



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 deals with an outstanding item that has been on the agenda of the Conference of the Parties (COP) since its second session. It elaborates on relevant precedents and latest developments pertaining to arbitration and conciliation procedures in the field of international environmental law that may be used in connection with the settlement of disputes, in accordance with article 28, paragraphs 2 (a) and 6, of the Convention. It also presents conclusions, recommendations and proposed actions.

In accordance with decision 29/COP.10 and decision 30/COP.10, this document has been prepared on the basis of document ICCD/COP(10)/26, taking into account, as appropriate, previous reports and written proposals submitted to the COP relating to this matter.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Background information	1–8	3
II. Submissions by Parties and interested institutions and organizations	9–27	4
A. Introduction	9	4
B. Tuvalu	10–12	5
C. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants	13	5
D. Submission of 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)	14–24	6
E. The Permanent Court of Arbitration	25–27	7
III. Relevant considerations.....	28	8
IV. Conclusions, recommendations and proposed actions	29–31	9

I. Background information

1. Article 28, paragraph 2, of the Convention 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 Depository 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 in accordance with procedures adopted by the Conference of the Parties in an annex as soon as practicable;
 - (b) Submission of the dispute to the International Court of Justice.”
2. For the purpose of this analysis, it should also be recalled that paragraph 6 of article 28 of the Convention 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, in accordance with procedures adopted by the Conference of the Parties in an annex as soon as practicable.”
3. It was not possible to include provisions on conciliation and arbitration as part of the 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”.
4. The secretariat prepared reports on arbitration and conciliation procedures for the second to the tenth sessions of the Conference of the Parties (COP).¹ The reports present background information, precedents and latest developments concerning these matters in the context of environmental agencies, and contain compilations and analyses of written proposals by Parties and interested institutions and organizations.
5. At its tenth session, the COP, for the purposes of fulfilling the provisions of article 28 of the Convention, decided:
 - (a) To reconvene, at its eleventh session, the open-ended Ad Hoc Group of Experts to examine further, and make recommendations on, the following:
 - (i) The annex on arbitration procedures;
 - (ii) The annex on conciliation procedures.

Furthermore, the COP, at the same session, by its decision 30/COP.10:

 - (b) Invited any Parties and interested institutions and organizations wishing to communicate their views on article 27 of the Convention to do so, in writing, to the secretariat by 31 January 2013; 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, ICCD/COP(9)/14 and ICCD/COP(10)/26.

(c) Requested the secretariat to prepare a new working document to include: (i) a compilation of submissions contained in previous documents of the COP on this matter and those submitted pursuant to subparagraph (b) above; and (ii) an updated version of the annexes contained in document ICCD/COP(10)/26 to reflect these views.

6. The present note integrates and updates document ICCD/COP(10)/26. Due to requirements regarding the format and submission of reports of the United Nations, it is not possible to reproduce submissions by Parties contained in previous COP reports as requested in decision 30/COP.10, paragraph 3. These written proposals are reproduced in their entirety, as submitted to the secretariat, on the United Nations Convention to Combat Desertification (UNCCD) website at <www.unccd.int>.

7. The present document is composed of four chapters. Chapter I is an introduction to the action taken by the secretariat regarding decision 30/COP.10 and the written proposals received by the secretariat from Parties and interested institutions and organizations. Submissions by Parties and interested institutions and organizations, as well as a brief summary of these written proposals are presented in chapter II. Chapter III consists of a series of questions that should be considered to tailor such procedures to the nature and specificities of UNCCD. Finally, Chapter IV presents conclusions, recommendations and proposed actions on this matter.

8. Having in mind the final drafting of the annexes on arbitration and conciliation procedures to the Convention to Combat Desertification, it should be recalled that document ICCD/COP(9)/14 contains two updated comparative tables on these annexes, which are still relevant to and valid for the present analysis. The tables benefit from advice and comments provided in submissions by the Parties and from information concerning progress made in multilateral environmental agreements (MEAs) since 1999. They are still valid for reference and comparative analysis purposes. Thus they may serve as a good means of providing key information and specific insight to the Parties in their discussions and recommendations to the COP relating to this legal issue.

