

INFORMATION NOTE

Prepared by

Law Division of the United Nations Environment Programme

Legal and institutional options for addressing drought under the United Nations Convention to Combat Desertification (UNCCD)

A. INTRODUCTION

1. The intergovernmental working group on drought which is one of the subsidiary bodies of the United Nations Convention to Combat Desertification (“UNCCD” or “Convention”) is currently discussing options on how the UNCCD can address drought within the framework of the Convention. The UNCCD Secretariat has sought the advice of the UNEP Law Division on legal and other institutional options that the working group may wish to consider in the light of the practices of Multilateral Environment Agreements (MEAs) and the experiences of UNEP.
2. In response to this request for advice, this Note addresses both legally binding and non-legally binding options that the working group may wish to consider: As far as legally binding options are concerned, those discussed are an amendment to the Convention; an annex to the Convention; a Protocol under the auspices of the Convention or a separate Agreement under the Convention as well as Decisions taken under the auspices of the Convention. As to non-legally binding options, these include a non-legally binding instrument; a Political Declaration and a “Global Framework.” The possibility of negotiating an instrument outside the UNCCD framework is also addressed.
3. In addition, the Note examines financial mechanisms under protocols to treaties or Conventions as well as “financial arrangements” created under non-binding legal instruments. Political Declarations are also reviewed although they usually do not provide for any type of financial mechanism.

B. MANDATE AND COMPOSITION OF THE WORKING GROUP ON DROUGHT

4. Paragraph 10 of Decision 23/14 adopted by the Conference of the Parties of the UNCCD (“COP”) on 13 September 2019 decided “to establish an intergovernmental working group, subject to the availability of resources, on effective policy and implementation measures for addressing drought under the United Nations Convention to Combat Desertification, with a view to presenting its findings and recommendations to Parties for their consideration at the fifteenth session of the Conference of the Parties.”
5. Operative paragraph 11 of the same COP Decision further decided that the terms of reference of the intergovernmental working group (“working group”), would be “to take stock of and review the existing policy, implementation and institutional coordination frameworks, including partnerships, on drought preparedness and response and to consider options for appropriate

policy, advocacy and implementation measures at all levels for addressing drought effectively under the Convention, in the context of a wider holistic and integrated approach to disaster risk reduction and enhancing the resilience of communities and ecosystems.”

6. The COP Decision also provides that the intergovernmental working group will comprise Parties, international organizations, the Science-Policy Interface, civil society organizations and key stakeholders. Currently, the working group is composed of 30 members that consist of 15 Party representatives nominated by each of the five regional groups. An additional 15 participants are drawn from key stakeholders, and include United Nations organizations, the Science-Policy Interface, other scientific organizations, regional organizations and civil society organizations.¹

C. LEGALLY BINDING OPTIONS

(i) Adoption of an Amendment to the Convention

7. The Glossary of terms relating to treaty actions in the United Nations Treaty Handbook² defines an Amendment as follows: “The term "amendment" refers to the formal alteration of treaty provisions affecting all the parties to the particular agreement. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Many multilateral treaties lay down specific requirements to be satisfied for amendments to be adopted. In the absence of such provisions, amendments require the consent of all the parties.”
8. Article 22 of the UNCCD Convention provides that the COP may adopt amendments to the Convention pursuant to Article 30 that provides that, “1. Any Party may propose amendments to the Convention. 2. Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Permanent Secretariat at least six months before the meeting at which it is proposed for adoption. The Permanent Secretariat shall also communicate proposed amendments to the signatories to the Convention.” Article 30 further provides that the amendments shall be adopted either by consensus or by a two thirds majority vote. Under Article 30, instruments of ratification, acceptance, approval or accession in respect of an amendment are to be deposited with the Depositary, the UN Secretary-General and Article 30 also provides for when amendments will come into force.³
9. Every multilateral treaty has its own procedure for the adoption of amendments. However, a good example is the amendment to Article 43 (2) of the Convention on the Rights of the Child that addresses the Committee on the Rights of the Child. The amendment was proposed by the Government of Costa Rica and circulated by the UN Secretary-General under cover of depositary

¹ <https://www.unccd.int/issuesland-drought/intergovernmental-working-group-drought>

² https://treaties.un.org/pages/Resource.aspx?path=Publication/TH/Page1_en.xml

³ See also Article 15 of the United Nations Framework on Climate Change (UNFCCC) and Article 29 of the Convention on Biological Diversity (CBD).

notification⁴ in accordance with article 50 (1) of the Convention. The COP convened by the Secretary-General adopted the amendment on 12 December 1995 which was subsequently approved by General Assembly.⁵ In the case of UNCCD, no approval by the UN General Assembly is required for amendments.

