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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

### EXECUTIVE SUMMARY

1. At its sixth session, the Conference of the Parties (COP) adopted decision 22/COP.6, by which it:

- Decided [...] to reconvene 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 and arbitration and conciliation procedures;
- Invited any Parties wishing to communicate their views on article 27, and any Parties and interested institutions on article 28 of the Convention, in writing to do so, to the secretariat, by 31 January 2005;
- Requested the secretariat to prepare a new working document on the basis of the submissions by Parties contained in documents ICCD/COP(4)/8, ICCD/COP(5)/8 and ICCD/COP(6)/7, the views communicated by Parties and interested institutions and organizations and an updated version of the annexes contained in ICCD/COP(4)/8 to reflect these views;

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- Decided further that the Ad Hoc Group of Experts shall take as the basis of its work the new working document to be prepared by the secretariat.

2. In accordance with decision 22/COP.6, the secretariat has prepared a report containing the views of Parties and interested institutions and organizations regarding procedures and institutional mechanisms for the resolution of questions on implementation and also with regard to annexes containing arbitration and conciliation procedures. In so doing, it includes and updates document ICCD/COP(6)/7 by providing current information pertaining to the relevant precedents cited in that document and information on new developments.

3. Chapter I 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, and considering annexes containing arbitration and conciliation procedures in accordance with article 28, paragraphs 2(a) and 6, of the Convention.

4. Relevant precedents and the new developments with regard to the consideration of procedures and institutional mechanisms for the resolution of questions on implementation are emphasized in chapter II. Chapter III considers annexes that contain arbitration and conciliation procedures that outline relevant precedents and new developments and which may constitute the core of future discussions. Chapter IV presents conclusions, recommendations and proposed action. Annex I lists reference documentation. Annexes II and III present a comparative table of the draft annexes resulting from the evolution of these procedures throughout the COP sessions, new developments among other environmental agencies, and written proposals by Parties and interested institutions and organizations.

5. It should be noted that due to new instructions concerning the length of official United Nations documents, the recommendation of the Chairperson of the Group requesting that the secretariat prepare two separate documents for its consideration during COP 7 could not be fulfilled.

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## I. BACKGROUND INFORMATION

1. In document ICCD/COP(6)/7, the secretariat produced a summary of the evolution of, and progress made on, the resolution of questions on implementation and also with regard to annexes on arbitration and conciliation procedures. This report assisted the Ad Hoc Group of Experts to examine and make recommendations in the light of the progress of negotiations on the same matters in other relevant environmental conventions and taking into account documents prepared by the secretariat for other sessions of the COP.
2. By its decision 22/COP.6, the COP decided, in accordance with articles 27 and 28 of the United Nations Convention to Combat Desertification (UNCCD), to reconvene, during its seventh session, 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 and on annexes on arbitration and conciliation procedures.
3. The COP, by its decision 22/COP.6, decided:
  - (a) To reconvene, during its seventh session, for the purposes of fulfilling articles 27 and 28 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 and on annexes on arbitration and conciliation procedures;
  - (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 documents ICCD/COP(4)/8, ICCD/COP(5)/8 and ICCD/COP(6)/7, and the submissions forwarded by Parties and interested institutions and organizations respectively;
  - (c) To invite any Parties and interested institutions and organizations wishing to communicate to the secretariat their views on articles 27 and 28 to do so, in writing, by 31 January 2005 and to request the secretariat to include such views in the new working document for consideration by the Ad Hoc Group of Experts.
4. As at 15 July 2005, the secretariat has not received any written proposals submitted on the aforementioned matters. In accordance with decision 22/COP.6, the secretariat has now prepared a report that updates document ICCD/COP(6)/7.
5. For ease of reference and understanding, the present document contains, as requested by the COP in decision 22/COP.6, a comparative analysis of draft arbitration and conciliation procedures, which merges the first draft of these annexes in document ICCD/COP(3)/7 and the revised draft in document ICCD/COP(4)/8 into two tables respectively. These tables should assist in giving a better idea of, and a clearer perspective on, the draft annexes as proposed by the secretariat and the views put forward by Parties as to how they should be amended and thus improved.