II. Submissions by Parties and interested institutions and organizations

A. Introduction

9. In September 2012 and March 2013, the secretariat sent a note verbale to Parties and interested institutions and organizations reminding them to communicate their views regarding the annexes containing arbitration and conciliation procedures. As at 31 May 2013, the secretariat had received three submissions, namely from Tuvalu, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants and the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). These written proposals are reproduced in their entirety, as submitted to the secretariat, and may be found on the UNCCD website at <www.unccd.int/cop/officialdocs/Submissions.pdf>.

B. Tuvalu

10. In consideration of this issue, the possible nature of disputes that may arise under article 28 should be first considered. Most of the obligations on Parties in Part II of the Convention are general in nature and are unlikely to generate disputes among Parties. Perhaps the most likely cause for dispute may arise when developing country Parties do not fulfil their obligations with respect to promoting the mobilization of new and additional funding under article 6 (c) on promoting and facilitating appropriate technology, knowledge and know-how to affected developing country Parties. Noting that these obligations are general in nature the most appropriate procedure for resolving such disputes should be based on “pre-emptive and non-confrontational approaches” as noted in document ICCD/COP(10)/26, paragraph 3. The COP should make every effort to encourage all Parties to meet their obligations under the Convention.

11. Should some form of arbitration be considered necessary, the following procedures may provide a useful guide:

(a) If a Party indicates to the Executive Secretary that it wishes to seek arbitration under article 28, the Executive Secretary shall appoint a facilitator to hold consultations between the Parties concerned. The Executive Secretary shall ensure that only matters relating to obligations under the Convention shall be considered in the arbitration;

(b) The Facilitator shall meet with the affected Parties and discuss the matter at hand, with a view to reconciling the differences. The Facilitator should make every effort to reconcile differences in a non-confrontational manner. No punitive measures shall be determined by the Facilitator;

(c) If the Facilitator is unable to reconcile the differences between Parties, she/he shall inform the Executive Secretary. The Executive Secretary shall then form an ad hoc arbitration committee consisting of equal numbers of developed and developing country representatives and having no more than 10 members;

(d) The Ad Hoc Arbitration Committee shall hold a hearing to consider the dispute and shall inform the Executive Secretary of its findings and recommendations. All Parties shall be informed of the findings and recommendations of the Ad Hoc Arbitration Committee;

(e) Should the findings and recommendations of the Ad Hoc Arbitration Committee not be accepted by the Parties concerned, the Party originally seeking the arbitration may take the matter to the International Court of Justice (ICJ) for further consideration.

12. The list of procedures is only general in nature. The COP may need to form a drafting committee if it wishes to proceed with developing such measures.

C. **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants**

13. The Basel Convention only refers specifically to arbitration in article 20, paragraph 2 and sets out procedures on arbitration in its annex VI. The Rotterdam Convention, article 20, paragraph 2 and article 6, and the Stockholm Convention article 18, paragraph 2, and article 6 are quite similar to the UNCCD article 6, paragraph 2. At its first meeting, the

Conference of the Parties to the Rotterdam Convention adopted, by its decision RC-1/11, annex VI (Settlement of Disputes) that sets out in part A procedures for arbitration and in part B rules on conciliation. Also at its first meeting, the Conference of the Parties to the Stockholm Convention adopted, by its decision SC-1/2, annex G on arbitration and conciliation procedures for settlement of disputes that sets out the arbitration procedure in part I and the conciliation procedure in part II.

D. Submission of 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)

14. Article 16, paragraph 2, of the Aarhus Convention on settlement of disputes 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.”