10. Recent examples of amendments within the context of Multilateral Environment Agreements (“MEAs”) include the Kigali Amendment that is an amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. It was adopted by the 28th Meeting of Parties to the Montreal Protocol (MOP28) on 15 October 2016 in Kigali, Rwanda.⁶ The Amendment adds greenhouse gases hydrofluorocarbons (HFCs) to the list of substances controlled under the Protocol and which are to be phased down. The Amendment entered into force on 1 January 2019 following ratification by 65 countries. The draft Amendment was negotiated within the Open-ended Working Group of the Parties to the Montreal Protocol that was given a mandate to negotiate a hydrofluorocarbon amendment in 2016.⁷

11. If consensus already exists on the content of the proposed amendment, the process for adoption and entry into force should be smooth and fast. Consensus should thus be achieved within the subsidiary body to the COP, such as a working group that has been mandated to conduct such negotiations on an amendment. If consensus does not exist then there is usually a high threshold for adoption, i.e. a two thirds majority vote within a COP. The amendment would only be legally binding on those Parties who ratify, accept, approve or accede to it. Thus, entry into force is conditional on an “opt-in procedure”, requiring a positive act from Parties, and the amendment would only be binding on those Parties that ratify, accept, approve, or accede to the amendment. No amendments have been made to the UNCCD Convention or its annexes to date and Parties may be reluctant to amend the Convention.

(ii) Adoption of an Annex under the Convention

12. Article 31 of the UNCCD provides that, “Any additional annex to the Convention and any amendment to an annex shall be proposed and adopted in accordance with the procedure for amendment of the Convention set forth in article 30” unless it relates to adopting an additional regional implementation annex or an amendment to that annex.⁸

13. Thus, it would be possible, using the same procedure for an amendment, for the UNCCD COP to adopt an annex to the Convention that addresses drought.

⁴ C.N.138.1995.TREATIES-3 of 22 May 1995

⁵ General Assembly resolution 50/155 of 21 December 1995

⁶ Report of the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP/OzL.Pro.28/12).

⁷ Report of the Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, resumed thirty-eighth meeting Kigali, 8 October 2016.

⁸ See also Article 16 of the UNFCCC and Article 30 of the CBD.

14. The same considerations that apply for the adoption of an amendment apply to the adoption of an annex. In addition, there may be prolonged debates on whether an annex to the UNCCD Convention is in the correct form, since current annexes relate to regional implementation arrangements only.

(iii) Adoption of a Protocol or Agreement under the auspices of the Convention

15. The United Nations Treaty Handbook states that “a protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A protocol is normally open to participation by the parties to the parent agreement. However, in recent times States have negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail”.⁹

16. Human rights treaties often have "Optional Protocols" which can provide for complaint, communication or inquiry procedures with regard to a treaty or address a substantive area related to a treaty. However, their status is no different to “Protocols”.¹⁰

17. Several MEAs have adopted Protocols to the original treaty and done so by way of decisions of their governing bodies. These Protocol are seen as supplementary agreements intended to address or elaborate upon the provisions of the original treaty.

