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OUTSTANDING ITEMS

Consideration of procedures and institutional mechanisms for the resolution of questions on implementation, in accordance with article 27 of the Convention, with a view to deciding how to take this matter forward

Consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6 of the Convention

Note by the secretariat*

SUMMARY

At its fifth session, the Conference of the Parties adopted decision 21/COP.5 which:

- (a) Decides [...] that the Ad Hoc Group of Experts shall take as the basis of its work a new working document prepared by the secretariat in the light of CCD/COP(4)/8 and ICCD/COP(5)/8 and noting the progress made in negotiations on the same matter in other relevant environmental conventions;
- (b) Invites any Parties wishing to communicate their views on article 27 to do so, in writing to the secretariat, by 31 January 2003;
- (c) Requests the secretariat to include such views in the new working document [...] for consideration by the Ad Hoc Group of Experts.

* The submission of this document was delayed in order to include consideration of as many submissions by Parties as possible.

In accordance with decision 21/COP.5, the secretariat prepared a report containing the views of Parties with regard to procedures and institutional mechanisms for the resolution of questions on implementation and also with regard to annexes containing arbitration and conciliation procedures. It incorporates and updates document ICCD/COP(5)/8. As is customary, it provides current information with regard to the relevant precedents cited in that document, as well as information on new developments.

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I. BACKGROUND INFORMATION

1. By its decision 20/COP.3, the Conference of the Parties (COP) decided, in accordance with articles 27 and 28 of the United Nations Convention to Combat Desertification (UNCCD), to convene during its fourth session an open-ended ad hoc group of experts to examine the following matters and to make recommendations on them, in the light of the progress of negotiations on the same matters in other relevant environmental conventions, and taking into account the documents prepared by the secretariat: (a) procedures for resolution of questions on implementation; (b) annex on arbitration procedures; (c) annex on conciliation procedures.

2. In the same decision, the COP invited Parties to communicate their views to the secretariat in writing on how to take this matter forward. The COP also requested the secretariat to compile these views for consideration by the COP at its fourth session and to update the information contained in ICCD/COP(3)/7 and ICCD/COP(3)/18, as necessary, to reflect the progress achieved in this area in other relevant conventions; the COP also requested the secretariat to prepare new documents for consideration at its fourth session.

3. Due to time constraints during its fourth session, the COP decided by its decision 20/COP.4 to reconvene the meeting of the open-ended ad hoc group of experts at COP 5. In the same decision, Parties were invited to communicate to the secretariat their views on how to take this matter forward. The secretariat was requested to incorporate such additional views into a revised version of ICCD/COP(4)/8 and to update the information contained in the document referred to above, as necessary, to reflect the progress achieved in this area in other conventions, and to prepare revised documentation for consideration by the COP at its fifth session.

4. Owing to pressure of time during the negotiation of the Convention, it was not possible to include annexes on conciliation and arbitration as part of the original text. Hence, paragraphs 2 and 6 of article 28 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".

5. At its second session, the COP, by decision 2/COP.2, decided to include as a selected item on the agenda for its third, and if necessary fourth, session, consideration of the above-mentioned issues. By decision 22/COP.2, the COP decided also to consider these issues further in the light of the progress of the negotiations on the same issues in other relevant environmental conventions, with a view to deciding how to take this matter forward.

6. The COP, by its decision 21/COP.5, decided:

(a) To reconvene, during its sixth session, for the purposes of fulfilling article 27 of the Convention, the open-ended Ad Hoc Group of Experts to examine further, and make recommendations on, procedures and institutional mechanisms for the resolution of questions on implementation;

(b) That the Ad Hoc Group of Experts should take as the basis of its work a new working document prepared by the secretariat in the light of ICCD/COP(4)/8 and ICCD/COP(5)/8, noting the progress made in negotiations on the same matter in other relevant environmental conventions;

(c) To invite any Parties wishing to communicate to the secretariat their views on article 27 to do so, in writing, by 31 January 2003 and to request the secretariat to include such views in the new working document for consideration by the Ad Hoc Group of Experts.