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

### A. Relevant precedents

6. As was the case in the previous report, 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).

7. The balance of obligations varies from one treaty to another and thus the precedents and experience of other environmental agencies should be examined with caution. For this reason, the procedures and institutional mechanisms need to be tailored to suit individual treaties. In the case of the UNCCD, effective action to combat desertification and mitigate the effects of drought has to be implemented through national and regional strategies. The specificities of each regional implementation annex should be taken into account to tackle and successfully resolve any matter with regard to the interpretation or application of the Convention. The following review of relevant precedents should therefore be examined bearing this in mind.

#### 1. Montreal Protocol on Substances that Deplete the Ozone Layer

8. In 2004, the Implementation Committee on non-compliance met and made several recommendations on the status of compliance, on the basis of information reported by each Party, to the Meeting of the Parties. Of a total of 39 Parties which were scheduled for consideration under this item, 21 had been included on the agenda of the 33<sup>rd</sup> meeting in order for the Committee to discharge its duty of monitoring the status of compliance by those Parties, while the remaining Parties had no outstanding issues to consider. The Committee agreed not to discuss those Parties in detail, but to note with appreciation their efforts towards complying with their commitments under the Protocol in the text of the report of the meeting.

9. In connection with recommendations dealing with plans of action for Parties in non-compliance, it was further clarified that the Montreal Protocol was operating in line with the principle of “constructive agreement”, common in public international law. Parties had agreed, by consensus, to go beyond the strict control measures laid out in the Protocol in order to address non-compliance in a pragmatic manner, an approach that proved highly effective in practice.

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

10. In 2004, the Executive Body of the LRTAP received the seventh 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.

11. The Chairperson of the Committee drew attention to its annual review of Parties' compliance with reporting obligations, noting non-compliance by several Parties with respect to reporting emissions. There also remained several instances of non-compliance with several protocols with respect to meeting emission target obligations.

12. 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 the years that the Committee had been working some countries had moved back into compliance with their obligations; others were moving in the right direction and expected to be back in compliance soon. A few countries, however, showed little indication of achieving compliance and the Executive Body expressed its concern about this situation. These countries in particular were called upon by the Executive Body to present further information to the Implementation Committee showing progress made towards achieving compliance and setting out a timetable that specified the year by which it expected to be in compliance, as well as listing the specific measures taken or scheduled to fulfil its emission reductions obligations.

13. The Chairperson of the Implementation Committee also indicated that the Committee had started its in-depth review of the 1998 Protocol on Persistent Organic Pollutants, that had entered into force in 2003, and that the Committee would report on this in 2005.

### 3. United Nations Framework Convention on Climate Change

14. The standing multilateral consultative committee established in accordance with article 13 of the UNFCCC (Resolution of questions regarding non-compliance), whose role is to prevent disputes among Parties from arising, has not made any progress since 2003. As stated in the previous report, this is mainly due to differences regarding the composition of the committee.

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

15. In 2004, the COP established a mechanism for promoting implementation of and compliance with the Basel Convention. The COP also called for the nomination of candidates for membership of the committee that would administer this mechanism and mandated the Open-ended Working Group to elect the first members of the committee on behalf of the COP. The terms of reference for the mechanism provide, among other things, that "the Committee shall report to each ordinary meeting of the Conference of the Parties on the work it has carried out to fulfil its functions for the information and/or the consideration of the Conference of the Parties."

16. The committee consists of fifteen members nominated by the Parties and elected by the COP. The terms of reference of the mechanism further provide that the members of the committee will serve objectively and in the best interest of the Convention, and shall have expertise relevant to the subject matter of the Convention, including in the scientific, technical, social, economic and legal fields. The COP shall elect five members, one from each region, for one term, and ten members, two from each region, for two terms. The COP shall, at each ordinary meeting thereafter, elect for two full terms new members to replace those members

whose period of office has expired, or is about to expire. Members shall not serve for more than two consecutive terms.

17. The committee shall also report to each ordinary meeting of the COP on any conclusions and/or recommendations it has developed on its suggestions for any future work that may be required on general issues of compliance and implementation, for the consideration and approval by the COP. The terms of reference set forth a "facilitation procedure" which the committee is to follow when considering a submission. The committee will make a recommendation to the COP on "additional measures" to be taken following the conclusion of the facilitation procedure whenever the committee considers that such measures are necessary to address compliance difficulties. There is also provision for a "general review" process, which permits the committee to review general issues of compliance and implementation under the Convention, as directed by the COP.

