



## Convention to Combat Desertification

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### Conference of the Parties

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#### Outstanding items

**Procedures and institutional mechanisms for the resolution of questions on implementation**

## Procedures and institutional mechanisms for the resolution of questions on implementation

### Note by the secretariat

#### *Summary*

This report presents background information and describes progress made in considering procedures and institutional mechanisms for the resolution of questions on implementation in accordance with article 27 of the Convention. It includes submissions by Parties and interested institutions and organizations, highlights relevant precedents and new developments, and presents conclusions, recommendations and proposed actions.

Pursuant to decision 28/COP.9, this document has been prepared on the basis of document ICCD/COP(9)/13, taking into account, as appropriate, previous reports of the Conference of the Parties relating to this matter.

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## I. Background information

1. In document ICCD/COP(9)/13, the secretariat produced a summary of the progress made on the resolution of questions on implementation. This report assisted the Ad Hoc Group of Experts (AHGE) in examining and making recommendations in the light of the progress of negotiations on the same matters in other relevant environmental conventions, taking into account documents prepared by the secretariat for other sessions of the Conference of the Parties (COP).

2. By its decision 28/COP.9, the COP decided, in accordance with article 27 of the United Nations Convention to Combat Desertification (UNCCD):

(a) To reconvene, during its tenth session, the open-ended AHGE to examine further, and make recommendations on, procedures and institutional mechanisms for the resolution of questions on implementation;

(b) To invite any Parties and interested institutions and organizations wishing to communicate their views on article 27 to do so, in writing, to the secretariat by 31 January 2011;

(c) To request the secretariat to prepare a new working document to include a compilation of submissions by Parties contained in previous COP documents on this matter, including a draft to provide options for, and the terms of reference of, a multilateral consultative process, and a compilation also of those views submitted pursuant to paragraph 2 (b) above; and

(d) That the AHGE shall take as the basis of its work the new working document to be prepared by the secretariat.

3. The secretariat prepared reports<sup>1</sup> on procedures and institutional mechanisms for the resolution of questions on implementation in accordance with article 27 of the Convention. The secretariat has fulfilled this request for every COP from the second to the tenth sessions. The secretariat has prepared the present document to summarize developments and progress made in the resolution of questions on implementation, with a view to deciding how to take this matter forward.

4. The present note is an update to document ICCD/COP(9)/13. In particular, it provides current information with regard to the relevant precedents cited in that document, as well as information on new developments. Owing to the formatting and submission regulations for United Nations documents, it is not possible to reproduce submissions by Parties contained in previous COP reports as requested in decision 28/COP.9. However, the secretariat has made these reports available for the tenth session of the COP (COP 10) on the UNCCD website at <<http://www.unccd.int/cop/officialdocs/Submissions.pdf>>.

5. The present document is composed of four parts and an annex. Chapter I is an introduction regarding decision 28/COP.9 and provides background information on the resolution of questions on implementation. Submissions by Parties are presented in Chapter II. Chapter III contains updated information on relevant precedents and new developments with regard to multilateral environmental agreements (MEAs). Chapter IV consists of conclusions, recommendations and proposed actions regarding options and ways forward on measures to resolve questions on implementation.

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<sup>1</sup> Documents ICCD/COP(2)/10, ICCD/COP(3)/18, ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7, ICCD/COP(7)/9, ICCD/COP(8)/7 and ICCD/COP(9)/13.

## **II. Submissions by Parties and interested institutions and organizations**

6. In November 2010 the secretariat forwarded a note verbale reminding Parties and interested institutions and organizations to communicate their views regarding this matter. As at 17 June 2011, the secretariat had received submissions from Argentina, Panama and the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The written proposals are reproduced in their entirety, as submitted to the secretariat, on the UNCCD website at <<http://www.unccd.int/cop/officialdocs/Submissions.pdf>>.

7. One Party indicates that it does not have any national provision (law or ordinance) establishing a mechanism for the resolution of questions on implementation. However, this Party fulfils the commitments of the Convention through its National Action Programme in accordance with article 10 of the Convention.

8. With regard to the fulfilment of MEAs, another Party favours a facilitating and enabling approach to prevent problems regarding the implementation of obligations spelled out in MEAs, rather than adopting a punitive approach.