7. Four submissions were received from Parties, namely Brazil, Oman, Saudi Arabia and Sri Lanka. This note records the contributions received from country Parties and interest groups as at 30 May 2003. Due to new instructions pertaining to the length of United Nations documents, submissions by Parties are not incorporated in this note. They are, however, reproduced in their entirety, as submitted to the secretariat, on the UNCCD Internet Web site at <http://www.unccd.int/cop/cop6/COPsubmissions.php>.

II. CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS ON IMPLEMENTATION

A. Relevant precedents

8. The most relevant precedents relating to article 27 of the UNCCD include the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the 1994 Protocol on Further Reductions of Sulphur Emissions (Second Sulphur Protocol) to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP), and article 13 of the United Nations Framework Convention on Climate Change (UNFCCC), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

9. As stated in ICCD/COP(5)/8, it should be borne in mind that the precedents and experience of other environmental agencies should be examined with caution. The balance of obligations varies from one treaty to another. Hence, the procedures and institutional mechanisms need to be tailored to suit individual treaties. The following review of relevant precedents should therefore be examined with this in mind. It should be noted also that in several of these regimes they will apply without prejudice to the provisions of dispute settlement procedures existing already in the individual treaties.

1. Montreal Protocol on Substances that Deplete the Ozone Layer

10. Article 8 of the Montreal Protocol states: "The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found in non-compliance".

11. Parties to the Montreal Protocol had finalized the development of a non-compliance procedure in 1992. This procedure was adopted by decision IV/5 of the fourth Meeting of the Parties. The Procedure includes the non-compliance procedure itself and an indicative list of measures that might be taken in respect of non-compliance. Decision IV/5 also stated that responsibility for legal interpretation of the Protocol rested with the Parties.

12. At the ninth Meeting of the Parties an Ad Hoc Working Group of Legal and Technical Experts was established (decision IX/35) with the task of reviewing the non-compliance procedure.

In 1998, as a result of the work of the Group, several amendments to the non-compliance procedure were introduced to streamline it. According to the amended process, an Implementation Committee forms the basis of the Protocol's procedures for non-compliance; this consists of 10 members with due consideration being paid to equitable geographic distribution. The functions of the Committee are: to receive submissions on non-compliance; to request, gather and consider relevant information; to identify causes of non-compliance; to make respective recommendations to the Meeting of the Parties; and to maintain information exchange with the Executive Committee of the Multilateral Fund. The Committee reports to the Meeting of the Parties. Reports of the Committee are available to the public, due respect being paid to the confidentiality of information involved in the Committee's proceedings. To date the Committee has held twenty-nine meetings.

13. Under the procedure, one or more Parties may trigger the non-compliance procedure with regard to another Party's non-compliance. A Party may also indicate its own inability to comply with its obligations under the Protocol. The secretariat serves as the linking element between the Parties involved and for collection of information on the case. The secretariat may indicate cases of potential non-compliance to the Meeting of the Parties through its reports, informing the Implementation Committee accordingly.

14. The indicative list of measures which might be taken in respect of non-compliance include: assistance, including assistance for the collection and reporting of data; technical assistance; technology transfer; financial assistance; information transfer and training; issuance of cautions; and suspension of specific rights and privileges under the Protocol.

15. Each Meeting of the Parties reviews annually all Parties' compliance with their obligations under the Protocol on the basis of information reported by each Party. Meetings make specific decisions for some Parties whose implementation of the Protocol is not in conformity with its provisions. Decisions by Parties include possible measures aimed at restoring compliance, such as: monitoring and review of performance by the Implementation Committee until the Party returns to compliance, submission to the Implementation Committee of action plans, including compliance benchmarks for the Committee's review, or issuance of cautions for further measures in the case where the Party does not restore compliance.