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

18. An open-ended intersessional working group and process were established at the 50th meeting of the CITES Standing Committee (Geneva, Switzerland, March 2004) to finalize a set of guidelines for compliance with the Convention, using as a basis the revised draft text prepared by the secretariat (see document SC50 Doc. 27, Annex 3). It was agreed that the Working Group on Compliance would report back to the Committee at its 53<sup>rd</sup> meeting (SC53). The Committee acknowledged, however, that any Party could submit the issue of compliance guidelines for discussion at the 13th meeting of the Conference of the Parties (CoP 13) held at Bangkok in 2004. This was done through document CoP13 Doc. 25 submitted by Ireland on behalf of the Member States of the European Community.

19. The Working Group held several meetings on the margins of CoP 13 in which representatives of the following Parties participated: Australia, Brunei Darussalam, Canada, China, Ecuador, Germany, Japan, Malaysia, Mexico, the Netherlands, New Zealand, Norway (Chair), Saint Lucia, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United Republic of Tanzania, the United States of America and Zambia. The secretariat was present at all of the meetings. One of these meetings was also opened to intergovernmental and non-governmental organizations so that they could express their views on the topic. Six organizations participated in that meeting. The Working Group used the revised draft guidelines on compliance with the Convention contained in document SC50 Doc. 27, Annex 3, as a basis for its discussions. Before the last meeting, the Chairperson circulated a new draft which took into account comments made during the discussions and some of the written contributions aimed at simplifying the structure of the guidelines. The Working Group decided to continue discussions by e-mail until SC 53.

20. By the time of SC 53 (Geneva, 27 June - 1 July 2005), the Working Group had not completed its deliberations. A summary of the Working Group's progress to date and a copy of the Chairperson's October 2004 draft text were provided in document SC53 Doc. 30. The Working Group then held several meetings on the margins of SC 53. It used a revised draft prepared by the Chairperson in June 2005 (incorporating comments that had been provided electronically by members of the Working Group) as a basis for its discussions. In his oral report to the Standing Committee, the Chairperson stated that the Working Group had made



good progress but needed some additional time in which to complete its work. He explained that, in view of the momentum of the Group, further negotiations could be concluded by electronic mail, well in time for an agreed draft text to be submitted for consideration by the 54th meeting of the Standing Committee (Geneva, tentatively October 2006).

## B. New developments

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

21. The UNFCCC continues to serve as the focus for intergovernmental action to combat climate change. A parallel advance was the adoption in 1997 and entry into force in February 2005 of the Kyoto Protocol with its legally-binding emissions targets for industrialized countries and subsequent development of the rules for its implementation.

22. The Kyoto Protocol supplements and strengthens the Convention, providing a framework for remedial and precautionary action to tackle adverse effects of climate change. Only Parties to the Convention can become Parties to the Protocol. The Protocol is founded on the same principles as the Convention and shares its ultimate objective, as well as the way it groups and classifies countries. It also shares the Convention's institutions, including its subsidiary bodies and secretariat. The Kyoto Protocol broke new ground with three innovative mechanisms (joint implementation, the clean development mechanism and emissions trading) designed to boost the cost-effectiveness for climate change mitigation by opening ways for Parties to cut emissions, or enhance carbon sinks, more cheaply abroad than at home.

23. In order to assess the compliance of each Party included in Annex I to the Convention (Annex I Party) with the Protocol, information will be needed on the steps they have taken to implement the Protocol, as well as on their emissions over the commitment period from 2008 to 2012 and their transactions under the mechanisms.

24. Entry into force of the Protocol has brought into play modified reporting and review requirements. In addition, each Annex I Party is now required to have made demonstrable progress in achieving its commitments under the Protocol, to report on such progress by 1 January 2006 and to incorporate in national communications the supplementary information to demonstrate compliance with commitments under the Protocol. This supplementary information should be submitted as part of the first national communications due under the Convention, following the Protocol's entry into force.

25. The Compliance Committee set up under the system consists of a plenary, a bureau and two branches (a facilitative branch and an enforcement branch). If a Party fails to meet its emissions target, it must make up the difference, plus a penalty of thirty per cent, in the second commitment period. It must also develop a compliance action plan and its eligibility to sell credits under emissions trading will be suspended.

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

26. In accordance with article 34 of the Protocol, and taking into account the work and recommendations of the Intergovernmental Committee for the Cartagena Protocol on Biosafety, the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) adopted, at its first meeting, procedures and mechanisms on compliance and established a Compliance Committee to promote compliance, to address cases of non-compliance, and to provide advice or assistance (decision BS-I/7).