9. Due to the length and detailed nature of the information provided by the Aarhus Convention secretariat, a summary of its written proposal is included in chapter III.F.

## **III. Procedures and institutional mechanisms for the resolution of questions on implementation**

10. As was the case in ICCD/COP(9)/13, the most relevant precedents containing the most recent developments with regard to MEAs relating to article 27 of the Convention include the Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Convention on Long-Range Transboundary Air Pollution (LRTAP), the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), the Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), the Aarhus Convention, the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) and the Convention on Persistent Organic Pollutants (Stockholm Convention).

### **A. The Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)**

11. During the period 2010–2011, the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol reviewed information relating to compliance with Parties to the Montreal Protocol and made appropriate recommendations to the Meeting of the Parties to the Montreal Protocol (MOP).

12. With regard to article 7 of the Montreal Protocol, data-reporting obligations fall into three categories. The first category covers reporting of base-year data under paragraphs 1 and 2 of article 7, which primarily affected new Parties to the Montreal Protocol or those newly ratifying an amendment. Within that category, two Parties had yet to submit some or all of their base-year data. One was a relatively new Party and had informed the Montreal Protocol secretariat that it expected to submit data soon; the other had recently ratified an

amendment but had not previously reported base-year data for the substance whose consumption was controlled by that amendment. The second category concerned paragraphs 3 and 8 ter of article 5, which redefined the control measures, and the base levels for determining compliance with those control measures, for Parties operating under paragraph 1 of article 5. The annual data reported thus far by Parties indicated that all Parties were in compliance with the requirement to report baseline data for substances that fell within that category. The final category was the requirement, under paragraph 3 of article 7, to report data every year from the year of entry into force of the Protocol or relevant amendment for a ratifying Party, which applied to all Parties. For the years 1986–2008 all Parties had complied with their annual data-reporting obligations. For the year 2009, to present date 62 Parties had reported.

13. As far as assessment of compliance with the control measures for Parties not operating under paragraph 1 of article 5 is concerned, the secretariat also took into consideration exemptions for essential and critical uses approved by the MOPs, allowances for extra production for basic domestic needs of Parties operating under paragraph 1 of article 5, and other factors, including transfer of production rights between Parties, laboratory and analytical uses that were exempted, and certain stockpiling scenarios that the MOPs had decided should be recorded for information purposes only. When applicable control measures and other factors were taken into account, no cases of deviation or possible non-compliance by Parties not operating under paragraph 1 of article 5 had been identified to date for the year 2009. Considering control measures for Parties operating under paragraph 1 of article 5, as defined under paragraphs 8 bis and 8 ter of article 5, exemptions, allowances and other factors applied in reviewing compliance are allowed. For Parties that had been the subject of decisions on non-compliance, agreed benchmarks were used as the primary determinant of those Parties' adherence to their commitments under the Protocol's control measures to reduce their production or consumption levels. For 2010 data, deviations recorded thus far for Parties operating under paragraph 1 of article 5 were either deviations allowed under decisions of the Parties or were within the commitment benchmarks of those Parties, and therefore did not require those Parties to be subjected to the non-compliance process.

## **B. The Convention on Long-Range Transboundary Air Pollution (LRTAP)**

14. The Implementation Committee of LRTAP, taking into account its previous conclusions regarding LRTAP Parties' reporting of their emission data, noted that there was continuing improvement in the completeness of emission data reported by Parties under all its protocols. It noted with satisfaction that reporting of annual emission data up until and including 2010 was complete for the 1985 Sulphur Protocol, the Protocol concerning the Control of Emissions of Nitrogen Oxides (NO<sub>x</sub>), the Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (VOCs) and the Gothenburg Protocol. Only two Parties had yet to report gridded data under the 1994 Sulphur Protocol and the Gothenburg Protocol.

15. The Committee noted that there was also an improvement in the reporting under the Protocol on Persistent Organic Pollutants (POPs) and Protocol on Heavy Metals. However, reporting of the annual emission data under these two Protocols was not yet complete. Two Parties had not submitted any data for 2010 under the Protocol on POPs. One Party had not submitted annual emission data for 2010 under the Protocol on Heavy Metals. Five Parties had still not provided gridded emission data for POPs.