2. *Convention on Long-Range Transboundary Air Pollution*

16. In 2002, the Executive Body for the Convention on Long-range Transboundary Air Pollution (LRTAP) received the fifth report of its Implementation Committee regarding compliance by Parties with their obligations under the Protocols to the Convention. The Committee had reviewed cases of non-compliance and presented recommendations. The Chairman of the Committee pointed out that the work of the Implementation Committee had reached a new phase, since the number of references had increased substantially in 2002. For the first time it had been called on to examine referrals made by the secretariat.

17. Based on the recommendations of the Implementation Committee, the Executive Body adopted a number of decisions concerning non-compliance by specific Parties with their obligations under different protocols. In these decisions, the Executive Body voiced concern over the continuing failure by several countries to fulfil their obligations under, *inter alia*, the 1991 VOC Protocol, the 1988 Nitrogen Oxides Protocol, the 1985 Sulphur and the 1988 NO_x Protocols.

18. These decisions expressed concern, and urged the countries concerned to meet their obligations as soon as possible; to lay down specific reporting tasks for the coming year and to continue to review the situation.

3. United Nations Framework Convention on Climate Change

19. Article 13 of the UNFCCC (Resolution of questions regarding non-compliance) declares: “The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention”.

20. Pursuant to this article, a multilateral consultative process was developed by the Conference of the Parties to the UNFCCC. The process is facilitative, non-judicial, transparent, cooperative and timely in manner. It includes the establishment of a standing multilateral consultative committee to provide assistance to Parties in implementation of the Convention and to prevent disputes from arising. This process has yet to be adopted due to differences regarding the composition of the committee.

4. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

21. Article 19 (Verification) of the Basel Convention states: “Any Party which has reason to believe that another Party is acting or has acted in breach of its obligations under this Convention may inform the Secretariat thereof and, in such an event, shall simultaneously and immediately inform, directly or through the Secretariat, the Party against whom the allegations are made. All relevant information should be submitted by the Secretariat to the Parties”.

22. In this connection, the Convention Parties mandated the Legal Working Group of the Convention to develop procedures for monitoring implementation of, and compliance with, the obligations set out by the Basel Convention. In May 2003, the Conference of the Parties established a mechanism of compliance, which aims to assist Parties to comply with their obligations and to facilitate, promote, monitor and secure implementation of and compliance with their obligations under the Convention. The mechanism is non-confrontational, transparent, cost-effective and preventive in nature, and oriented towards helping Parties to implement the provisions of the Convention. A Committee, consisting of 15 members, is established to administer the mechanism. Members are elected by the Conference of the Parties for four years. A Party in a situation of non-compliance may make submissions to the Committee and the secretariat, as may a Party which has concerns about, or is affected by, a failure to comply with and/or implement the Convention’s obligations by another Party with whom it is directly involved under the Convention.

23. It is important to note that the Committee has a role to play in facilitating compliance. This procedure includes provision by the Committee of advice, recommendations and information. In addition, if after the facilitation procedure the matter is still unresolved the Committee may recommend the Conference of the Parties to provide further support under the Convention for the Party concerned (including prioritization of technical assistance and capacity-building and access to financial resources) or to issue a cautionary statement providing advice regarding future compliance

in order both to help Parties to implement the provisions of Convention and to promote cooperation between all Parties.

24. The Committee makes every effort to reach agreement by consensus on all matters of substance. If no consensual agreement has been reached, any decision shall, as a last resort, be taken by a two-thirds majority of the members present and voting, or by eight members, whichever is the greater. Ten members of the Committee constitute a quorum.

5. Convention on International Trade in Endangered Species of Wild Fauna and Flora

25. Article XI, paragraph 3 of CITES requires the Parties regularly to review the implementation of the Convention and authorizes the Conference of the Parties, where appropriate, to make recommendations for improving the effectiveness of the Convention. Article XII provides the Conference of the Parties with authority to make “whatever recommendations it deems appropriate” in relation to allegations of unsustainable trade or ineffective implementation. The Standing Committee is empowered by the Conference of the Parties to consider measures including restrictions on trade and to recommend specific trade sanctions for Parties in the interim periods between meetings of the Conference. Under Article XII of the Convention the Secretariat is requested to “study the reports of Parties and to request from them any further information necessary to ensure implementation of the Convention”. It is also required “to make recommendations for the implementation of the aims and provisions of the Convention”.