18. For example, by Decision 1/CP.3 of 11 December 1997 the Conference of the Parties (“COP”) of the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Kyoto Protocol to the UNFCCC that was annexed to Decision 1. The Decision also requested the UN Secretary-General to serve as Depositary and invited all Parties to the UNFCCC to sign the Protocol and to deposit their instruments of ratification, acceptance or approval.¹¹

19. A similar approach was followed by the COP of the Convention on Biological Diversity (CBD) when it adopted Decision X/1 on 29 October 2010 entitled, “Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization.” By this Decision, the COP decided to adopt the Nagoya Protocol on Access to Genetic Resources that was set out in the annex to that Decision. The COP also requested the UN Secretary-General to be the Depositary of the Protocol and to open it for signature to the Parties who were called upon to “deposit instruments of ratification, acceptance or approval or instruments of accession, as appropriate, with a view to ensuring its entry into force as soon as possible.”¹²

⁹ United Nations Treaty Handbook, Glossary of Terms, p.69

¹⁰ <https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>

¹¹ FCCC/CP/1997/7/Add.1

¹² UNEP/CBD/COP/DEC/X/1

20. When an MEA considers the negotiation of a supplementary agreement, such as a Protocol it usually takes a decision to establish a subsidiary body such as a working group or a subsidiary “process”. For example, the CBD by its Decision II/5¹³, established an Open-ended Ad Hoc Working Group on Biosafety to develop a draft protocol on biosafety that would operate in accordance with terms of reference attached to the Decision. Those terms of reference specified that the Open-ended Ad Hoc Working Group should be composed of representatives, including experts, nominated by Governments and regional economic integration organizations and that it would elaborate the modalities and elements of a protocol based upon the criteria set out in the terms of reference. This ultimately led the CBD COP on 29 January 2000, to adopt the Cartagena Protocol on Biosafety.¹⁴
21. In the case of the Kyoto Protocol, the process of negotiation leading to the adoption of the Protocol was mandated by UNFCCC decision 1/CP.1 of 7 April 1995 entitled “The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2(a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up”. By this Decision the Parties to UNFCCC agreed to begin a “process” to enable it to take appropriate action to strengthen the commitment of the Parties under specific provisions of the Convention “through the adoption of a protocol or another legal instrument.”¹⁵
22. As indicated in paragraph 9 above, it is also possible to have amendments to Protocols. As far as the Kyoto Protocol is concerned, Parties adopted an amendment by decision 1/CMP.8 at the eighth session of the UNFCCC Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) held in Doha on 8 December 2012 (“the Doha amendment”).¹⁶
23. While Protocols are seen as supplementary agreements to Conventions and intended to enhance their implementation, sometimes COPs decide to adopt “agreements” as opposed to protocols. This was the case for the 2015 Paris Agreement under the UNFCCC. By Decision 1/CP.21 the UNFCCC COP decided to adopt the Paris Agreement under the UNFCCC as contained in the annex to that Decision and requested the UN Secretary-General to be the Depositary of the Agreement. Parties to the Convention were invited to sign the Agreement and to deposit their respective instruments of ratification, acceptance, approval or accession.¹⁷
24. The institutional link to the UNFCCC is made clear in the preamble which states that the Agreement is “in pursuit of the objective of the Convention” as well as in the operative provisions, including Article 2 that provides that “this Agreement, in enhancing the

¹³ <https://www.cbd.int/decision/cop/?id=7078>

¹⁴ <https://bch.cbd.int/protocol/background/>

¹⁵ <https://unfccc.int/sites/default/files/resource/docs/cop1/07a01.pdf>

¹⁶ <https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>

¹⁷ Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum: Part two: Action taken by the Conference of the Parties at its twenty-first session (FCCC/CP/2015/10/Add.1).

implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change.”

25. The advantage of a protocol or separate agreement is that while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail. The protocol would only be binding on those Parties who ratify or accede to it and would enter into force after an agreed number of Parties had ratified or acceded to it. A protocol would have its own governance structure and Parties would under that governance structure meet separately from the governance structure under the Convention.