16. The Committee also noted some inconsistencies in the use of notation keys in the reports by several Parties with respect to the data for POPs and heavy metals. While the

meaning of each notation key is defined in the Guidelines for Estimating and Reporting Data, some Parties had used more than one notation key at the same time, which made it difficult for the Committee to properly assess compliance. The Committee therefore recommends to the LRTAP Executive Body to take action to ensure that the notation keys are used properly and in particular that they are not used cumulatively.

### **C. The United Nations Framework Convention on Climate Change and its Kyoto Protocol**

17. Since the first meeting of the Compliance Committee of the Kyoto Protocol in 2006, it has developed and subsequently amended its rules of procedure, agreed on working arrangements with respect to the participation of observers in its meetings and reviewed the numerous reports submitted to it.

18. Both the facilitative branch and the enforcement branch of the Compliance Committee of the Kyoto Protocol have been active, with the facilitative branch having addressed 15 questions of implementation, while the enforcement branch has addressed five and is, at present, considering two more. In the period since the publication of document ICCD/COP(9)/13, two Parties have been found to be in non-compliance with the Kyoto Protocol and suspended from participation in the market-based mechanisms. One of these Parties was later reinstated, while one Party remains suspended and has appealed to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol against the final decision of the enforcement branch.

### **D. The Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)**

19. Further to its work programme, the Basel Convention Compliance Committee reported on the steps it had taken to implement its recommendation with regard to submissions by the Basel Convention secretariat. The secretariat reminded the Committee that, in accordance with paragraph 9 (c) of the terms of reference of the Committee, its mandate is limited to “possible difficulties of any Party in complying with its reporting obligations under article 13 paragraph 3 of the [Basel] Convention, provided that the matter has not been resolved within three months by consultation with the Party concerned”. The secretariat also reminded the Committee that the Committee had recommended that the secretariat, in implementing paragraph 9 (c), focus on the two following criteria: (a) cases where no national reports have been submitted by a Party to the Basel Convention since the date of its adherence to the Convention; and (b) cases where the information provided by a Party required under part I of the national reports on competent national authority, focal point and legislation is incomplete, in accordance with article 13, paragraph 3, of the Basel Convention.

20. The secretariat reported that, according to its records, 12 Parties fell under criterion (a), while 113 Parties fell under criterion (b) limited to the 2010 national reports, including 77 Parties under an obligation to do so that had not submitted their 2010 national report. The secretariat emphasized that it had no mandate to assess the content of the national reports sent by Parties, and that a report could only be deemed ‘incomplete’, in accordance with the secretariat’s understanding of the term, by formally checking whether a question had been answered in the reporting questionnaire sent by the Party. The secretariat then asked the Committee for guidance on the way forward, in particular on its suggestion to enter into consultations with the Parties falling under criteria (a) and (b). The secretariat indicated that its intention is to seek further guidance from the Committee once the consultation process had been completed.

21. As a result of the events described in paragraphs 20 and 21 above, the Committee recommended that the secretariat engage in consultations with the Parties falling under criteria (a) and (b), as suggested by the secretariat, as these consultations would provide an opportunity to assist individual Parties in implementing their reporting obligation. The Committee emphasized its facilitative nature and, for transparency purposes, asked that the secretariat bring this information to the attention of all the Parties in the context of the seventh session of the Open Ended Working Group of the Basel Convention.

22. In line with decision VIII/32 of the Conference of the Parties to the Basel Convention (COP), the Committee considered how it could work better with relevant organizations on improving information sharing and on capacity-building activities aimed at preventing and combating illegal traffic, including its Chair's proposal for the establishment of a partnership. Committee members welcomed the proposal that a partnership be established and discussed elements of the options paper prepared by the Basel Convention secretariat for the establishment of a partnership on preventing and combating illegal traffic.<sup>2</sup> The Committee agreed to recommend that, at its tenth meeting, the COP adopt a decision regarding the establishment of a partnership on preventing and combating illegal traffic to bring together and improve coordination among relevant entities with a specific mandate to deliver capacity-building activities on preventing and combating illegal traffic, such as Interpol, UNEP, individual Parties, the Basel Convention Regional Centres, informal networks and the secretariat, with a focus on developing tools and training materials, hosting workshops and exchanging information.

