the dispute arises or the agreement to conciliate. The expression ‘agree upon in writing’ includes provisions in agreements, contracts, conventions, treaties, the constituent instrument of an international organization or agency or reference upon consent of the parties by a court. For the purposes of this and all following articles, ‘writing’ may include electronic methods of communication in accordance with accepted international practice.

Commencement of Conciliation Proceedings

Article 2

1. The party² initiating conciliation shall send to the other party, with a copy thereof to the International Bureau of the Permanent Court of Arbitration (the ‘International Bureau’) a written invitation to conciliate under these Rules, including as appropriate:

- (a) the names, addresses and telephone, or other communication references of the parties to the dispute and of the representative of the party filing the invitation;

² Words used in the singular include the plural and vice-versa as the context may require.

- (b) a reference to the agreement under which this invitation arose;
 - (c) a reference to any rule, decision, agreement, contract, convention, treaty, or instrument of an organization or agency, under which the dispute arises;
 - (d) a reference to the general nature of the dispute which led to the invitation.
2. (a) Conciliation proceedings commence when the other party accepts the invitation to conciliate, or when the invitation reaches the other party in the event there is an obligation to conciliate.
- (b) If the party initiating conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such longer period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to conciliation. The initiating party shall inform the other party of any such decision.
3. The International Bureau shall take charge of the archives of the conciliation commission (as meant in article 4) unless the parties otherwise agree. In addition, upon written request of the parties or the conciliation commission, the International Bureau shall act as a channel of communication between the parties and the conciliation commission, provide administrative and secretariat services, and/or serve as Registry.

Number of Conciliators³

Article 3

There shall be one conciliator unless the parties agree on three or five conciliators. As a general rule, where there is more than one conciliator, they ought to act jointly.

Appointment of Conciliators

Article 4

1. (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator within sixty days after commencement of the conciliation proceedings;

³ In this and all following articles, the term ‘conciliator’ applies to a sole conciliator or all conciliators where more than one are appointed, and the term ‘conciliation commission’ means a sole conciliator or all conciliators where more than one are appointed.

OPTIONAL CONCILIATION RULES – NATURAL RESOURCES AND ENVIRONMENT

- (b) In conciliation proceedings with three conciliators, each party appoints one conciliator within sixty days after commencement of conciliation proceedings, communicating the name of the conciliator to the other party and the International Bureau, and within thirty days thereafter, the two conciliators thus appointed shall choose a third conciliator to act as president of the conciliation commission;
 - (c) In conciliation proceedings with five conciliators, each party appoints two conciliators within sixty days after commencement of conciliation proceedings, communicating the names of the conciliators to the other party and the International Bureau, and within thirty days thereafter, the four conciliators thus appointed shall choose a fifth conciliator to act as president of the conciliation commission;
 - (d) If after sixty days, as set out in sub-paragraphs (a), (b) and (c) above, the parties have not agreed on a sole conciliator, or a party has not appointed its conciliator, the Secretary-General of the Permanent Court of Arbitration (the ‘Secretary-General’) shall notify the parties and make such appointment within thirty days;
 - (e) In addition, if after thirty days, as set out in sub-paragraphs (b) and (c) above, the party-appointed conciliators have not chosen a president, the Secretary-General shall notify the parties and make such appointment within thirty days.
2. Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,
- (a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or
 - (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.
 - (c) If the person or institution enlisted in this article refuses to act or fails to appoint the conciliator within sixty days of a party’s request therefor, the parties shall endeavour to reach agreement on the name of a conciliator within thirty days.
 - (d) If, after thirty days, as set out in sub-paragraph (c) above, the parties have not agreed on a sole conciliator, or a party has not appointed its conciliator, the Secretary-General shall make such appointment within thirty days.
3. Parties may also enlist the assistance of the Secretary-General in connection with the appointment of conciliators. In particular:
- (a) A party may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(a) of this article;

PERMANENT COURT OF ARBITRATION – BASIC DOCUMENTS

- (b) The parties may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(b) of this article; or
 - (c) The Secretary-General may be the ‘person’ performing the functions set forth in paragraphs 2(a) and (b) of this article, pursuant to a request or agreement.
 - (d) When designated as appointing authority, the Secretary-General will make appointments within thirty days after such designation.
4. For the purpose of assisting the parties and the person or institution performing the functions set out in paragraphs 2(a) and (b) of this article, the Secretary-General will make available a list of persons considered to have expertise in the subject-matter of the dispute at hand.
5. (a) In disputes between more than two parties, parties having the same interest shall appoint their conciliator to the commission jointly by agreement pursuant to this article.
- (b) Where two or more parties cannot reach agreement on the appointment of a conciliator or conciliators within a period of sixty days after commencement of conciliation, the conciliator shall then be appointed within thirty days by the Secretary-General.
6. In recommending or appointing individuals to act as conciliator, the institution or person making such appointments shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole, third, or fifth conciliator, shall take into account the need of appointing a conciliator of a nationality other than the nationalities of the parties. The parties may request that the conciliator sign an impartiality declaration indicating any past or present professional, business, or other relationships with the parties.

Submission of Statements to Conciliator

Article 5

1. The conciliator, upon appointment, shall request each party to submit a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of its statement to the other party and the International Bureau.
2. The conciliator may request each party to submit a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of its statement to the other party and the International Bureau.