26. The present compliance scheme of CITES is evolving and is based on a positive and facilitative approach to compliance, with some coercive elements. CITES has employed a range of remedial actions to deal with non-compliance. These actions have been consultative, non-judicial and non-adversarial in nature and have included procedural safeguards for the parties involved. To promote compliance and to prevent non-compliance, the CITES scheme uses gathering, communication and review of information (annual and biennial reports, special reports, responses to information requests) as a primary means of collecting information on and assessing compliance. Facilitation of compliance is promoted through advice and assistance (providing the Party with information, technical and financial assistance, technology transfer, training or other). A party may be asked to undertake additional self-reporting and targeted monitoring. An informal warning can be issued if needed.

27. Determination of non-compliance is initiated by a specific event, which may be a Party’s failure to meet a deadline, a complaint registered by one or more Parties, or the result of a review of submitted information.

28. Measures to address non-compliance have included: advice and assistance, issuance of a formal caution (direct contact with the Party), verification (verification missions), public notification of non-compliance, development of a compliance action plan, and a temporary suspension of commercial or all trade specimens of one or more CITES species. Trade sanctions have been used mainly to deal with Parties which have not adopted adequate domestic legislation. In some cases the power delegated to the secretariat has been substantial, such as determining whether a State were adequately implementing its obligations.

B. New developments

1. Kyoto Protocol to the United Nations Framework Convention on Climate Change

29. Article 18 of the Kyoto Protocol reads as follows: “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”

30. The compliance procedures were developed in 2001, which resulted in the establishment of a Compliance Committee. The same year, an appendix on compliance rules was finalized and a decision reached to forward the draft rules to the first Meeting of the Parties of the Kyoto Protocol for consideration.

31. The compliance structure for the Kyoto Protocol consists of a Compliance Committee composed of two branches, a facilitative branch and an enforcement branch, each comprising of 10 members, due respect being paid to equitable geographic distribution and rotation of members. Any Party can, with regard to itself or to another Party, make submissions to the Committee on compliance issues.

32. The facilitative branch is responsible for providing advice and assistance to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments, taking into account the principle of common but differentiated responsibilities. This branch decides on the application of consequences of a facilitative nature listed in the rules. A three-quarters majority is required for decisions of the facilitative branch.

33. The enforcement branch is responsible for determining whether or not a Party included in Annex I to the Protocol is in compliance with some obligations, enumerated in the rules. This branch determines whether to apply some measures aiming at adjustments to requirements, or consequences aimed at restoration of compliance as set out in the rules. These consequences include such measures as declaration of non-compliance, an analysis of causes of non-compliance, development and implementation of different plans or timetables to restore compliance, deductions from future assigned amounts of emissions in the case of present assigned amounts being exceeded, and suspension of eligibility to make transfers of emissions and participate in the emission market. Decisions of the enforcement branch require a double majority of both Annex I and non-Annex I Parties. Parties may appeal to the Conference of the Parties against a decision by the enforcement branch.

34. Procedures for the Committee include assessment of information from reports provided under the Protocol, from Parties concerned, from the Conference of the Parties, or from the other branch. Intergovernmental and non-governmental organization may also submit information. Information is normally made public subject to any rules relating to confidentiality. Procedures include procedural safeguards for Parties concerned. In the case of non-compliance with emission targets, the Party can also lodge an appeal to the Conference of the Parties if that Party believes it

has been denied due process. An expedited procedure set for the enforcement branch with shorter timeframes applies to questions regarding eligibility to participate in the mechanisms. A Party may request, either through an expert review team or directly to the enforcement branch, to have its eligibility restored if it believes it has rectified a problem and is again meeting the relevant criteria.