(iv) Adoption of Decisions

26. Decisions of UN inter-governmental bodies have often addressed the implementation of the provisions of Conventions.
27. Implementation has also been addressed by the General Assembly and recently, the Assembly by resolution 74/221 of 19 December 2019 entitled, “Implementation of the Convention on Biological Diversity and its contribution to sustainable development” adopted specific recommendations concerning the implementation of the CBD. The General Assembly has also adopted resolutions on the implementation of the Convention on the Rights of the Child¹⁸; and on the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction¹⁹.
28. This has also been the case for UNCCD, where the General Assembly has adopted successive resolutions on the implementation of UNCCD in those countries experiencing serious drought and/or desertification, particularly in Africa.²⁰
29. Similarly, COPS of MEAs such as UNCCD have often adopted decisions on implementation. Decisions on implementation have also been adopted by the governing bodies of the Kyoto Protocol and the Paris Agreement.
30. Unless otherwise provided for by the provisions of a treaty, COP decisions can be both binding as well as non-binding on Parties. A decision is usually limited to the implementation of a Convention and cannot address questions that arise outside the mandate of the Convention. That is why Parties opt for a separate protocol or agreement should they wish to address a different subject matter or elaborate upon the provisions of a Convention. It is within the competence of the Parties to decide what falls within the mandate of a Convention.

D. NON-LEGALLY BINDING OPTIONS

¹⁸ General Assembly resolution 49/211 of 23 December 1994

¹⁹ General Assembly resolution 74/40. of 12 December 2019

²⁰ General Assembly resolutions have included resolutions 66/201 of 22 December 2011; 67/211 of 21 December 2012; 68/213 of 20 December 2013 and recently 74/220 of 19 December 2019.

(i) Adoption of a non-legally binding instrument

31. It is also possible for the COP of UNCCD to authorize the negotiation of a non-legally binding instrument that could be adopted at a COP meeting.
32. For example, the United Nations Economic and Social Council (“ECOSOC”) by resolution 2006/49 of 28 July 2006 entitled, “Outcome of the sixth session of the United Nations Forum on Forests” requested the Forum, a subsidiary body of ECOSOC to conclude and to adopt a “non-legally binding instrument on all types of forests”.²¹ The UN General Assembly, by resolution 62/98 of 17 December 2007 adopted the text of the “non-legally binding instrument on all types of forests.” The Instrument provides for voluntary commitments²² and has as its stated purpose “to strengthen political commitment and action at all levels to implement effectively sustainable management of all types of forests and to achieve the shared global objectives on forests.”²³
33. Another example within the regional context would be the Instrument for Strengthening the Acid Deposition Monitoring Network in East Asia (EANET), which thirteen participating countries in East Asia have signed.²⁴ The objective and scope of the Instrument, is, inter alia, to “create a common understanding of the state of acid deposition problems in East Asia” and “to contribute to cooperation on the issues related to acid deposition among the Participating Countries.” EANET provides for the monitoring of acid deposition and participating countries are encouraged to promote bilateral and multilateral cooperation for the effective implementation of the activities under the Instrument.
34. While the Instrument does contain provisions for monitoring and reporting and promotes bilateral and multilateral cooperation, it is not a treaty under international law that creates binding obligations upon States that are Parties. Participating countries have only signed the Instrument and there are no standard provisions that are usual in treaties concerning the method by which States would express their consent to be bound such as signature, acceptance, approval, accession or entry into force.
35. A non-legally binding instrument does not require any procedure for its adoption. Thus, the procedure for adoption is much easier than for an amendment, annex, protocol or agreement. In essence, all that is required is signature by those Parties who support the instrument. In addition, while a non-binding instrument may require or recommend specific action by Parties and also allow for monitoring and reporting, its provisions are of a non-binding nature. Thus, consensus may be easier to achieve by Parties.

(ii) Adoption of a Political Declaration or Decision

²¹ Paragraph 26.