3. At any stage of the conciliation proceedings the conciliator may request that a party submit additional information.

Representation and Assistance

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party, the conciliator, and to the International Bureau; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

Role of Conciliator

Article 7

1. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
2. The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties and the circumstances surrounding the dispute, including any previous practices between the parties. The conciliator will make proposals to preserve the respective rights of the parties, and to prevent and/or mitigate serious harm to the environment falling within the subject-matter of the dispute.
3. The conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the relevant law and circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and any special need for a speedy settlement of the dispute.
4. The conciliator may propose the appointment of one or more experts to report on specific issues, after having obtained the views of the parties. The conciliator may enlist the services of the Secretary-General who will provide an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon.
5. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Communication Between Conciliator and Parties

Article 8

1. The conciliator may meet with the parties, or may communicate with them orally or in writing. The conciliator may communicate with the parties together or with each of them separately, subject to prior notification of the intention to meet separately with the other party.
2. The conciliator shall fix the location of any meetings after consulting with the parties. The conciliator may request the International Bureau to arrange for the place where such meetings will be held.

Disclosure of Information

Article 9

When the conciliator receives information concerning the dispute from a party, the conciliator *may* disclose the substance of that information to the other party in order that the other party may present an explanation. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of Parties with Conciliator

Article 10

The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide information and attend meetings.

Suggestions by Parties for Settlement of Dispute

Article 11

Each party may, on its own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

Article 12

1. When it appears to the conciliator that elements of a settlement exist which would be acceptable to the parties, the conciliator will formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
2. If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.
3. The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.
4. The conciliator may propose the establishment of an implementation committee upon written agreement of the parties to the settlement agreement, to assist the parties in implementing the settlement agreement. If the parties agree on the establishment of an implementation committee, the parties may request the assistance of the conciliator in any aspect of its establishment. The implementation committee may:
 - (a) request the parties to provide periodic reports on implementation to the committee and parties to the settlement agreement;
 - (b) review reports provided by the parties and communicate results of the review to other parties to the settlement agreement;
 - (c) monitor implementation of the settlement agreement according to procedures to be determined by the parties;
 - (d) determine a list of indicative measures meant to facilitate implementation and propose such measures to a party determined not to be meeting its obligations under the terms of the settlement agreement.

Confidentiality

Article 13

Unless the parties agree otherwise, or disclosure is required by a court or tribunal of competent jurisdiction, the conciliator, the parties and all other persons involved in the conciliation shall respect the confidentiality of the conciliation and may not use or disclose to any outside party any information concerning, or obtained in the course of, the

conciliation. ‘Information’ for the purpose of this article includes, but is not limited to, views expressed, suggestions, arguments and admissions made, and positions taken by the parties or the conciliator during the conciliation. Each such person shall sign an appropriate confidentiality agreement and shall keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of Conciliation Proceedings

Article 14

The conciliation proceedings are terminated:

- (a) by the signing of the settlement agreement by the parties, on the date of the agreement; or
- (b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration, unless there is an obligation to conciliate, in which case the procedure of the underlying agreement will prevail.

Resort to Arbitral or Judicial Proceedings

Article 15

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for the preservation of and/or the interim protection of its rights.

Competence of the Conciliation Commission

Article 16

Where there is an obligation to conciliate, a disagreement as to whether the conciliation commission has competence shall be decided by the conciliation commission. Any objection that the conciliation commission has no competence shall be raised as early as possible, and in any case not later than the date of the submission of the written statement mentioned in article 5, paragraph 1.

Costs

Article 17

1. Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. All costs related to the conciliation proceedings should be reasonable in amount. The term ‘costs’ includes only:

- (a) the fee of the conciliator;
- (b) the travel and other expenses of the conciliator;
- (c) the travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
- (d) the costs of any expert advice requested by the conciliator with the consent of the parties;
- (e) the cost of any assistance provided pursuant to article 2, paragraph 3 and article 4, paragraphs 2 and 3 of these Rules;
- (f) the costs of any services of the Secretary-General and the International Bureau of the Permanent Court of Arbitration.

2. The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

Deposits

Article 18

1. The conciliator, upon appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph 1, which are expected to be incurred.
2. During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party. Before agreeing to provide initial or supplementary deposits, the parties may request an estimate of the costs including items listed in article 17, paragraph 1(a) to (f).
3. If the required deposits under paragraphs 1 and 2 of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.
4. Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.
5. The conciliator may request the International Bureau to perform the functions set out in paragraphs 1 to 4 of this article.

Role of Conciliator in Other Proceedings

Article 19

The parties and the conciliator undertake that, unless the parties agree otherwise, the conciliator will not act as an arbitrator or as a representative or counsel of a party or other person involved in the conciliation, in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

Admissibility of Evidence in Other Proceedings

Article 20

Subject to the general provisions of article 13, the parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

OPTIONAL CONCILIATION RULES – NATURAL RESOURCES AND ENVIRONMENT

- (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) admissions made by the other party in the course of the conciliation proceedings;
- (c) proposals made by the conciliator;
- (d) the fact that the other party had indicated its willingness to accept a proposal for settlement made by the conciliator.