ECONOMIC COMMISSION FOR EUROPE

MEETING OF THE PARTIES TO THE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES

CONFERENCE OF THE PARTIES TO THE CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS

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PCA PROPOSALS FOR ARTICLE 13 *(BIS)*

OF THE ´DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES WITHIN THE SCOPE OF THE UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND THE UNECE CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS'

* This document has not been formally edited.

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PROPOSALS FOR ARTICLE 13(*BIS*) OF THE ´DRAFT LEGALLY BINDING INSTRUMENT ON CIVIL LIABILITY FOR TRANSBOUNDARY DAMAGE CAUSED BY HAZARDOUS ACTIVITIES WITHIN THE SCOPE OF THE UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS CONVENTIONS´[1]

PRESENTED AT THE 3RD MEETING OF THE INTERGOVERNMENTAL WORKING GROUP, MAY 6-8, GENEVA

Following the Intergovernmental Working Group (IGWG hereinafter) meeting of February 5 in Geneva, the International Bureau of the Permanent Court of Arbitration (PCA hereinafter) was kindly invited by the delegation of Germany and IGWG to submit language for Article 13(*bis*) on Arbitration. The PCA is honoured to fulfill this request and submits a suggestion for Article 13(*bis*) and a modification to Article 7 to accommodate that suggestion, below, accompanied by brief explanatory remarks.

The need for an arbitration clause for the Draft Legally Binding Instrument on Civil Liability for Transboundary Damage Caused by Hazardous Activities Within the Scope of the UNECE Convention on the Protection and use of Transboundary Watercourses and International Lakes ("Watercourses" hereinafter) and Transboundary Effects of Industrial Accidents ("TEIA" hereinafter) Conventions has been contemplated by the IGWG since its first meeting[2], and this idea was further elaborated in Working Papers submitted by the delegation of Hungary[3]. Therein, the delegation of Hungary pointed out some of the advantages of providing recourse to arbitration as a complement to national courts in the context of the Protocol[4]. In addition to those, further noteworthy advantages of arbitration in the context of the Protocol may be singled out[5]:

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[2] *See*: MP.WAT/AC.3/2001/2 – CP.TEIA/AC.1/2001/2.

[3] *See*: MP.WAT/AC.3/2001/WP.1 – CP.TEIA/AC.1/2001/WP.1 at 4, and MP.WAT/AC.3/2002/WP.2 – CP.TEIA/AC.1/2002/WP.2 at 2-3.

[4] Among the advantages of arbitration over national courts cited were: ´a more rapid procedure, more professional expertise, and the assurance of execution of the decisions of such tribunals´. Expertise in the subject matter will be indispensable for effective settlement of the dispute given the amount of complexity involved in the regime at hand. In this regard, the PCA Environmental Rules offer the use of the Member State nominated panels of environmental law and science experts. National courts may also choose to refer disputes under the present Protocol to arbitration, as they may not possess the necessary expertise to deal with a case involving transboundary harm as an expert arbitral tribunal might. *Ibid.* MP.WAT/AC.3/2001/WP.1 – CP.TEIA/AC.1/2001/WP.1 at 4.

[5] Romano discusses some of the advantages of arbitration for the peaceful settlement of international environmental disputes in: Cesare P. R. Romano, *The Peaceful Settlement of International Environmental Disputes. A Pragmatic Approach.* (The Hague 2000), at 102-110. *See also*: Attila Tanzi, Recent Trends in International Water Law Dispute Settlement. In: *International Investments and Protection of the Environment; The Role of Dispute Resolution Mechanisms*. (The Hague 2001), at 133-174. Here 156-157. Prof. Tanzi notes in the context of water law disputes that "the possibility that mutually agreed settlement is reached before the award is made, with the effect of terminating the arbitral proceedings, is also of special

- An arbitral tribunal composed of party-appointed neutrals would offer the assurance of impartiality both for claimant and respondent who might not wish to have the dispute settled under the jurisdiction of the opposing party´s courts[6]. The impartiality of the arbitral tribunal could benefit both the claimant´s and respondent´s home States vis-à-vis their respective populations and neighboring States[7].

