



**UNITED
NATIONS**



**Convention to Combat
Desertification**

Distr.
GENERAL

ICCD/COP(9)/14
16 June 2009

ORIGINAL: ENGLISH

CONFERENCE OF THE PARTIES

Ninth session

Buenos Aires, 21 September–2 October 2009

Item 13 (c) of the provisional agenda

Outstanding items

Annexes containing arbitration and conciliation procedures

Annexes containing arbitration and conciliation procedures

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 submissions by Parties, conclusions, recommendations and proposed action.

In accordance with decision 21/COP.8, this working document has been prepared on the basis of document ICCD/COP(8)/8, taking into account, as appropriate, previous reports and written proposals by Parties submitted to the COP relating to this matter.

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
I. BACKGROUND INFORMATION	1-7	3
II. SUBMISSIONS BY PARTIES	8-10	4
III. DEVELOPMENTS ON ARBITRATION AND CONCILIATION PROCEDURES	11-16	5
IV. RELEVANT CONSIDERATIONS	17	6
V. CONCLUSIONS, RECOMMENDATIONS AND PROPOSED ACTIONS	18-21	7

Annexes

I. Draft annex on arbitration procedures (comparative table).....	9
II. Draft annex on conciliation procedures (comparative table).....	13

I. Background information

1. Article 27 of the Convention provides that:

"The Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention."

2. Provisions of that type are generally considered to be a relatively new feature of environmental conventions. They are an attempt to pre-empt and avoid confrontation that might trigger more formal dispute resolution procedures. They are thought to be particularly well suited to global environmental regimes, where many Parties share an interest in the effective implementation of the Convention's objectives.

3. The pre-emptive and non-confrontational approach is becoming the practice in certain new environmental treaties, especially when non-implementation stems from lack of capacity or inadvertence. Because procedures for resolution of questions remain within the jurisdiction of the governing body of a convention, they are generally considered as a means of enabling Parties to a convention to discuss its implementation in a constructive and cooperative manner to secure amicable solutions.

4. At its eighth session, the Conference of the Parties (COP) adopted decision 21/COP.8, by which it:

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

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

(b) Invited any Parties and interested institutions and organizations wishing to communicate their views on the matter referred to in paragraph 1 above to do so, in writing, to the secretariat by 31 January 2009;

(c) Requested the secretariat to prepare a new working document to include (i) a compilation of submissions contained in previous COP documents on this matter and those submitted pursuant to paragraph 2 above, and (ii) an updated version of the annexes contained in ICCD/COP(7)/9 to reflect these views;

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

5. The Chair of the AHGE noted in the summary that delegations participating in the eighth session of the COP were not prepared to discuss in depth annexes containing arbitration and conciliation procedures in connection with the United Nations Convention to Combat Desertification (UNCCD), because they felt that this legal issue could be more

appropriately discussed once the 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018) and the future of the Committee for the Review of the Implementation of the Convention as a subsidiary body to the COP had been decided by the COP. The Group concluded that it would therefore be advisable to postpone the consideration of these items to the ninth session of the COP (COP 9). In addition, it was also felt that each issue should be the subject of a separate decision and a separate COP report.

6. The present note integrates and updates document ICCD/COP(8)/8. More particularly, it provides current updated information with regard to the Optional Rules for Arbitration and Conciliation of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, as this is the relevant development that has taken place since 2007. Due to requirements regarding the format and submission of reports of the United Nations, it is not possible to reproduce submissions by Parties contained in previous COP reports as requested in decision 21/COP.8. However, the secretariat will reproduce such reports^a for the ninth session of the COP so that they are available for ease of reference and discussion, as appropriate.

7. The present document is composed of five chapters and two annexes. Chapter I is an introduction regarding decision 21/COP.8 and it also provides background information on arbitration and conciliation procedures. Submissions by Parties are presented in chapter II. Chapter III contains updated information on developments in the Optional Rules for Arbitration and Conciliation of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration. Chapter IV consists of a series of questions that should be considered to tailor such procedures to the nature and specificities of UNCCD. Chapter V presents conclusions, recommendations and proposed actions on this matter. Finally, this report includes two updated comparative tables on the annexes on arbitration and conciliation procedures, respectively. The tables benefit from advice and comments provided by submissions by the Parties and from information concerning progress made in multilateral environmental agreements (MEAs), since 1999.

II. Submissions by Parties

8. In November 2008 and January 2009 the secretariat forwarded a note verbale reminding Parties and interested institutions and organizations to communicate their views regarding the annexes containing arbitration and conciliation procedures. As at 15 May 2009, the secretariat had received four submissions, namely from Australia, Colombia, Saudi Arabia and Trinidad and Tobago on the aforementioned matter. These written proposals are reproduced in their entirety, as submitted to the secretariat, on the UNCCD website at <www.unccd.int>.

9. In its written proposal, one Party made the following points:

(a) The AHGE should continue examining these procedures;

(b) Geographic distribution within the AHGE must be just and equitable. Regions and groups should name their representatives at the beginning of each COP meeting;

^a Documents ICCD/COP(2)/10, ICCD/COP(3)/18, ICCD/COP(4)/8, ICCD/COP(5)/8, ICCD/COP(6)/7, ICCD/COP(7)/9 and ICCD/COP(8)/8.