2. Cartagena Protocol on Biosafety to the Convention on Biological Diversity

35. Article 34 of the Cartagena Protocol states: “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the Convention.”

36. The Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) addressed the issue of compliance and preparation for entry into force of the Cartagena Protocol. The first meeting of the ICCP (1 December 2000) invited Parties to the Convention and Governments to forward to the Executive Secretary their views regarding elements and options for a compliance regime under the Cartagena Protocol on the basis of a questionnaire. An open-ended meeting of experts was convened, which reviewed a synthesis report of views submitted by Parties.

37. The draft text of the procedures and mechanism on compliance under the Cartagena Protocol, addresses the following topics: I. Objective, nature and underlying principles (compliance procedures and mechanisms shall be simple, facilitative, non-adversarial and cooperative); II. Institutional mechanisms (establishment, size, composition and operation of the Compliance Committee); III. Functions of the Committee (identification of cases of non-compliance, consideration of information, provision of advice and assistance, review of general issues of compliance, taking measures or making recommendations to the Conference of the Parties serving as the meeting of the Parties to the Protocol); IV. Procedures (submissions and procedures to follow upon receipt of submissions); V. Information and consultation (modalities of collection of information and bodies entitled to submit information, seeking advice from experts, respect for confidentiality of the information collected); VI. Measures to promote compliance and address cases of non-compliance; VII. Review of the procedures and mechanisms.

38. The text still includes bracketed text on several substantial issues, including whether the operation of the compliance procedures and mechanisms should be guided by the principle of “common but differentiated responsibilities”. Disagreement remains with regard to the issue of balance between representatives of importing and exporting countries in the composition of the Compliance Committee, and whether the members of the Committee shall serve in their individual capacity. As to the procedures, divergent views remain as to whether any Party could make submissions with regard to another Party and whether the Conference of the Parties serving as the meeting of the Parties to the Protocol could make submissions to the Committee. Brackets still remain in the list of sources from which the Committee may seek, receive or consider information. Disagreement remains on the measures that the Conference of the Parties serving as the meeting of the Parties may take to address cases of non-compliance.

3. *United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*

39. Article 15 (Review of Compliance) 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) states: "The meeting of the Parties shall establish, on a consensus basis, optional arrangements for a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."

40. At the first meeting of signatories to the Convention, a task force on compliance mechanisms was established to draft elements for compliance mechanisms in order to facilitate discussion of the matter at the second meeting of signatories. At this second meeting, it was decided to establish an open-ended intergovernmental working group to draw up the draft text of a decision for the first Meeting of the Parties.

41. The first Meeting of the Parties (October 2002) adopted decision I/7 on review of compliance with the Convention. The decision established a Compliance Committee, and included a set of rules, on "Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance". Functions of the Committee (Part III) include consideration of submissions by Parties on their own compliance or another Party's compliance (Part IV), consideration by the secretariat of referrals on possible non-compliance made on the basis of reports submitted by Parties in accordance with the Convention's requirements (Part V), and of communications from the public submitted under specified conditions (Part VI). The Committee also prepares reports on compliance with the Convention (Part X), monitors, assesses and facilitates compliance with reporting requirements under the Convention and makes recommendations if and as appropriate. In order to fulfil its functions, the Committee undertakes information gathering with due regard being paid to the confidentiality of the information collected.

42. The Meeting of the Parties may, upon consideration of a report of recommendation by the Compliance Committee, adopt the following measures: advice and assistance, recommendations to the Party concerned, a request to the Party to submit a strategy on achievement of compliance, recommendations to the Party concerned on specific measures to address a matter raised in a communication from the public, declarations of non-compliance, cautions, suspension of rights and privileges under the Convention, and/or any other non-confrontational, non-judicial and consultative measures.

43. The first Meeting of the Parties elected the first Compliance Committee. The Committee will hold its first session in 2003.