- The fact that proceedings under the PCA Environmental Arbitration Rules provide more party autonomy than litigation might lead to a more cooperative settlement of the dispute and protect more fully the interests of both claimant and respondent and their respective home States. For example, the amount of confidentiality is up to the parties, as are items such as the number of arbitrators, applicable law, location of the arbitration, language, etc.

- Arbitration under the PCA Environmental Rules in particular, offers great flexibility in the nature and number of parties who may have standing. This could be especially important in the context of the Protocol, as there may be multiple claimant and/or respondent parties to a dispute falling within the scope of the Protocol[8].

In summarizing, arbitration appears to offer important advantages over litigation in national courts for civil liability under the Protocol. These advantages will be developed further in relation to specific provisions of the Protocol.

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importance." He further notes that the prospect of unilaterally triggered arbitration might even be conducive to the settlement of the dispute on agreed terms.

[6] Redfern and Hunter describe this situation in terms of traditional international commercial arbitration, but their analysis is equally applicable to international arbitration within the context of the Protocol. Practical problems such as the unfamiliarity of a claimant with the language of the respondent's home courts, and of course the laws of that State are described. *See*: Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London 1999) at 23-30.

[7] Lachs applies *Realpolitik* to the advantages of arbitration over adjudication noting that the impartiality and neutrality of a tribunal may protect a State from loss of face, providing the potential of assigning responsibility to the tribunal, while still obtaining finality and international recognition of the result. He further notes that arbitration is often faster, more flexible, and allows more party autonomy in developing procedures specific to the dispute at hand than litigation. *See*: M. Lachs, Arbitration and International Adjudication, in: *International Arbitration; Past and Prospects*. Ed. By A.H.A. Soons, (The Hague 1990) at 37-54. Here: 40.

[8] As per Article 2(2)(b)(ii) of the Protocol. The property involved could be owned by a variety of actors (individuals, corporations, organizations, etc.), thus creating the need to have broad standing of the type that an arbitral tribunal can provide. *See above* Redfern and Hunter, note 6. Moreover, a variety of actors might have a right to claim damages of the type listed in Article 2(2)(b)(v). *See also* Edward H.P. Brans, *Liability for Damage to Public Natural Resources-Standing, Damage, and Damage Assessment*, (The Hague 2001). Brans studies the right of standing in several civil liability instruments across several jurisdictions.

The drafting proposal for Article 13(*bis*) reads as follows:

- "Article 13 (*bis*):

  1. Claims for damage as defined above in Article 2(2)(b) against ´persons liable´ under this Protocol, and in accordance with Article 7 of this Protocol, may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, as annexed hereto.

  2. In the absence of an existing contractual arrangement allowing for a dispute between claimants and persons liable under this Protocol to be referred to arbitration, where both parties can agree, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, as annexed hereto."

The present draft instrument, MP.WAT/AC.3/2002/4 – CP.TEIA/AC.1/2002/4, contemplates optional arrangements for arbitration where the claimant and respondent "can agree to proceedings". Paragraph 1 of the proposal above would provide claimant parties direct recourse to arbitration without a separate arbitration agreement where a person is already liable under the Protocol, and the claimant is also either a person liable under the Protocol, or there is a contractual arrangement providing for arbitration according to the procedures of the Protocol[9]. Paragraph 1 of this proposal also takes into account that there may be multiple claimants and respondents, and that obtaining submission agreements for respondent parties in such a scenario could be a very time-consuming process: in effect potentially allowing the hazardous activity leading to the dispute to continue until the tribunal could be formed[10]. Paragraph 1 allows the claimant to initiate proceedings directly and rapidly[11]. The tribunal could thereby be constituted even where the respondent was recalcitrant.

Paragraph 2 provides for the scenario that there may not be a contractual relationship such as the one referred to in Article 7(1)(b) allowing for arbitration between affected claimant parties and a person liable under the Protocol. In such cases, arbitration pursuant to the above proposal would be optional, i.e. where claimants and respondents could agree to arbitrate. Parties may further wish to consider adopting a provision to the Protocol giving standing to any affected party to initiate arbitration proceedings against a

[9] As provided for in Article 7(1). The subsequent proposal to modify Article 7(1) may be necessary to implement the proposal for Article 13(bis)(1).