²² Paragraph 2

²³ Paragraph 1

²⁴ <https://www.eanet.asia/>

36. It is also possible for the COP of UNCCD to negotiate and adopt a Political Declaration that would be adopted in the form of a COP decision under the Convention.
37. Historically, Declarations have been adopted by the Principal Organs of the United Nations, such as the General Assembly and ECOSOC, UN Conferences and the COPs of Multilateral Environment Agreements. The scope and content of declarations vary greatly, from broad and general statements to detailed action plans. Their drafting may be done through intergovernmental negotiations and can be proposed by the President or Chair of a meeting or process. Usually, Declarations are adopted at the level of Heads of State and Government or at least at the Ministerial level.
38. Examples in the environmental sphere of important political declarations, include the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972²⁵; the Nairobi Declaration on the role and mandate of the United Nations Environment Programme adopted at the 19th session of the UNEP Governing Council in February 1997²⁶; the Rio Declaration on Environment and Development adopted at the 1992 UN Conference on Environment and Development²⁷; the “Future We Want” adopted at the UN Conference on Sustainable Development in 2012;²⁸ and “Transforming our world: the 2030 Agenda for Sustainable Development” adopted by General Assembly as the outcome document of the UN summit for the post-2015 development agenda in September 2015.²⁹
39. More recently, the General Assembly adopted resolution 72/222, entitled, “Towards a Global Pact for the Environment” that, inter alia, created an ad hoc open ended working group to discuss possible options to address gaps in international environmental law and environment-related instruments, and, “if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations, which might include the convening of an intergovernmental conference to adopt an international instrument, to the Assembly during the first half of 2019.”³⁰ The working group adopted thirteen recommendations but did not recommend the convening of an intergovernmental conference to adopt an international instrument. Rather it inter alia, proposed that the UN Environment Assembly (“UNEA”) prepare at its fifth session, in February 2021, a political declaration for a UN high-level meeting. The General Assembly by resolution 73/333 of 30 August 2019, endorsed the recommendations of the working group, including the recommendation that UNEA prepare a political declaration for a UN high-level meeting.
40. The high-level segment of the UNCCD COP has adopted Declarations, many of which have focused on implementation of the Convention. This has included the “Declaration on the

²⁵ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972(A/CONF.48/14/Rev.1), part one, chap. I.

²⁶ UNEP/GC.19/34

²⁷ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992vol. I, Resolutions Adopted by the Conference, resolution 1, annex I.

²⁸ General Assembly resolution 66/288 of 27 July 2012.

²⁹ General Assembly resolution 70/1 of 25 September 2015

³⁰ Operative paragraph 2

commitments to enhance the implementation of the obligations of the Convention” at COP 4 in December 2000³¹; the Declaration by Heads of State and Government on implementation of the Convention at COP 6 in 2003³²; the Namib Declaration on a stronger United Nations Convention to Combat Desertification for a land degradation neutral world at COP 11 in 2013³³ and the Ordos Declaration adopted at COP 13 in 2017.³⁴ These Declarations have been welcomed or taken note of by COP decisions and included as an annex to the COP Reports or decisions.

41. Political declarations create visibility as they are often adopted by Heads of State, Government and Ministers. They are aspirational in nature and usually contain broad provisions that address overarching policy concerns rather than specific areas or new areas for implementation.

(iii) Global Framework

42. Global frameworks have occasionally been adopted by United Nations inter-governmental bodies as a way to address substantive matters under a Convention and can be used not only for implementing the Convention whose governing bodies adopt it, but can be of use to other treaty bodies and processes. While a framework usually sets out an overall vision and mission as well as specific goals, a governing body can decide to use the framework as a basis for imposing specific obligations upon Parties.
43. For example, by Decision 14/34, the CBD COP set out the process for developing a post-2020 global biodiversity framework. The Decision established the Open-ended Working Group on the Post-2020 Global Biodiversity Framework to support this process. Under the mandate of Decision 14/34, the biodiversity framework is intended to be used not only for the CBD but also for the other MEAs processes and instruments.³⁵
44. The stated purpose of the framework is to galvanize action by Governments and civil society to achieve the outcomes set out in the global framework’s vision, mission, goals and targets with the framework being implemented primarily at the national level. However, it is envisaged that the decision of the COP that would adopt the framework could include obligations upon Parties with respect to reporting, review and means of implementation.³⁶
45. The Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework) was endorsed by the General Assembly following the 2015 Third UN World Conference on Disaster Risk Reduction and advocates for the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries. The Sendai Framework works hand in hand

³¹ Decision 8/COP.4 of 22 December 2000

³² Decision 25/COP.6 of 5 September 2003

³³ Decision 36/COP.11 of 27 September 2013

³⁴ Decision 27/COP.13 of 15 September 2017.

