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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 action. In accordance with decision 22/COP.7, this working document has been prepared on the basis of document ICCD/COP(7)/9, taking into account, as appropriate, previous reports submitted to the COP relating to this matter.

* The submission of this document was delayed because of the need to obtain inputs from international organizations and interested institutions specialized in the subject matter.

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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 ... ; (b) submission of the dispute to the International Court of Justice.” Paragraph 6 of the same article further provides that: “If the Parties to a dispute have not accepted the same or any procedure ... and if they have not been able to settle their dispute within twelve months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute ...”

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

3. The secretariat prepared reports on arbitration and conciliation procedures for the second to the seventh 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 compile and analyse written proposals by Parties and interested institutions and organizations.

4. The COP, by its decision 22/COP.7, decided:

(a) For the purposes of fulfilling the provisions of article 28 of the Convention, to reconvene, at its eighth session, the open-ended Ad Hoc Group of Experts (AHGE) to examine further and make recommendations on the following issues:

- (i) Annex on arbitration procedures;
- (ii) Annex on conciliation procedures;

(b) To invite any Parties and interested institutions and organizations wishing to communicate their views on the issues referred to in paragraph 4 (a), above to do so, in writing, to the secretariat by 31 January 2007;

(c) To request the secretariat to prepare a new working document to include a compilation of submissions contained in documents ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7 and ICCD/COP(7)/9, and those submitted pursuant to paragraph 2 above; and an updated version of the annexes contained in document ICCD/COP(4)/8 to reflect these views;

¹ Documents ICCD/COP(2)/10, ICCD/COP(3)/7, ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7 and ICCD/COP(7)/9.

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

5. In 2006 the secretariat forwarded a note verbale reminding Parties to communicate their views regarding this matter by 31 January 2007. As at 15 June 2007, the secretariat had not received any written proposals on the aforementioned matters. In accordance with decision 22/COP.7, the secretariat has now prepared a report that updates document ICCD/COP(7)/9.

6. The AHGE may decide to discuss the table contained in document ICCD/COP(7)/9 with a view to drafting the annexes on arbitration and conciliation procedures at COP 8 and submitting them to the COP for its consideration and adoption. In fact, the table remains relevant for the purpose of assisting the COP in its deliberations on formulating the procedures required by article 28 of the Convention and is still an important tool for guiding the work of the AHWG on this matter because it compares the first annex on arbitration and conciliation procedures put forward at COP 3 in 1999 and the revised report submitted to COP 4 in 2000. It should be underscored that there have not been any major developments relating to arbitration or conciliation procedures in environmental agencies since 2005 when the last report on these issues was produced.

7. The Chair of the AHGE noted in the summary report on the Group's work to the sixth session of the COP that the nature of the issue at hand was complex and stressed the need for further submissions by the Parties on article 27. The Group furthermore asked the secretariat to prepare two documents – one on article 27 and another on article 28, paragraphs 2 (a) and 6 – for its consideration at the next session of the COP. The secretariat has since prepared separate documents on the two matters in question; the information on procedures and institutional mechanisms for the resolution of questions on implementation is contained in document ICCD/COP(8)/7.

II. Last developments on arbitration and conciliation procedures

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

8. The Permanent Court of Arbitration's (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment and the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment ("Environmental Rules") were adopted in 2001 and 2002 respectively. They are in principle open to use by State and private parties alike and hence potentially by all players that might be involved in environmental disputes.

9. Numerous cases with an environmental component are being or have been administered by the PCA International Bureau (the PCA secretariat), including four relating to the United Nations Convention on the Law of the Sea, one under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), one under the Rhine Chlorides Convention, two under a bilateral treaty, and several involving private contracts. The PCA has thereby facilitated resolution, or is currently facilitating resolution, of more

international disputes pursuant to multilateral environmental agreements (MEAs) or with an environmental/natural resource component than any other international organization.

10. The PCA began participating in negotiations and meetings of the Parties to MEAs, focusing on the three Rio Conventions (and their Protocols) and a number of other instruments, in order to raise awareness of the utility of these Environmental Rules for use in MEAs which refer to dispute resolution but have not yet adopted procedures for dispute resolution. These efforts have yielded results, for example in Kiev at the Environment for Europe Conference. The May 2003 United Nations Economic Commission for Europe Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters contains a clause allowing disputes between private parties to be resolved using the PCA Environmental Arbitration Rules. This clause has served as a model for resolving disputes under future civil liability regimes (e.g. the Antarctic Convention and Protocol with annexes, the Biosafety Protocol, Access and Benefit Sharing under the Convention on Biological Diversity).

11. Furthermore, the PCA has been asked by the secretariats of various United Nations conventions such as the United Nations Framework Convention on Climate Change (UNFCCC) to provide opinion papers and expert advice on certain dispute resolution issues, as have certain PCA member States. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Bonn Convention on Migratory Species and the Madrid Protocol to the Antarctic Treaty are all MEAs that contain references to PCA dispute settlement procedures.