27. The Compliance Committee is composed of fifteen members nominated by Parties and elected by the COP-MOP on the basis of three members from each of the five regional groups of the United Nations. The members of the Committee shall serve objectively and in a personal capacity.

28. The Committee shall receive, through the secretariat, submissions relating to compliance from: (a) any Party with respect to itself; and (b) any Party, which is affected or likely to be affected, with respect to another Party. The Compliance Committee may take a number of measures with a view to promoting compliance and addressing cases of non-compliance. These include: (a) providing advice or assistance to the Party concerned; (b) making recommendations to the COP-MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity-building measures; (c) requesting or assisting the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a time frame to be agreed upon between the Committee and the Party.

29. The COP-MOP may, upon the recommendations of the Compliance Committee, decide upon one or more of the following measures: (a) provide financial and technical assistance; (b) issue a caution to the concerned Party; (c) request the Executive Secretary to publish cases of non-compliance in the Biosafety Clearing-House; and (d) in cases of repeated non-compliance, take such measures as may be decided by the COP-MOP at its third meeting.

30. The Compliance Committee held its first meeting from 14 to 16 March 2005. The main task of the Committee was to develop its rules of procedures which were then forwarded to the COP-MOP for its approval. It also adopted a work plan for the period up to the review of the Compliance Procedures and Mechanisms on Compliance as specified in section VII of the Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety (Annex, decision BS-I/7).

31. At its second meeting, which took place from 30 May to 3 June 2005, the COP-MOP considered and approved, in decision BS-II/1, the rules of procedure for meetings of the Compliance Committee as proposed by the first meeting of the Committee. The rules cover, *inter alia*, items regarding dates and notice of meetings; agenda; distribution and consideration of information; publication of documents and information; members; officers; participation in Committee proceedings; conduct of business, and voting. Few issues related to voting are still unresolved.

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

32. The second Meeting of the Parties reviewed the first set of national reports on implementation, providing an opportunity for all concerned to see whether and how the goals of the Convention are applied in practice. In the first test of the Convention's compliance mechanism, the Meeting also considered and upheld the findings of the Compliance Committee that three country Parties had failed to comply with certain provisions of the Convention. It also addressed the general issues of compliance put forward in the report of the Committee. The compliance mechanism is unique in that any member of the public, including non-governmental organizations, having concerns about a Party's compliance with the Convention may trigger a process of formal review by the Committee.

33. The Compliance Committee established at the first meeting of the Parties to the Convention had held eight meetings prior to the second meeting of the Parties. The Committee has, to date, reviewed one submission by a Party concerning compliance by another Party and admissibility of thirteen communications from the public, of which three were deemed to be inadmissible, five were considered on merit, and five are currently under consideration.

34. The Committee also developed a set of rules for its own *modus operandi*, regarding, *inter alia*, decision-making, presence of the public and participation of observers, publication of meetings and documentation, languages and conflict of interest.

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

35. The Intergovernmental Negotiating Committee (INC), at its tenth session, held in November 2003, reconvened the Open-ended Working Group on Compliance that was established at its ninth session, and requested that it review the draft prepared by its chair, as well as the draft decision and questionnaire presented in the note by the secretariat. The working group carefully examined the chair's draft and proposed a revised text of the draft compliance mechanisms and procedures, which the chair of the group presented to the Committee. The Committee decided to forward the draft to the COP for consideration at its first meeting.

36. The COP, at its first meeting, held in September 2004, addressed this subject, and adopted its decision RC-1/10. In that decision, the COP, recalling article 17 of the Convention, was mindful that the procedures and mechanisms under that article would help address issues of non-compliance, including by facilitating assistance and providing advice to Parties facing compliance issues. The COP noted with appreciation the preparatory work already undertaken by the INC on the elaboration of the procedures and mechanisms called for by article 17, and especially that reflected in the note by the secretariat on procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance, prepared for the first meeting of the Conference. Against that background, the COP decided to convene an open-ended ad hoc working group on article 17 immediately prior to its second meeting, with a view to preparing for and carrying forward deliberations on the issue.

37. Pursuant to that decision, a meeting of the Open-ended Ad hoc Working Group on article 17 will be held in September 2005. The outcomes of the Working Group will be reported to the COP at its second meeting to be held at the same venue in September 2005.