³⁵ Zero draft of the Post -2020 Global Biodiversity Framework, Note by the Co-Chairs, 6 January 2020 (CBD/WG2020/2/3)

³⁶ Ibid. Paragraphs 2-4 of the Zero draft.

with the other 2030 Agenda agreements, including the Paris Agreement, the New Urban Agenda, the Addis Ababa Action Agenda on Financing for Development, and the Sustainable Development Goals. The Framework recognizes that, to support its implementation, other international organizations and treaty bodies, including the COP to the UNFCCC need to support developing countries, at their request, in the implementation of the framework, in coordination with other relevant frameworks.³⁷

46. As the Global Biodiversity Framework and the Sendai Framework indicate, a framework can address not only Governments but also civil society. A framework can include obligations upon Parties yet also recommend specific action by Parties that is non-binding. A framework often addresses other processes and can be used not only for UNCCD but also for other MEAs processes and instruments. A framework may therefore be a useful tool should UNCCD wish to address and/or integrate into other multilateral processes.

E. NEGOTIATION OF AN INSTRUMENT OUTSIDE THE UNCCD FRAMEWORK

47. It is also possible that Parties to the UNCCD may wish to address the question of drought outside the Convention.
48. In such a case, Parties that are UN Member States in essence have two options within the United Nations. Firstly, Member States can seek a mandate from the General Assembly and have the Assembly adopt a resolution that will set in motion a process to negotiate a legal instrument. Thus, for the UNFCCC, the General Assembly adopted resolution 45/212 of 21 December 1990 that established an Intergovernmental Negotiating Committee to be supported by UNEP and the World Meteorological Organization to negotiate a Convention. The General Assembly also decided upon a similar process by resolution 47/188 of 22 December 1992 for the elaboration of an international convention to combat desertification i.e. UNCCD, except that the Secretariat was an ad hoc secretariat drawn from staff within the UN system.
49. Secondly, Member States could through the UN Environment Assembly (“UNEA”) adopt a resolution that sets in motion inter-governmental negotiations on a legal instrument under UNEA. Thus, in the past the UNEP Governing Council has adopted decisions that set in motion inter-governmental negotiations for the Minamata Convention on Mercury³⁸; the Convention on Biological Diversity³⁹ and the Stockholm Convention on Persistent Organic Pollutants⁴⁰.
50. If the Parties to UNCCD decide to go this route they would be leaving it to UN Member States to negotiate a treaty that is completely separate from UNCCD.

F. FINANCIAL MECHANISMS

³⁷ Sendai Framework, paragraph 48 e)

³⁸ Governing Council Decision 25/5 of February 2009.

³⁹ Governing Council Decision 14/26 of February 1987

⁴⁰ Governing Council Decision 19/13C of February 1997

(i) Legally binding instruments

51. The UNCCD Convention addresses financial resources in Article 20. Article 21 of the UNCCD Convention is entitled “financial mechanisms” and provides that, “the Conference of the Parties shall promote the availability of financial mechanisms and shall encourage such mechanisms to seek to maximize the availability of funding for affected developing country Parties, particularly those in Africa, to implement the Convention.” Paragraph 4 of Article 21 created a Global Mechanism to, inter alia, “promote actions leading to the mobilization and channeling of substantial financial resources” and that functions under the authority and guidance of the Conference of the Parties and is accountable to it.”
52. The UNCCD COP has taken decisions that have reviewed and addressed the activities of the Global Mechanism pursuant to the COPs overall mandate under Article 22 to review the activities of the Convention. Recently COP 13 requested the Global Mechanism to report at COP 14 on the implementation of decision 14/COP.13 on the mobilization of resources for the implementation of the Convention. The same decision requested the Global Mechanism to continue exploring and developing innovative financing mechanisms and funding options to scale up support for country Parties in their efforts to develop and implement transformative projects and programmes and to step up support, in collaboration with other international funding entities, for the resource mobilization efforts of developing countries in support of achieving land degradation neutrality and the implementation of the Convention.⁴¹ COP 14 in September 2019 subsequently addressed the activities of the Global Mechanism in several Decisions.⁴²
53. As far as changes to financial mechanisms are concerned, an amendment to a Convention could modify an existing financial mechanism of a Convention or create a new one. For example, the Kigali Amendment modified Article 10 of the Montreal Protocol on the Protocol’s Financial Mechanism.
54. A Protocol to the Convention or Agreement under the Convention could include a separate financial mechanism. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer in Article 10 established a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to Parties operating under paragraph 1 of Article 5 of the Protocol, i.e. developing country Parties to enable their compliance with the control measures set out in the Convention. Article 10 also established a Multilateral Fund with terms of reference set out in Article 10 that operates under the authority of the Parties to the Protocol.
55. Alternatively, the financial mechanisms of a parent Convention can be made applicable to a Protocol and include additional provisions on financing specific to that Protocol. For example, the Kyoto Protocol provides that the financial procedures applied under the UNFCCC shall apply