#### **E. The Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol)**

23. The Cartagena Protocol Compliance Committee held its sixth meeting in 2009. At that meeting, the Compliance Committee considered issues related to reporting obligations of Parties to the Cartagena Protocol based on a document<sup>3</sup> on the reporting rates under other MEAs. It also considered general issues regarding the compliance of Parties to make information on compliance available to the Biosafety Clearing-House. The Compliance Committee agreed, on a preliminary basis, on a number of points for further consideration and recommendations for possible submission to the fifth meeting of Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol (COP-MOP). The Compliance Committee also considered whether it had a mandate to receive and consider a submission made by a non-governmental organization alleging non-compliance of a Party with its obligations under the Cartagena Protocol. It concluded that it has no mandate to consider the submission because section IV of the compliance procedures adopted in the annex to COP-MOP decision BS-I/7 permits only a Party to trigger the procedures with respect to itself, or with respect to another Party.<sup>4</sup>

24. The seventh meeting of the Parties to the Cartagena Protocol took place in 2010. The Compliance Committee held further discussions on those items that it examined at its previous meeting, which were related to national reporting rates and status of compliance in fulfilling obligations. It also considered the views submitted by Parties on how to improve the supportive role of the Compliance Committee. The Compliance Committee finalized its recommendations and report for submission to the fifth meeting of the COP-MOP.<sup>5</sup>

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<sup>2</sup> See annex II to document UNEP/CHW/CC/8/2.

<sup>3</sup> For details, see the report of the meeting in UNEP/CBD/BS/CC/6/4.

<sup>4</sup> *Idem*.

<sup>5</sup> For details, see the report of the meeting in document UNEP/CBD/BS/CC/7/3.

25. The COP-MOP, at its fifth session, considered the report of the Compliance Committee and underlined the need to further build the confidence of Parties in the role of the Compliance Committee. In this regard, the COP-MOP decided that, in instances where a Party makes a submission relating to compliance with respect to itself, the Compliance Committee shall, in response, consider taking only measures that are facilitative and supportive, i.e. providing advice or assistance to the Party concerned and/or making recommendations to the COP-MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures (decision BS-V/1). The COP-MOP also encouraged Parties that are facing difficulties complying with their obligations under the Protocol due to lack of capacity to make a submission to the Compliance Committee relating to their compliance so that the Compliance Committee or the COP-MOP could consider taking facilitative and supportive measures, as appropriate, with a view to helping them overcome the difficulties.

#### **F. The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)**

26. The Aarhus Convention provides for two mechanisms to promote proper implementation and adequate compliance. One is the requirement for regular reporting on implementation under article 10, paragraph 2, of the Aarhus Convention; the other is the more sophisticated arrangement under article 15 of the Aarhus Convention to review compliance.

27. Article 15 does not establish a system for compliance review, but it obliges the Meeting of the Parties to the Aarhus Convention (MOP) to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance. Its aim is to recognize and assess Parties' shortcomings and to work in a constructive atmosphere to assist them in compliance. In keeping with the Aarhus Convention's spirit, article 15 proposes an option of involving members of the public.

28. The Aarhus Convention Compliance Committee cannot issue binding decisions, but rather may make recommendations either to the MOP, or, in certain circumstances, directly to individual Parties. Committee reports are available to the public. The MOP may, upon consideration of a report and any recommendations of the Compliance Committee, decide upon appropriate measures to bring about full compliance with the Convention.

29. As of today, the Compliance Committee has received 56 communications from the public and one submission by a Party about another Party's compliance. No submissions have been received by Parties concerning their own compliance, neither has the secretariat proceeded with a referral concerning non-compliance. To date, all findings of non-compliance by the Compliance Committee have been endorsed by the MOP.

30. According to decision I/7 on the review of compliance adopted by the MOP, communications from members of the public concerning a Party's compliance with the Convention may be brought to the Compliance Committee on the expiry of twelve months from either the date of adoption of that decision or from the date of the entry into force of the Convention with respect to a Party, unless the Party has notified the Depositary in writing by the end of the applicable period, that it is unable to accept, for a period of not more than four years, the consideration by the Compliance Committee of such communications. During that four-year period, a Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Compliance Committee by one or more members of the public concerning that Party's compliance with

the Convention. Thus far, no Party to the Convention has made use of the possibility to notify its inability to accept communications from members of the public.