4. *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*

44. In its article 17, the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) states that "the Conference of the Parties shall, as soon as practicable, develop and approve procedures and

institutional mechanisms for determining non-compliance with the provisions of this Convention and for treatment of Parties found to be in non-compliance".

45. In 2002, the Intergovernmental Negotiating Committee at its ninth session further considered compliance issues addressed in Article 17 of the Convention. Stressing the importance of having sound procedures and mechanisms on compliance, and having heard a general exchange of views by governments' representatives on the subject, the Committee established an open-ended working group to meet during the session to discuss mechanisms and procedures on compliance (working group on compliance).

46. The working group on compliance examined various aspects of compliance issues under Article 17, including practical issues regarding the implementation of the Convention and how these should affect the drafting of any compliance mechanism. Using the draft prepared by the Secretariat, the working group produced a working draft of procedures and institutional mechanisms for handling cases of non-compliance. The Committee agreed to reconvene the working group on compliance at its tenth session for further consideration of the subject. As agreed at the Committee, a negotiating document will be prepared under the guidance of the chairperson of the working group on compliance.

5. Convention on Persistent Organic Pollutants

47. Within the framework of the interim process of the Convention on Persistent Organic Pollutants (POPs), the work on non-compliance started at the sixth session of the Intergovernmental Negotiating Committee (INC) in June 2002 in Geneva. The INC adopted decision 6/18 on Non-compliance, which invites governments and the secretariats of multilateral environmental agreements to provide the secretariat with their views on non-compliance addressed in article 17 of the POPs Convention. The INC also requested the secretariat to prepare and submit to the INC at its seventh session a report providing a compilation of views submitted by governments and interested secretariats on the aforementioned issue and a report on the existing non-compliance regimes under multilateral environmental agreements.

III. CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES

Relevant precedents and latest developments

1. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

48. In its article 20, paragraph 2 (a), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) provides for adoption by the Conference of the Parties of an annex concerning arbitration procedures. In addition, article 20, paragraph 6 stipulates that an annex on procedures relating to a conciliation commission will be adopted by the Conference of the Parties no later than at the second meeting of the Conference.

49. The Rotterdam Convention's legal working group, having thoroughly examined the draft procedures, produced a draft text of the conciliation procedure as well as a draft text of the arbitration procedure. The texts of the draft arbitration and conciliation procedures prepared by the legal working group were subsequently adopted by the Committee at its eighth session in 2002. The Committee decided to place an item on settlement of disputes on the agenda of its ninth session, with a focus on the outstanding point referred to above.

50. As stated before ICCD/COP(5)/8, the Rotterdam Convention has not yet entered into force, and thus the impact of the annexes on the UNCCD remains to be seen.

2. Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration

51. Equally salient regarding the procedures for settlement of disputes is that the Permanent Court of Arbitration adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment on 19 June 2001, and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment on 16 April 2002. These sets of optional rules are based respectively on the 1976 Arbitration Rules and the 1980 Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL). These optional rules seek to make the fewest possible changes from the 1976 Arbitration Rules and the 1980 UNCITRAL Conciliation Rules but are tailored to facilitating consensual resolution of environmental disputes.

52. The Permanent Court of Arbitration Environmental Arbitration Rules have been incorporated into the UNECE Civil Liability Mechanism for the Watercourses and Transboundary Effects of Industrial Accidents (TEIA) Conventions, are referred to in Kyoto Protocol-based emission trading contracts, and are being considered in the context of the liability and redress article of the Biosafety Protocol to the Convention on Biodiversity and many other multilateral environmental agreements.

53. These rules could thus be a useful reference point for the work of the group of experts on legal issues in that they seek to address the lacunae in environmental dispute resolution, especially in matters relating to the composition of the arbitral tribunal, confidentiality, interim measures, speed of the arbitral proceedings, and the binding effect of the award. Delegates may wish to consider that adopting a reference to or modifying an existing set of rules such as the PCA Environmental Arbitration Rules to serve as arbitration procedures within the UNCCD could save delegates the time and expense of negotiating an entirely new set of procedures.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Resolution of questions on implementation

54. The COP may wish at its sixth session to consider the relevant background on procedures and institutional mechanisms for the resolution of questions which may arise with regard to the implementation of the Convention, in order to assist Parties to comply with their commitments under the Convention.