15. This provision of the Aarhus Convention is to a large extent similar to article 28, paragraph 2, of the UNCCD. In principle, Parties are encouraged to seek a solution by negotiation (see article 16, paragraph 1, of the Aarhus Convention, and also article 28, paragraph 1, of the UNCCD). Parties can make a written declaration to the Secretary-General of the United Nations, i.e. the Depositary, choosing between arbitration and adjudication by the 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.

16. 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 and briefly discussed 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.

17. The procedures for cases before the ICJ are laid down in the Statute of the International Court of Justice, as elaborated by its own practice. To date, there have been no disputes taken to arbitration or ICJ adjudication under the Convention.

18. 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: the fact that the ICJ procedure is a highly formalized one, whereas parties to arbitration set their own rules (such as set out in the annex to the Aarhus Convention) that can be modified to meet the needs of the case and the international law applicable; that some of the 15 judges of the ICJ have environmental expertise, whereas arbitrators for a particular case are specialized in the subject matter of a particular case, as well as in the cultural and legal issues of the countries involved in the case; the time needed to reach a conclusion under the ICJ or the arbitration procedure (a case before the ICJ may take up to four years or more, whereas annex II to the Aarhus Convention sets limits on timing depending on the needs of the particular case) and the costs (ICJ costs are typically lower than those of arbitration, since arbitration parties must pay the arbitrators, including travel costs and other expenses).

19. Annex II establishes the framework under which Parties to the Aarhus Convention can use arbitration to resolve disputes arising under the Convention. The terms of the annex are almost identical to those of several other conventions of the UNECE, including the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Environmental Impact Assessment in a Transboundary Context.

20. The scope of annex II is limited to disputes between Parties to the Convention, 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 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 that govern such cases.

21. Pursuant to paragraph 1 of annex II, once Parties have decided to use arbitration, the first step in constituting a tribunal is notifying the secretariat to the Convention. Parties must indicate the subject matter of the desired arbitration and the articles of the Convention that 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.

22. Paragraph 7 of the annex specifies that the decisions of the tribunal will be made by majority vote of the arbitrators. The president's role is thus limited to presiding over the arbitral hearing and casting a vote equal in weight to those of the other two members. This type of voting structure is similar to that used in other conventions, such as the Convention on Biological Diversity.

23. If a responding Party wishes to file a counter-claim against one or more Parties initiating arbitration, such action is governed by paragraph 13. The only restriction is that counter-claims must be directly relevant to the subject matter of the original dispute being arbitrated.

24. Pursuant to paragraph 17, the award granted by the tribunal is final and binding on all parties to the dispute. The decision must be accompanied by a statement of reasons, which typically addresses both factual and legal explanations for the outcome of the case. Once the decision is rendered, it must be transmitted by the tribunal to all of the parties to the dispute and the secretariat of the Convention. The secretariat then forwards the information received to all the Parties to the Convention. Although the award is only binding on the parties to the dispute, dissemination of this information allows the Parties to keep informed of issues involving implementation of the Convention, to track the role of arbitration in resolving disputes, to see how arbitrators interpret specific provisions of the Convention, and to develop a sense of how arbitrators might react to similar issues in the future.

E. The Permanent Court of Arbitration

25. The Permanent Court of Arbitration (PCA) encourages the open-ended ad hoc group of experts as well as the Conference of the Parties (COP) to consider adopting the PCA Environmental Rules as the arbitration and conciliation annexes referred to in article 28, paragraphs 2 (a) and 6 of the UNCCD.

26. The PCA Environmental Rules are based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, but deviate from them by strengthening the confidentiality guarantees, allowing Parties to comply with their national laws and political sensibility considerations concerning environmental information. There

are also more elaborated provisions concerning the production of evidence, appointment of experts and the ordering of provisional measures for the protection of the environment. The PCA Environmental Rules continue to be referred to as the procedural rules for resolving certain disputes in a variety of instruments, ranging from treaties, such as the 2003 UNECE Civil Liability Protocol, to numerous public and private carbon emissions trading contracts in the context of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. In addition, the PCA has already successfully provided administrative support to two cases under the PCA Environmental Rules; both cases concerned carbon emissions in the context of the Kyoto Protocol.