⁴¹ ICCD/CRIC(18)/7

⁴² See inter alia, Decision 13/COP.14 entitled, “Assessment of financial flows for the implementation of the Convention”.

mutatis mutandis under the Kyoto Protocol, except as may be otherwise decided by consensus by the COP serving as the MOP to the Protocol.⁴³ The Kyoto Protocol also includes additional financial obligations. For example, Article 11 provides that the developed country Parties and other developed Parties included in Annex II to the Convention shall provide new and additional financial resources to meet the costs incurred by developing country Parties in advancing the implementation of existing commitments under specific provisions of the Convention; and also provide financial resources, including for the transfer of technology, needed by the developing country Parties to meet commitments under the Convention.

56. Another example is the Nagoya Protocol that provides in Article 25, paragraph 2 that “the financial mechanism of the Convention shall be the financial mechanism for this Protocol.” In addition, Article 25, paragraph 3 provides that on capacity building and development, the COP “serving as the meeting of the Parties to this Protocol, in providing guidance with respect to the financial mechanism” shall “take into account the need of developing country Parties, in particular the least developed countries and small island developing States among them, and of Parties with economies in transition, for financial resources, as well as the capacity needs and priorities of indigenous and local communities, including women within these communities.” In addition, Article 25 provides that, “the guidance to the financial mechanism of the Convention in relevant decisions of the Conference of the Parties, including those agreed before the adoption of this Protocol, shall apply, *mutatis mutandis*, to the provisions of this Article.”⁴⁴
57. Similarly, the Paris Agreement regulates financial matters in Article 9 that provides, *inter alia*, that the Financial Mechanism of the UNFCCC Convention, including its operating entities, shall serve as the financial mechanism of this Agreement. Article 9, paragraph 9 also provides that, “the institutions serving this Agreement, including the operating entities of the Financial Mechanism of the Convention, shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced readiness support for developing country Parties, in particular for the least developed countries and small island developing States, in the context of their national climate strategies and plans.”
58. As is the case with UNCCD, COPs of inter-governmental bodies often review their financial mechanisms and take decisions on such mechanisms. COPs perform such functions as part of their overall mandate as the supreme body of a Convention to keep implementation of the Convention under review.
59. In addition, provisions for the review of a financial mechanism can be expressly included in a Convention. For example, paragraph 6 of Article 13 of the Stockholm Convention on Persistent Organic Pollutants (“Stockholm Convention”) established a financial mechanism for the provision of financial resources to developing country Parties and Parties with economies in transition. Paragraph 8 of the same Article 13 provides that the COP should review on a regular basis, the effectiveness of the mechanism established under this Article, its ability to address the changing needs of the developing country Parties and Parties with economies in transition, the

⁴³ Kyoto Protocol, Article 13, paragraph 5

⁴⁴ The Cartagena Protocol on Biosafety adopts a similar approach in its Article 28

level of funding as well as the effectiveness of the entities entrusted to operate the mechanism. Paragraph 8 also mandates the Parties to “take appropriate action, if necessary, to improve the effectiveness of the mechanism, including by means of recommendations and guidance on measures to ensure adequate and sustainable funding to meet the needs of the Parties.” Pursuant to these provisions, the COP of the Stockholm Convention has conducted regular reviews of its financial mechanism.⁴⁵ Similar provisions are also contained in Article 11 of the UNFCCC.