12. Many other MEAs relating to a variety of environmental issues such as climate change, biosafety, civil liability and fisheries, are currently considering incorporating references to the PCA Environmental Rules as the dispute resolution procedures or using them separately in the context of the agreement. The utility of providing a reference to a pre-existing set of procedures designed to address the particularities of international environmental disputes and sanctioned by the international community is evident. The PCA member States recognized that negotiating novel procedures for each and every new instrument would be a costly and time-consuming task, and the drafters of the Rules considered that harmonization of dispute settlement clauses to include the Environmental Rules would contribute to building consistent case law in the field. The PCA Environmental Rules were thus designed to be prêt-à-porter procedures that could be incorporated by reference, saving parties time and expense.

13. Most notably, there has been a dramatic increase in the number of references to the PCA Environmental Rules in Kyoto Protocol emissions trading contracts and in clean development mechanism and joint implementation host country agreements. Numerous public and private entities are referring to the PCA Environmental Rules as the arbitration procedures of choice in their emissions trading and related contracts. The PCA has lists of emissions trading experts that could be relied upon for the constitution of an arbitral tribunal or to serve as tribunal-appointed experts, and has cooperated with the secretariat of the UNFCCC on several occasions with regard to these lists.

14. The PCA environmental programme is particularly suited to addressing environmental and/or natural-resource-related disputes in developing countries. Two panels of environmental

law and science experts appointed by PCA member States have been constituted pursuant to the Environmental Rules and can be called upon for the constitution of an arbitral tribunal, conciliation or fact-finding commission or to assist such a body, and potentially for legal and scientific capacity-building. In addition, the PCA is considering how regional legal frameworks for developing countries can be developed in order to help address disputes in a specific region and in the local language (potentially lowering the external costs of dispute resolution).

15. In this connection, the PCA has a Financial Assistance Fund to help defray the costs of arbitration for qualifying developing countries. Common but differentiated responsibilities have been applied in many ways in MEAs but so far not in the field of dispute settlement. The World Trade Organization dispute settlement mechanism's "high cost" has been criticized for effectively creating a barrier to access for developing and least developed countries. This kind of barrier might be bridged through recourse to the Financial Assistance Fund in the context of environmental dispute resolution.

B. The Permanent Court of Arbitration Environmental Rules in the context of the Convention

16. Several salient issues may arise in the context of the United Nations Convention to Combat Desertification (UNCCD) with regard to a Party's obligations under the Convention and/or environmental and other disputes relating to implementation of the Convention. These issues are the following:

(a) Adopting a reference to the PCA Environmental Rules to serve as the annexes on arbitration and conciliation contemplated under article 28, paragraph 2 (a) and (6) of the UNCCD would save Parties the considerable time and expense involved in drafting an entirely new set of rules;

(b) As can be seen from a comparison of the draft annexes on arbitration and conciliation circulated at COP 7, all the procedures contemplated therein are already contained in the PCA Environmental Rules; indeed the latter are more elaborate;

(c) The PCA Environmental Rules have already been accepted by the 107 PCA member States (which are also United Nations Member States) after a two-year drafting process, and have been incorporated into a number of other instruments;

(d) The PCA Environmental Rules present an opportunity to take concrete action to complete the desertification regime in a way that serves the purpose of the Convention in article 28.

17. In this regard, if it is deemed appropriate to adopt a reference to or to modify an existing set of rules, such as the above-mentioned PCA, the following wording may be used:

"The Permanent Court of Arbitration's "Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" shall serve as the annex on arbitration foreseen in article 28, paragraph 2 (a) of the Convention, and the Permanent Court of Arbitration's "Optional Rules for Conciliation of

Disputes Relating to Natural Resources and/or the Environment” shall serve as the annex on conciliation foreseen in article 28, paragraph 6 of the Convention.”

III. Conclusions, recommendations and proposed action

18. In the summary report presented at COP 5, the Chair of the AHGE stated that, with regard to the development of arbitration and conciliation procedures, the Group concluded that the design and content of arbitration and conciliation procedures under multilateral environmental agreements were well precedented and uncontroversial; the task of developing such procedures was essentially a technical one.

19. As stated in document ICCD/COP(7)/9, the information with regard to relevant precedents and latest developments, and especially a number of preliminary questions contained in section I.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 comparative tables on draft annexes on arbitration and conciliation procedures contained in document ICCD/COP(7)/9 would be a useful working tool to make a comparative analysis of the evolution of these matters and to learn about and consider the views of Parties and other interested institutions and organizations concerning the final outcome of these annexes.

20. At its eighth session the COP may wish to adopt annexes containing arbitration and conciliation procedures to assist Parties to fulfil their obligations concerning the Convention, in particular article 28, paragraphs 2 (a) and 6.

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

(a) To call for further comments from Parties and other interested institutions and organizations on the elements mentioned in the present note;

(b) To extend the mandate of the AHGE up and until COP 9 and to convene a three-day meeting of the Group during the seventh session of the Committee for the Review of the Implementation of the Convention;

(c) To request the AHGE, 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;

(d) 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;

22. At the proposed intersessional meeting of the AHGE, delegations and other participants in the meeting could 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 ninth

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.