(c) The new working document, to be prepared by the secretariat, should include the views of the Parties expressed in previous COP meetings and the experiences of other environmental conventions in this subject, especially the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.

10. In the opinion of one Party, the dispute resolution provisions contained in article 28 of the Convention should not be duplicated by any compliance regime. Another Party believes that any dispute relating to the interpretation and implementation of the Convention should be resolved through arbitration.

III. Developments on arbitration and conciliation procedures

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

11. The Permanent Court of Arbitration (PCA) is an intergovernmental organization with 109 member States. Established in 1899 to facilitate arbitration and other forms of dispute resolution between States, the PCA has developed into a modern, multi-faceted arbitral institution that is now situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of States, State entities, intergovernmental organizations, and private parties.

12. The 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.

13. As stated in document ICCD/COP(8)/8, several cases with environmental components have been administered by the PCA, i.e., four cases 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. This proves the usefulness and applicability of the rules and facilitative role of the PCA.

14. Furthermore, The PCA 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.

15. These Rules could, if appropriate, be instrumental 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 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.

16. In view of the potential convenience and efficiency of the rules, the COP may consider adopting them using the following wording in its decision:

“The Permanent Court of Arbitration 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 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.”

IV. Relevant considerations

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

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

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

(c) What are the types or range of questions that could be raised under the procedures and institutional mechanisms pursuant to article 27?

(d) What principles should govern the procedures and institutional mechanisms of article 27? Is it sufficient that they should be simple, transparent, facilitative and non-confrontational in character?

(e) What should be the exact nature and composition of the institutional mechanisms contemplated under article 27? Should membership and participation in them be restricted to representatives of Parties or should there be a role for experts such as legal, economic, social or technical experts appointed on a personal basis?

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

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

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

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

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

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

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

V. Conclusions, recommendations and proposed actions

18. As stated by the Chair of the AHGE at COP 5, the design and content of arbitration and conciliation procedures under multilateral environmental agreements have numerous precedents and are uncontroversial, and the task of developing such procedures is essentially a technical one.

19. In this regard, the Parties and interested institutions and organizations could use as working documents the comparative tables annexed to this report. These tables result 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.

20. At its ninth 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 to:

(a) Adopt and amend, if appropriate, the annexes containing arbitration and conciliation procedures contained in the annexes of this report;

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

(c) Call for further comments from Parties and other interested institutions and organizations on the elements mentioned in the present note and request the AHGE, with the assistance of the secretariat, to consolidate the 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) Extend the work of the AHGE and decide that, in order to reduce financial burdens, the Group should meet for a period of three days during intersessional sessions of the Committee for the Review of the Implementation of the Convention. At the proposed meeting of the AHGE, delegations and other participants in the meeting should have enough time to analyse, discuss and draft annexes on arbitration and conciliation procedures, which may in the second instance be reviewed by the AHGE at the 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.

Annex I

Draft annex on arbitration procedures (comparative table)

Article	First draft, COP 3 ^a (1999)	Subject	Article	Revised draft
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 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;</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 secretariat shall forward the information thus received to all Parties to the Convention.</p>
3	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.	Appointment of arbitrators		

^a ICCD/COP(3)/7.

Article	First draft, COP 3 ^a (1999)	Subject	Article	Revised draft
	<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 to the dispute are treated with equality and that 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>

Article	First draft, COP 3 ^a (1999)	Subject	Article	Revised draft
8	The parties to the dispute shall facilitate the work of the Arbitral Tribunal and, in particular, using all means at their disposal, shall: (a) Provide it with all relevant documents, information and facilities; and (b) Enable it, when necessary, to call witnesses or experts and receive their evidence.	Facilitating the work of the Tribunal		
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 the 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.	Counterclaims		
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 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		

Article	First draft, COP 3 ^a (1999)	Subject	Article	Revised draft
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	<p>1. The award shall be made in writing and 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.</p> <p>2. The parties undertake to carry out the award without delay.</p> <p>3. The final decision may be made public only with the consent of both parties.</p>
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	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.
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 II

Draft annex on conciliation procedures (comparative table)

Article	First draft, COP 3 (1999)^a	Subject	Article	Revised draft
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		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. 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. 3. If the party rejects the invitation, there will be no conciliation proceedings.
3	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. 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.	Composition and appointment of members		

^a ICCD/COP(3)/7.

Article	First draft, COP 3 (1999) ^a	Subject	Article	Revised draft
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		
5	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.	Failure to appoint President within time limit		
6	The Conciliation Commission shall, unless the parties to the dispute otherwise agree, determine its own procedure.	Procedure		
7	A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.	Decisions on competence		
		Costs of the proceedings	8	The costs are borne equally by the parties unless the settlement agreement provides for a different apportionment.
		Submission of statements	9	<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>

Article	First draft, COP 3 (1999) ^a	Subject	Article	Revised draft
		Role of the Conciliation Commission	10	1. The Conciliation Commission assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. 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 the parties may express, including any request for a speedy settlement of the dispute. 3. The Conciliation Commission may, at any time of the conciliation proceedings, make proposals for a settlement of the dispute.
		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 draw up and sign a written settlement agreement. If requested by the parties, the Conciliation Commission can 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	