### **G. The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)**

31. At its fourth meeting, the Rotterdam Convention Conference of the Parties (COP) established a contact group to prepare a draft decision on the adoption of these draft compliance procedures and mechanisms for consideration by the COP. Notwithstanding the great effort by the many Parties participating in the contact group, it was not possible to reach consensus on the draft compliance procedures and mechanisms. The COP accordingly adopted decision RC-4/7, by which it decided to consider further at its fifth meeting for adoption the procedures and institutional mechanisms on non-compliance required under article 17 of the Rotterdam Convention.<sup>6</sup>

### **H. The Convention on Persistent Organic Pollutants (Stockholm Convention)**

32. An analysis was carried out from 2009 to 2010 on compliance needs and requirements. All Parties to the Stockholm Convention who were consulted had agreed that effective and appropriate compliance procedures were an important requirement of the Convention. Chief among the remaining obstacles to reaching agreement was the concern of some Parties that the financial resources provided to enable Parties to comply with the Convention were insufficient and that, in their view, there should be no further discussion on compliance procedures until progress has been made in providing more financial resources.

33. With regard to the draft text on compliance procedures discussed during previous meetings of the Stockholm Convention Conference of the Parties (COP), as set out in the annex to decision SC-4/33 of the COP, some of those consulted described it as a good compromise, while others expressed reservations. Given the divergence in views, there seemed to be little chance of progress during the latest session. During the ensuing discussion, several representatives emphasized the importance of adopting a compliance mechanism in the interest of the effective implementation of the Convention and the general credibility of MEAs. Such a mechanism should be non-adversarial, non-judicial and cooperative, and should allow compliance difficulties to be resolved in a timely manner.

34. Several representatives emphasized the importance of technical support, training and other capacity-building measures, supporting their view with an example of how establishing a regional centre in Africa would greatly facilitate compliance. One representative, speaking on behalf of a group of countries, proposed the establishment of an independent financial mechanism to meet the needs of developing countries and countries with economies in transition that are in non-compliance. Two representatives pointed to the Multilateral Fund for the Implementation of the Montreal Protocol as a model of the sort of compliance-related financial mechanism that would be needed.

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<sup>6</sup> See the draft text on compliance procedures and mechanism as reproduced in the annex to decision RC-4/7 in document UNEP/FAO/RC/COP.5/16.

#### **IV. Conclusions, recommendations and proposed actions**

35. At its tenth session, the COP may wish to consider the relevant background on procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention, in order to assist Parties in complying with their commitments under the Convention.

36. At previous meetings of the AHGE, it was agreed, first, that any procedure or institutional mechanism to resolve questions on implementation should be facilitative and non-confrontational in character and, second, that such procedures and institutional mechanisms should assist the Parties to fulfil their obligations under the Convention.

37. Further consideration is required regarding the scope of article 27 of the Convention, which could be understood as relating either to problems of implementation faced by the Parties to the Convention as a whole, and/or to difficulties experienced by individual Parties in fulfilling their obligations. As mentioned in particular in ICCD/COP(6)/7, the scope of article 27, the relationship between article 22, paragraph 2, and articles 26, 27 and 28 and the scope, mandate, functions and composition of a multilateral consultative mechanism) should be considered. The draft terms of reference for a multilateral consultative process in the annex to document ICCD/COP(9)/13 would be a good starting point for giving shape to a mechanism to efficiently address questions on implementation and resolve them bearing in mind the nature, scope, objectives and specific characteristics of the Convention, including the particularities of its five Regional Implementation Annexes.

38. After considering all issues mentioned above, the COP may wish to:

(a) Adopt the draft terms of reference attached as an annex to document ICCD/COP(9)/13 and establish a multilateral consultative committee to assist Parties in the resolution of questions on implementation;

(b) Extend the work of the AHGE and decide that, in order to reduce financial burdens, the AHGE should meet for a period not exceeding three days during the next intersessional session of the COP's subsidiary bodies. At the meeting of the AHGE, delegations should have enough time to analyse, discuss and review the draft terms of reference on a multilateral consultative committee aimed at resolving questions on implementation. This draft terms of reference could be reviewed again at COP 11 and adopted to assist Parties in complying with their commitments under the Convention; and

(c) Defer the consideration of article 27 of the Convention to a future meeting of the COP, when Parties consider that consensus is likely to be reached in order to take a final decision.

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