#### 5. Convention on Persistent Organic Pollutants

38. The first session of the COP (COP 1) of the Stockholm Convention, held in May 2005, adopted decision SC-1/14, by which it decided to convene an open-ended ad hoc working group on non-compliance immediately prior to its COP 2, for a duration of two to three days.

39. By the same decision, governments, Parties and non-Parties and relevant organizations were requested to provide their views and proposals on a non-compliance mechanism under the Convention. The secretariat was requested to present to the ad hoc working group a compilation of those views and to draft a text on procedures and institutional mechanisms on non-compliance under article 17 of the Convention, reflecting the views expressed and the practice of other multilateral environmental agreements.

### **III. CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES**

#### Relevant precedents and latest developments

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

40. Article 20, paragraph 2, of the Convention provides that any Party that is not a regional economic integration organization may declare in a written statement that 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 to be adopted by the Conference of the Parties in an annex as soon as practicable; and
- (b) Submission of the dispute to the International Court of Justice.”

41. Paragraph 6 of the same article states that “procedures relating to the conciliation commission shall be included in an annex to be adopted by the Conference of the Parties no later than the second meeting of the Conference.”

42. The INC considered arbitration procedures as well as procedures relating to the conciliation commission at its eighth, ninth and tenth sessions. At its tenth session, the Committee agreed on draft rules on arbitration as well as draft rules on conciliation, and decided to forward them to the COP for consideration at its first meeting.

43. The first meeting of the COP, by its decision RC-1/11, decided to adopt Annex VI to the Convention setting out the arbitration procedure for purposes of paragraph 2 (a) of article 20 of the Convention and the conciliation procedure for purposes of paragraph 6 of article 20 of the Convention, as contained in the annex to that decision.

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

44. The Permanent Court of Arbitration in the Hague 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 Rules are tailored to the issues that may arise in environmental dispute resolution and are open to States and non-States alike, thus potentially involving commercial and public international law issues.

45. Parties using the Rules can constitute the arbitral tribunal or conciliation commission from panels of environmental law and environmental science experts nominated by governments, in order to ensure that the tribunal possesses the requisite expertise for resolving the dispute. Furthermore, the tribunal itself may call upon the panels to advise it on technical matters. Especially in a complex field such as desertification, expertise in the subject matter of disputes may be necessary to their effective resolution. Moreover, an expert tribunal may be better placed to resolve the dispute in a manner that will encourage the parties to implement the award.

46. The Permanent Court of Arbitration Environmental Arbitration Rules have been incorporated into the United Nations Economic Commission for Europe (UNECE) Civil Liability Protocol for the Watercourses and Transboundary Effects of Industrial Accidents (TEIA) Conventions, which are referred to in numerous Kyoto Protocol-based emission trading contracts, 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.

47. These Rules could, if appropriate, be a useful reference point for the UNCCD in that they seek to address the lacunae in environmental dispute resolution, especially in matters relating to the composition of the arbitral tribunal, experts, confidentiality, interim measures, speed of the arbitral proceedings, and the enforceability of the award. Delegates may wish to consider that adopting a reference to, or modifying an existing set of, rules such as the Permanent Court of Arbitration (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, RECOMMENDATIONS AND PROPOSED ACTION**

##### **A. Resolution of questions on implementation**

48. The COP at its seventh session 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 to comply with their commitments under the Convention.

49. At previous meetings of the Ad Hoc Group of Experts, 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.

50. Further consideration would be required of the scope of article 27, 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.

51. In this regard, the aforementioned issues, as well as those contained in document ICCD/COP(6)/7 (that is, 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 in order that the COP, should it so decide, may:

- Call for further comments from Parties on the elements mentioned in the present note; and
- 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.

##### **B. Arbitration and conciliation procedures**

52. At its seventh 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 paragraphs 2(a) and 6 of article 28.

53. 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 section F of document ICCD/COP(4)/8, 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. 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 broadly recognized

in international law, the design and content of arbitration and conciliation procedures, under the multilateral environmental agreements, are well preceded and uncontroversial. The task of developing such procedures is essentially a technical one.

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

- To call for further comments from Parties and other interested institutions and organizations on the elements mentioned in the present note;
- To request the Ad Hoc Group of Experts, with the assistance of the secretariat, to 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; or
- To adopt the Optional Rules for Arbitration of Disputes Relating to Natural Resources and 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.