55. As pointed out in the summary by the Chairperson of the Ad Hoc Group of Experts, the COP may also wish to study further:

- The scope of article 27 (measures to resolve questions on implementation), which could be understood as relating either to problems of implementation faced by the Parties to the Convention as a whole, or to difficulties experienced by individual Parties in fulfilling their obligations;
- The relationship between articles 22.2 (tasks of the COP in implementing the Convention), 26 (communication of information), 27 and 28 (settlement of disputes), and especially the relationship between articles 22 (Conference of the Parties) and 27, would require further consideration by the COP, *inter alia*, to avoid duplication in their implementation;
- The scope, mandate, functions and composition of a multilateral consultative mechanism – similar to that established by the UNFCCC and other environmental agencies – to facilitate implementation by Parties to the Convention.

56. Upon consideration of these issues, the Committee may wish to call for comments from its Parties and other interested institutions and organizations on the elements mentioned in the present note. For consideration at further sessions, the COP may also wish to request the Ad Hoc Group of Experts, with the assistance of the secretariat, to develop a draft model of a mechanism to handle cases of unresolved questions on implementation, and consolidate draft annexes on arbitration and conciliation procedures with the provisions of the Convention based on work undertaken in other relevant international agreements and input received from Parties and other interested institutions and organizations.

B. Arbitration and conciliation procedures

57. The COP may wish to consider at its sixth 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:

- Article 27 on measures to resolve questions on implementation;
- Article 28 on settlement of disputes, particularly paragraphs 2(a) and 6.

58. COP may also wish to consider the written proposals submitted by country Parties and the report prepared by the secretariat, and thus determine the design and content of arbitration and conciliation procedures, since under the multilateral environmental agreements they are well precedented and uncontroversial. The task of developing such procedures is essentially a technical one.

59. The Ad Hoc Group of Experts may wish to consider the draft texts of the arbitration and conciliation procedures contained in ICCD/COP(4)/8 and ICCD/COP(5)/8, with a particular focus on the outstanding points referred to above, and, should agreement be reached on that point, to decide whether it wishes to transmit the texts of these annexes to the COP.

V. REFERENCE DOCUMENTATION

<u>Document symbol</u>	<u>Title or description</u>
ICCD/COP(5)/11/Add.1	Report of the Conference of the Parties on its fifth session – Action taken
ICCD/COP(5)/8	Outstanding items – Consideration of procedure and institutional mechanisms for the resolution of questions on implementation, in accordance with article 27 of the Convention, with a view to deciding how to take this matter forward – Consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6 of the Convention
ICCD/COP(4)/11/Add.1	Report of the Conference of the Parties on its fourth session – Action taken
ICCD/COP(4)/8	Outstanding items – Consideration of procedure and institutional mechanisms for the resolution of questions of implementation, in accordance with article 27 of the Convention, with a view to deciding how to take this matter forward – Consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6 of the Convention
ICCD/COP(3)/20/Add.1	Report of the Conference of the Parties on its third session – Action taken
ICCD/COP(3)/7	Procedures for resolution of questions, arbitration and conciliation
ICCD/COP(3)/17	Establishment of additional procedures and/or institutional mechanisms to review the implementation of the Convention
ICCD/COP(3)/18	Procedure and institutional mechanism for the resolution of questions that may arise with regard to implementation of the Convention
ICCD/COP(2)/14/Add.1	Report of the Conference of the Parties on its second session – Action taken
ICCD/COP(2)/10	Consideration with a view to adopting, pursuant to article 27 of the Convention, procedures and institutional mechanisms for the resolution of questions that may arise with regard to implementation
ICCD/COP(1)/11/Add.1	Report to the Conference of the Parties on its first session – Action taken

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