



Convention to Combat Desertification

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Outstanding items

Annexes containing arbitration and conciliation procedures

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Note by the secretariat

Summary

This report is a follow-up to an outstanding item that has been on the agenda of the Conference of the Parties (COP) since its second session. It describes relevant precedents and latest developments pertaining to arbitration and conciliation procedures in the field of international environmental law which may be used in connection with the settlement of disputes, in accordance with article 28, paragraphs 2 (a) and 6, of the United Nations Convention to Combat Desertification. It also presents submissions by Parties and interested institutions and organizations, conclusions, recommendations and proposed action.

In accordance with decision 29/COP.9, this document has been prepared on the basis of document ICCD/COP(9)/14, taking into account, as appropriate, previous reports and written proposals submitted to the COP for consideration.

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I. Background information

1. Article 28, paragraph 2, of the United Nations Convention to Combat Desertification (UNCCD) provides that: “When ratifying, accepting, approving, or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation: (a) arbitration ... ; (b) submission of the dispute to the International Court of Justice.” Paragraph 6 of the same article further provides that: “If the Parties to a dispute have not accepted the same or any procedure ... and if they have not been able to settle their dispute within twelve months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute ...”

2. It was not possible to include provisions on conciliation and arbitration as part of the original text of the Convention. Hence, article 28, paragraphs 2 and 6 provide that arbitration and conciliation shall be in accordance with “procedures adopted by the Conference of the Parties in an annex as soon as practicable”.

3. The secretariat prepared reports on arbitration and conciliation procedures for the second to the ninth sessions of the Conference of the Parties (COP).¹ These reports present background information, precedents and latest developments concerning these matters in the context of environmental agencies, and compile and analyse written proposals from Parties and interested institutions and organizations.

4. By its decision 29/COP.9, the COP decided:

(a) To reconvene at its tenth session, for the purposes of fulfilling the provisions of article 28 of the Convention, the open-ended ad hoc group of experts (AHGE) to examine further, and make recommendations on, the following:

(i) Annex on arbitration procedures;

(ii) Annex on conciliation procedures;

(b) To invite any Parties and interested institutions and organizations wishing to communicate their views on the matter referred to in paragraph 1 above to do so to the secretariat, in writing, by 31 January 2011;

(c) To request the secretariat to prepare a new working document to include

(i) a compilation of submissions contained in previous COP documents on this matter and those submitted pursuant to paragraph 2 above, and

(ii) an updated version of the annexes contained in ICCD/COP(9)/14 to reflect these views;

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

5. The present note updates document ICCD/COP(9)/14. It comprises five chapters. Chapter I is an introduction regarding decision 29/COP.9, and also provides background information on arbitration and conciliation procedures. Submissions by Parties and

¹ 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)/8 and ICCD/COP(9)/14.

interested institutions and organizations are presented in chapter II. Chapter III contains updated information on developments, in particular concerning 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). Chapter IV presents conclusions, recommendations and proposed action on this matter.

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 the annexes containing arbitration and conciliation procedures. As at 17 June 2011, the secretariat had received three submissions, namely from Argentina, Panama and the Aarhus Convention. These 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 has no objections to adopting the revised annexes on arbitration and conciliation procedures, as contained in the annexes to document ICCD/COP(9)/14, as well as the Optional Rules for Arbitration and Conciliation of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration. This Party believes that these instruments aim particularly to resolve any matter or dispute in connection with paragraphs 2 and 6 of article 28 of the Convention.

8. With regard to the implementation of multilateral environmental agreements (MEAs), another Party favours a facilitating and enabling approach to preventing any problems regarding implementation of obligations spelled out in MEAs, rather than a punitive one.

9. Due to the length and detailed nature of the information provided by the Aarhus Convention, its submission is provided in the next chapter of this note.

III. Developments on arbitration and conciliation procedures

The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

10. Article 16, paragraph 2, of the Aarhus Convention reads:

“2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

- (a) Submission of the dispute to the International Court of Justice;
- (b) Arbitration in accordance with the procedure set out in annex II”.

11. This provision of the Aarhus Convention is to a large extent similar to article 28, paragraph 2, of the Convention. In principle, Parties are encouraged to seek a solution through negotiation.² Parties can make a written declaration to the Secretary-General of the United Nations, that is, the Depositary, choosing between arbitration or adjudication by the International Court of Justice (ICJ), when non-binding methods such as negotiation and mediation are not sufficient to resolve the dispute. The results of the compulsory dispute settlement will be binding on any Parties that accept the means of dispute settlement. A Party may seek to establish an arbitration tribunal or to submit its dispute to the ICJ, or both.

12. Under the Aarhus Convention, the procedures for arbitration have been negotiated from the start and are laid down in annex II to the Aarhus Convention; they are discussed briefly below. Arbitration is a process of dispute settlement, based on the determination of facts and law by an independent third person or persons. The process results in a binding decision.