#### Annex I

#### **REFERENCE DOCUMENTATION**

<u>Document symbol</u>	<u>Title or description</u>
ICCD/COP(6)/11/Add.1	Report of the Conference of the Parties on its sixth session – Action taken
ICCD/COP(6)/7	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
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 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

<u>Document symbol</u>	<u>Title or description</u>
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 procedures 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	Outstanding items – Consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6, of the Convention
ICCD/COP(3)/17	Implementation of the Convention – Consideration of additional procedures or institutional mechanisms to assist the Conference of the Parties in regularly reviewing the implementation of the Convention
ICCD/COP(3)/18	Outstanding items – Consideration of procedures and institutional mechanisms for the resolution of questions that may arise with regard to implementation, in accordance with article 27 of the Convention, with a view to deciding how to take this matter forward
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



Annex II

**DRAFT ANNEX ON ARBITRATION PROCEDURES: COMPARATIVE TABLE**

Article	First draft, COP 3 (1999) <sup>1</sup>	Subject Purpose	Article	Revised draft, COP 4 (2000) <sup>2</sup>
1	The present Annex provides the procedures for arbitration referred to in article 28 of the Convention.	Purpose		
2	<p>1. The claimant Party shall notify the Permanent Secretariat that the Parties are referring a dispute to arbitration pursuant to article 28 of the Convention. The notification shall state the subject matter of arbitration and include, in particular, the articles of the Convention, the interpretation or application of which are at issue.</p> <p>2. If the Parties do not agree on the subject matter of the dispute before the President of the Arbitral Tribunal is designated pursuant to Article 3, the Tribunal shall determine the subject matter</p> <p>3. The Permanent Secretariat shall forward the information thus received to all Parties to the Convention.</p>	Notification of disputes		<p>1. The claimant Party shall notify the Permanent Secretariat that the Parties are referring a dispute to arbitration pursuant to article 28 of the Convention. The notification shall state:</p> <p>(a) The subject matter of arbitration;</p> <p>(b) The articles of the Convention, the interpretation or application of which are at issue;</p> <p>(c) A statement of the facts supporting the claim; and</p> <p>(d) The relief or remedy sought.</p> <p>2. If the Parties do not agree on the subject matter of the dispute before the President of the Arbitral Tribunal is designated pursuant to Article 3, the Tribunal shall determine the subject matter.</p> <p>3. The Permanent Secretariat shall forward the information thus received to all Parties to the Convention.</p>
3.	<p>1. In disputes between two parties, a Tribunal shall be established consisting of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the Tribunal. The latter shall not be a national of any of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.</p>	Appointment of arbitrators		

<sup>1</sup> See document ICCD/COP(3)/7.

<sup>2</sup> See document ICCD/COP(4)/8.

	<p>2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.</p> <p>3. Any vacancy shall be filled in the manner prescribed for the initial appointment.</p>			
4	<p>1. If the President of the Tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a Party, designate the President within a further two-month period.</p> <p>2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Secretary-General of the United Nations, who shall make the designation within a further two-month period.</p>	Failure to appoint arbitrator or designate President		
5	The Tribunal shall render its decisions in accordance with the provisions of the Convention and international law.	Basis for decisions		
6	Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall determine its own rules of procedure.	Rules of procedure		
		Conduct of proceedings	6	The Tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.
7	The Tribunal may, at the request of one of the parties, recommend essential interim measures of protection.	Interim measures of protection		<p>1. The Tribunal may, at the request of one of the Parties, recommend essential interim measures of protection.</p> <p>2. Such interim measures shall be established in the form of an interim award.</p> <p>3. The Tribunal shall be entitled to require security for the costs of such measures.</p>
8	The parties to the dispute shall facilitate the work of the Arbitral Tribunal and, in particular, using all means at their disposal, shall:	Facilitating work of the Tribunal		
	<p>(a) Provide it with all relevant documents, information and facilities; and</p> <p>(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.</p>			

9	The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the Tribunal.		Confidentiality of information	
10	1. Unless the Arbitral Tribunal determines otherwise because of the particular circumstances of the case, the costs of the Tribunal shall be borne by the parties to the dispute in equal shares. 2. The Tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.		Costs of Tribunal	
11	Any Party to the Convention that has an interest of a legal nature in the subject matter of the dispute, which may be affected by the decision in the case, may intervene in the proceedings with the consent of the Tribunal.		Intervention in proceedings	
12	The Tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.		Counter-claims	
13	If one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. The absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the Tribunal must satisfy itself that the claim is well founded in fact and in law.		Non-appearance of a party	
14	Decisions both on procedure and substance of the Tribunal shall be taken by a majority vote of its members.		Majority for decision	
15	The Tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period, which should not exceed five more months.		Time limit for final decision	
16	The final decision of the Tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the Tribunal may attach a separate or dissenting opinion to the final decision.		Final decision	