60. Decisions of Protocols or Agreements established under Conventions can make specific financial arrangements of the parent body applicable. For example, the COP of the Paris Agreement has decided that the UNFCCC Adaption Fund should serve the Paris Agreement.⁴⁶

(ii) Non legally binding instruments

61. Political Declarations adopted by United Nations inter-governmental and treaty bodies do not usually contain provisions for financial mechanisms but do contain provisions on “means of implementation”. Such provisions do not create legally binding obligations for Member States but affirm the need for financial resources to be deployed for the purpose of the activities of the declaration. For example the “Future We Want” called upon countries to prioritize sustainable development in the allocation of resources and recognized the importance of international, regional and national financial mechanisms; and called for the significant mobilization of resources, in order to give support to developing countries in their efforts to promote sustainable development.⁴⁷ Goal 17 of the Sustainable Development Goals entitled, “Strengthen the means of implementation and revitalize the global partnership for sustainable development” addresses financing though calling for resource mobilization at the national and international level and a call to “mobilize additional financial resources for developing countries from multiple sources.”

62. Global Frameworks do also not create financial mechanisms and this is not addressed in the zero draft of the post 2020 Global Biodiversity Framework.⁴⁸ However, the zero draft does state that the success of the implementation of the framework will depend on inter alia, “Ensuring that means of implementation are in place, including financial resources, capacity-building, and sustained and targeted support to Parties.”⁴⁹

63. Similarly, Political Declarations adopted by the UNCCD COP, have reaffirmed Parties’ obligations to provide substantial financial resources and other forms of support to assist affected developing country Parties.⁵⁰ In addition, in the Declaration adopted by Heads of State and

⁴⁵ UNEP/POPS/COP.3/18

⁴⁶ Decision 2/CMA.1 entitled “Matters relating to the implementation of the Paris Agreement”

⁴⁷ Paragraphs 253 and 254 of the “Future We Want”.

⁴⁸ CBD/WG2020/2/3

⁴⁹ Paragraph 8 (e)

⁵⁰ Declaration on the commitments to enhance the implementation of the obligations of the Convention, Concrete measures and means for enhancing the implementation of the Convention

Government on implementation of the Convention at COP 6, Parties agreed to promote the mobilization of new and additional financial resources from public and private sources.⁵¹ Decisions of the UNCCD have also addressed resource mobilization.⁵²

64. Financial mechanisms have been established under non-binding instruments. For example, the Instrument for Strengthening the Acid Deposition Monitoring Network in East Asia (EANET) in Item 14 entitled, “Financial Arrangement” regulates financial arrangements for the activities of EANET that are financed by voluntary contributions. These arrangements regulate, inter alia, the administrative and operational cost of the national monitoring activities within each country, the costs of the Secretariat, and the administration of financial contributions as well as the auditing of contributions.

G. CONCLUSION

65. The intergovernmental working group on drought would need to review the range of legal and institutional options presented in this Note and then deliberate on what option is best suited bearing in mind what UNCCD is seeking to achieve in the area of drought. Specifically, it would also have to consider whether a legal instrument or another instrument would be suitable and what types of obligations would be imposed upon Parties to the Convention.

66. It is important to recall that the working group has a limited membership of 15 Parties and does not have an express mandate to negotiate an instrument in order to address drought. Any working group that negotiates an instrument should have an express mandate to do so and also consist of all Parties to the Convention, participating on an equal basis.

67. Financial Mechanisms have usually been created by treaties or Conventions that have imposed obligations upon Parties. Protocols to such treaties or Conventions have either created their own financial mechanisms or applied the mechanism of the parent body. However, it would be possible to create a “financial arrangement” through a non-binding legal instrument provided that it is understood that financial contributions are voluntary and do not impose obligations upon signatories to that instrument.

68. When the UNCCD COP considers the recommendations of the working group, the COP may wish to decide to (i) create a new working group consisting of all Parties with a mandate and terms of reference; or (ii) revise the composition of the existing working group in order to allow for all Parties to participate on an equal basis and to give the working group revised terms of reference.

26 August 2020

⁵¹ Declaration by Heads of State and Government on implementation of the Convention at COP 6 Member States

⁵² Decision 1/COP.6