[10] Article 33 of the PCA Environmental Rules on applicable law may also be useful for a multiple party scenario, as claims pursuant to the Protocol will involve multiple legal systems. It states that where parties cannot agree on the applicable law, the tribunal may determine the applicable law based on appropriate international, national, and rules of law, thus allowing the tribunal to take into account relevant national legislative circumstances applying to the dispute, in addition to international law and rules of law. *See* Romano, *above* note 5 at 103, where he refers to the *Trail Smelter* arbitration in connection with how an arbitral tribunal might rule on applicable law in the context of transboundary harm.

[11] The PCA has experience and could be involved if requested in assisting with an initial screening of claims in order to ensure that they meet procedural requirements.

person liable under the Protocol[12]. If Parties agree to do the latter, paragraph 2 might not be necessary. Neither Proposal would affect rights under Article 7(2).

Consideration might need to be given to whether an arbitral tribunal under Article 13(*bis*) is to be seen as a "competent court" under Article 7. In the drafting proposal for Article 13(*bis*) above, it is assumed that an arbitral tribunal under Article 13(*bis*) would have the equivalent status of a competent court for the purposes of Article 7. The reason for this assumption is that an arbitral tribunal seems to be performing the same function as a domestic court in providing the claimant with recourse. It may therefore be desirable to add language to Article 7(1) to ensure that the right of recourse to an arbitral tribunal is equal to that before a "competent court". It would then be up to the claimant to choose the venue.

The drafting proposal for the chapeau of Article 7(1) reads as follows:

- Add "or arbitral tribunal established under Article 13 (*bis*)" after the words "competent court". The chapeau of Article 7 (1) would then read as follows (proposal in underlined italics):
  "Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court *or arbitral tribunal established under Article 13(bis).*"

Finally, the PCA could institute an arbitration and provide Registry services at any location if so desired, as the tribunal may require institutional support. However, the parties to the dispute remain free under the PCA Environmental Rules to choose the location of the arbitration, and Registry unless a proposal making specific reference thereto is added to Article 13 (*bis*) or any submission agreement. As stated in the paper presented at the last meeting of the IGWG, the panels of expert environmental arbitrators and scientists can be made available to parties using the PCA Rules.

A model clause is attached for perusal of the IGWG and could be inserted into existing and future contracts or used *ad hoc*.

MODEL CLAUSE:

Future Disputes
Parties may choose to include the following model clause in agreements to have disputes referred to arbitration under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment:

1. *Any dispute, controversy, or claim arising out of or relating to the interpretation, application or performance of this agreement, including its existence, validity, or termination, shall be settled by final and binding arbitration in accordance with the Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, as in effect on the date of this agreement. The International Bureau of the PCA shall serve as*

[12] Such a provision might require persons liable under the Protocol to agree to submit to arbitration for any and all disputes for which they are liable and the claimant can show it has a legal interest in the dispute.

Registry and archives for the proceedings. (NB: Parties may agree to vary this model clause. If they consider doing so, they may consult with the Secretary-General of the PCA to ensure that the clause to which they agree will be appropriate in the context of these Rules, and that the functions of the Secretary-General and the International Bureau can be carried out effectively)

Parties may wish to consider adding:

2. *The number of arbitrators shall be...[insert one, three, or five]*

3. *The language(s) to be used in the arbitral proceedings shall be...[insert choice of one or more languages]*
4. *The appointing authority shall be...[insert choice]*"(*NB: Parties may agree upon any appointing authority. The Secretary-General will consider accepting designation as appointing authority in appropriate cases. Before inserting the name of an appointing authority in an arbitration clause, it is advisable for the parties to inquire whether the proposed authority is willing to act.)*

Existing Disputes

If the Parties have not already entered into an arbitration agreement, or if they mutually agree to change a previous agreement in order to provide for arbitration under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, they may enter into an agreement in the following form:

1. *The Parties agree to submit the following dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, as in effect on the date of this agreement: ...[insert brief description of dispute] The International Bureau of the PCA shall serve as Registry and archives for the proceedings.*

2. Parties may wish to consider adding paragraphs 2-4 as set forth above under "Future Disputes".