17	The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.	Authority of award	18	<ol style="list-style-type: none"> <li>1. The award shall be made in writing and be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.</li> <li>2. The parties undertake to carry out the award without delay.</li> <li>3. The final decision may be made public only with the consent of both parties.</li> </ol>
18	Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the Tribunal which rendered it.	Controversy on interpretation or implementation	19	<p>Within sixty days after the receipt of the final decision, either party, with notice to the other party, may request that the Tribunal give an interpretation of the final decision or the manner in which it shall be implemented.</p>
19	The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.	Italicized headings		

Annex III**DRAFT ANNEX ON CONCILIATION PROCEDURES: COMPARATIVE TABLE**

<b>Article</b>	<b>First draft, COP 3 (1999)<sup>1</sup></b>	<b>Subject</b>	<b>Article</b>	<b>Revised draft, COP 4 (2000)<sup>2</sup></b>
1	The present Annex provides the procedures for conciliation referred to in article 28 of the Convention.	Purpose		
2	A Conciliation Commission shall be created at the request of any party to a dispute in accordance with the provisions of article 28, paragraph 6, of the Convention.	Creation of Conciliation Commission		<ol style="list-style-type: none"> <li>1. A Conciliation Commission shall be created at the request of any party to a dispute in accordance with the provisions of article 28, paragraph 6, of the Convention.</li> <li>2. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.</li> <li>3. If the party rejects the invitation, there will be no conciliation proceedings.</li> </ol>
3	<ol style="list-style-type: none"> <li>1. The Conciliation Commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each party concerned and a President chosen jointly by those members.</li> <li>2. In disputes between more than two parties, parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.</li> </ol>	Composition and appointment of members		
4	If any appointments by the parties are not made within two months of the date of the request to create a Conciliation Commission, the Secretary-General of the United Nations shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.	Failure to appoint members within time limit		

<sup>1</sup> See document ICCD/COP(3)/7.<sup>2</sup> See document ICCD/COP(4)/8.

5	<p>If a President of the Conciliation Commission has not been designated within two months of the last of the members of the Commission being appointed, the Secretary-General of the United Nations shall, if asked to do so by a party, designate a President within a further two-month period.</p>	<p>Failure to appoint President within time limit</p>	
6	<p>The Conciliation Commission shall, unless the parties to the dispute otherwise agree, determine its own procedure.</p>	<p>Procedure</p>	
7	<p>A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.</p>	<p>Decisions on competence</p>	
		<p>Costs of the proceedings</p>	<p>8</p> <p>The costs are borne equally by the parties unless the settlement agreement provides for a different apportionment.</p>
		<p>Submission of statements</p>	<p>9</p> <p>1. The Conciliation Commission, upon its appointment, requests each party to submit a written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of its statement to the other party.</p> <p>2. The Conciliation Commission may request each party to submit a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of its statement to the other party.</p>
		<p>Role of the Conciliation Commission</p>	<p>10</p> <p>1. The Conciliation Commission assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.</p> <p>2. The Conciliation Commission may conduct the conciliation proceedings in such a manner as it considers appropriate, taking into account the circumstances of the case, the wishes that the parties may express, including any request they need for a speedy settlement of dispute.</p> <p>3. The Conciliation Commission may, at any time of the conciliation proceedings, make proposals for a settlement of the dispute.</p>

			Cooperation with the Conciliation Commission	11	The parties shall cooperate with the Conciliation Commission and, in particular, shall endeavour to comply with requests by the Commission to submit written materials, provide evidence and attend meetings.
8	Decisions both on procedure and substance of the Conciliation Commission shall be taken by a majority vote of its members.		Majority required for decisions	12	
9	The Conciliation Commission shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.		Proposal for resolution	13	1. The Conciliation Commission shall render a proposal for resolution of the dispute, which the parties shall consider in good faith. 2. If the parties reach an agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement. If requested by the parties, the Conciliation Commission may draw up or assist the parties in drawing up the settlement agreement.
10	The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.		Italicized headings	14	

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