27. To sum up the submission in section III below, Tuvalu is of the opinion that given the general nature of the obligations that may arise out of article 28, these are unlikely to generate disputes among Parties, and the annexes on arbitration and conciliation of UNCCD should logically follow a pre-emptive and non-confrontational approach. The Basel, Rotterdam and Stockholm Conventions have adopted annexes on arbitration and conciliation procedures which are very similar to the ones proposed by the UNCCD secretariat in document ICCD/COP(9)/14. The Aarhus Convention also has procedures similar to those proposed by the Parties and interested institutions and organizations, especially the comparative table concerning annexes on arbitration and conciliation procedures (see paragraph 16 above). The Aarhus Convention also prefers making recourse to these more flexible procedures to solve disputes due to the nature and specificities of multilateral environmental agreements rather than lodging a case with the ICJ as set out in article 28, paragraph 2 (b) of the UNCCD. Finally, the PCA says that its Environmental Rules continue to be a reference when trying to resolve certain disputes in treaties and numerous public and private carbon emissions trading contracts. Thus the PCA sees it advantageous for UNCCD to adopt these Environmental Rules, which have already proven useful in the settlement of disputes in connection with international environmental law.

III. Relevant considerations

28. The Ad Hoc Group of Experts (AHGE) may wish to address certain preliminary questions in order to draft annexes containing arbitration and conciliation procedures. These questions should help in defining the legal framework and the specific needs of the UNCCD in view of the adoption of the annexes:

(a) What is the relationship between the procedures and institutional mechanisms pursuant to article 27 and the review of implementation by the COP pursuant to article 22, as well as the related provisions on communication of information pursuant to article 26?

(b) What is the relationship between the procedures and institutional mechanisms of article 27 and the dispute settlement procedures provided for under article 28? Are they mutually exclusive, i.e. should recourse to the procedures under one article prevent any recourse under the other?

(c) What are the types or range of questions that could be raised under the procedures and institutional mechanisms pursuant to article 27? What principles should govern the procedures and institutional mechanisms of article 27? Is it sufficient that they should be simple, transparent, facilitative and non-confrontational in character? What should be the exact nature and composition of the institutional mechanisms contemplated under article 27? Should membership and participation in them be restricted to representatives of Parties or should there be a role for experts such as legal, economic, social or technical experts appointed on a personal basis?

(d) Who can invoke article 27? In other words, could article 27 be invoked by entities other than Parties, for example intergovernmental organizations? Non-governmental organizations? The secretariat? The subsidiary bodies of the UNCCD?

(e) Should the procedures and mechanisms be public and open-ended or private? What should be the degree of transparency and flexibility?

(f) At what point in time and under what conditions can a Party initiate the application of the procedures and institutional mechanisms pursuant to article 27?

(g) What would be the time frame of application of such procedures and mechanisms from the time they are initiated to the time conclusions are reached?

(h) What would be the modalities by which such procedures and mechanisms arrive at their conclusions? What would be the nature of their various phases?

(i) What would be the legal effect, if any, of the conclusions of such procedures and mechanisms?

(j) What measures should be taken for the adoption of the procedures and institutional mechanisms?

IV. Conclusions, recommendations and proposed actions

29. At its eleventh session, the COP may wish to consider 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 article 28, paragraphs 2 (a) and 6.

30. 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 this document and the two comparative tables included as annex to 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 UNCCD. In the annexes to the afore-mentioned document, the comparison made 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 multilateral environmental agreements, are well precedented and uncontroversial. The task of developing such procedures is essentially a technical one.

31. 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 document ICCD/COP(9)14;

(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 analyse, discuss and draft annexes on arbitration and conciliation procedures, which may in the second instance be reviewed by the AHGE at the twelfth 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 article 28, paragraphs 2 (a) and 6, of the UNCCD, in which case the consideration of this item will be deferred to a future COP session, when Parties will determine that there is enough consensus to reach a final decision.