13. The procedures for cases before the ICJ are laid down in the Statute of the International Court of Justice, as developed in practice. To date, there have been no disputes taken to arbitration or ICJ adjudication under the Aarhus Convention. When deciding whether to choose the ICJ or an arbitration tribunal to resolve a dispute, Parties may consider a number of practical aspects, such as the following:

(a) The ICJ procedure is a highly formalized one, whereas parties to arbitration set their own rules (such as the annex to the Aarhus Convention) which can be modified to meet the needs of the case and the international law applicable.

(b) Some of the 15 ICJ judges have environmental expertise, whereas arbitrators for a particular case are specialized in the subject matter of that case, as well as in the cultural and legal background of the countries involved in the case.

(c) The time needed to reach a conclusion under the ICJ or the arbitration procedure (a case before the ICJ may take four years or more, whereas annex II to the Aarhus Convention sets time limits, depending on the needs of a particular case).

(d) The costs (ICJ costs are typically lower than those of arbitration, since arbitration parties must pay the arbitrators, including travel costs and other expenses).

14. Annex II establishes the framework under which Parties to the Aarhus Convention can use arbitration to resolve disputes arising under that Convention. The terms of the annex are almost identical to those of several other United Nations Economic Commission for Europe conventions, including the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Environmental Impact Assessment in a Transboundary Context.³ The scope of annex II is limited to disputes between Parties to the Convention, and so arbitration with third parties, such as non-governmental organizations, is not covered. This does not mean, however, that Parties are prevented from engaging in arbitration with third parties to resolve disputes arising under the Aarhus Convention. Agreement by a Party to arbitrate with a third party would not violate the terms of the Convention – in this case, the terms of annex II simply would not apply. For example, the Permanent Court of Arbitration regularly settles disputes between States and private parties and therefore has a special set of procedural rules governing such cases.

² See article 16, paragraph 1, of the Aarhus Convention, and also article 28, paragraph 1, of the Convention.

³ See also <www.unece.org/env/teia/about.html> and <www.unece.org/env/eia/about/eia_text.htm>.

15. Pursuant to paragraph 1 of annex II, once parties have decided to use arbitration, the first step in constituting a tribunal is to notify the secretariat to the Convention. Parties must indicate the subject matter of the desired arbitration and the articles of the Convention which form the basis of the dispute. In keeping with the Convention's emphasis on the active dissemination of information, the secretariat will then forward the information received to all Parties to the Convention.

16. From the above, it can be ascertained that the procedures on arbitration and conciliation which have already been adopted under this Convention are very similar and have in broad terms the same scope as the updated annexes on arbitration and conciliation procedures contained in the comparative table in document ICCD/COP(9)/14. This might facilitate the task of the COP in adopting procedures concerning this subject.

IV. Conclusions, recommendations and proposed actions

17. The COP may wish to consider at its tenth session the relevant background information on annexes containing arbitration and conciliation procedures to assist the COP in regularly reviewing the implementation of the Convention, and in particular paragraphs 2 (a) and 6 of article 28.

18. The COP may also wish to consider the report prepared by the secretariat, where the relevant precedents and latest developments in other environmental agencies illustrate the most substantial elements of the implementation processes. The information with regard to relevant precedents and latest developments, and especially a number of preliminary questions contained in chapter IV of document ICCD/COP(9)/14, remains useful for the purpose of assisting the COP in its deliberations on formulating procedures and mechanisms as required by article 28 of the Convention. In the annexes of the same document, the comparison between the first draft of the annexes prepared at COP 3 in 1999 and that prepared at COP 4 in 2000 shows that the relevant changes introduced do not constitute major obstacles in agreeing to consolidated draft procedures. As previously pointed out, the design and content of arbitration and conciliation procedures, under the MEAs, are well precedented and uncontroversial. The task of developing such procedures is essentially a technical one.

19. Upon consideration of the issues mentioned above, the COP may wish:

(a) To adopt and amend, if appropriate, the annexes containing arbitration and conciliation procedures contained in the annexes to this report;

(b) To further adopt the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of 19 June 2001 and the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment of 16 April 2002 of the Permanent Court of Arbitration;

(c) To extend the work of the AHGE and decide that, in order to reduce financial burdens, the Group should meet for a period of three days during intersessional sessions of the Committee for the Review of the Implementation of the Convention. At the proposed meeting of the AHGE, delegations and other participants in the meeting should have enough time to discuss and draft annexes on arbitration and conciliation procedures, which may in the second instance be reviewed by the AHGE at the eleventh session of the COP so that the latter may adopt such annexes in order to assist Parties in complying with their commitments under the Convention;

(d) To further consider paragraphs 2 (a) and 6 of article 28 of the Convention, in which case consideration of this item will be deferred to a future COP session, when Parties consider that there is enough consensus to reach a final decision.
