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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN
INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR
THE APPLICATION OF THE PRIOR INFORMED CONSENT
PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND
PESTICIDES IN INTERNATIONAL TRADE

Ninth session

Bonn, 30 September - 4 October 2002

Item 5 (b) of the provisional agenda*

PREPARATION FOR THE CONFERENCE OF THE PARTIES:

SETTLEMENT OF DISPUTES

Note by the secretariat

1. At its eighth session, the Intergovernmental Negotiating Committee had before it a note by the secretariat (UNEP/FAO/PIC/INC.8/13) on settlement of disputes, containing draft arbitration and conciliation procedures, and requested the legal working group to examine them. The legal working group, having thoroughly examined the draft procedures, produced the agreed text of the draft conciliation procedure as well as the text of the draft arbitration procedure which was also agreed within the group except for an article governing the extension of the time period for designating the members of the arbitral tribunal. The texts of the draft arbitration and conciliation procedures prepared by the legal working group and subsequently adopted by the Committee at its eighth session are reproduced in annexes I and II to the present note, respectively.
2. At its eighth session, the Committee took note of the different views concerning the extension of the time period for designating the members of the arbitral tribunal that had been expressed during the work of the legal working group. Some representatives had considered the two-month period specified in other multilateral environmental agreements to be too long and to the potential disadvantage of the claimant Party in certain cases. Other representatives had been of the view that the two-month period was too short to properly identify arbitrators.
3. The Committee decided to place an item on settlement of disputes on the agenda of its ninth session, with a focus on the outstanding point referred to above.

* UNEP/FAO/PIC/INC.9/1.

Possible action by the Committee

4. The Committee may wish to consider the texts of the draft arbitration and conciliation procedures, with a particular focus on the outstanding point referred to above, and, should agreement be reached on that point, to decide whether it wishes to transmit the procedures to the Conference of the Parties.

Annex I

Draft rules on arbitration

The arbitration procedure for purposes of paragraph 2 (a) of article 20 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade shall be as follows:

Article 1

1. A Party may initiate recourse to arbitration in accordance with article 20 of the Convention by written notification addressed to the other Party to the dispute. The notification shall be accompanied by a statement of the claim, together with any supporting documents, and shall state the subject matter for arbitration including, in particular, the articles of the Convention the interpretation or application of which are at issue.
2. The claimant Party shall notify the secretariat that the Parties are referring a dispute to arbitration pursuant to article 20. The written notification of the claimant Party shall be accompanied by the statement of claim and the supporting documents referred to in paragraph 1 above. The secretariat shall forward the information thus received to all Parties.

Article 2

1. In disputes between two Parties, an Arbitral Tribunal shall be established. It shall consist of three members.
2. 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 President of the Tribunal shall not be a national of one 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.
3. In disputes between more than two Parties, Parties in the same interest shall appoint one arbitrator jointly by agreement.
4. Any vacancy shall be filled in the manner prescribed for the initial appointment.
5. If the Parties do not agree on the subject matter of the dispute before the President of the Arbitral Tribunal is designated, the Arbitral Tribunal shall determine the subject matter.

Article 3

1. If one of the Parties to the dispute does not appoint an arbitrator within two months of the date on which the respondent Party receives the notification of the arbitration, the other Party may inform the Secretary-General of the United Nations who shall make the designation within a further two-month^{1/} period.

^{1/} The question of this time period remains open and needs to be revisited by the Intergovernmental Negotiating Committee at its ninth session. The principal multilateral environmental agreements specify a two-month period and many delegations would be content to proceed on that basis. Some delegations were of the opinion that this might be too long and work to the disadvantage of the claimant Party in certain cases, whilst some other delegations considered that a period of more than two months might be more appropriate given the practical problems in identifying an appropriate arbitrator.

2. If the President of the Arbitral Tribunal has not been designated within two months of the date 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^{1/} period.

Article 4

The Arbitral Tribunal shall render its decisions in accordance with the provisions of the Convention and international law.

Article 5

Unless the parties to the dispute agree otherwise, the Arbitral Tribunal shall determine its own rules of procedure.

Article 6

The Arbitral Tribunal may, at the request of one of the Parties, recommend essential interim measures of protection.

Article 7

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.

Article 8

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 Arbitral Tribunal.

Article 9

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. The Tribunal shall keep a record of all its costs and shall furnish a final statement thereof to the Parties.

Article 10

A Party 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 Arbitral Tribunal.

Article 11

The Arbitral Tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

Decisions of the Arbitral Tribunal on both procedure and substance shall be taken by a majority vote of its members.

Article 13

1. If one of the Parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Tribunal to continue the proceedings and to render its decision. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings.
2. Before rendering its final decision, the Arbitral Tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The Arbitral 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.

Article 15

The final decision of the Arbitral 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.

Article 16

The decision shall be binding on the Parties to the dispute. It shall also be binding upon a Party intervening under article 10 above insofar as it relates to matters in respect of which that Party intervened. It shall be without appeal unless the Parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between those bound by the final decision in accordance with article 16 above, as regards the interpretation or manner of implementation of that decision, may be submitted by any of them for decision to the Arbitral Tribunal which rendered it.

Annex II

Draft rules on conciliation

The conciliation procedure for purposes of paragraph 6 of article 20 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade shall be as follows:

Article 1

1. A request by a Party to a dispute to establish a Conciliation Commission in accordance with paragraph 6 of article 20 of the Convention shall be addressed in writing to the secretariat. The secretariat shall forthwith inform all Parties accordingly.
2. The Conciliation Commission shall, unless the Parties agree otherwise, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two Parties, Parties in the same interest shall appoint their members of the Conciliation Commission jointly by agreement.

Article 3

If any appointments by the Parties are not made within two months of the date of receipt by the secretariat of the written request referred to in article 1 above, the Secretary-General of the United Nations shall, upon request by a Party, make those appointments within a further two-month period.

Article 4

If the President of the Conciliation Commission has not been chosen within two months of the fourth member of the Commission being appointed, the Secretary-General of the United Nations shall, upon request by a Party, designate the President within a further two-month period.

Article 5

1. The Conciliation Commission shall, unless the Parties to the dispute agree otherwise, determine its own rules of procedure.
2. The Parties and members of the Conciliation Commission are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the Commission.

Article 6

The Conciliation Commission shall take its decisions by a majority vote of its members.

Article 7

The Conciliation Commission shall render a report with recommendations for resolution of the dispute within twelve months of being established, which the Parties shall consider in good faith.

Article 8

Any disagreement as to whether the Conciliation Commission has competence to consider a matter referred to it shall be decided by the Commission.

Article 9

The costs of the Conciliation Commission shall be borne by the Parties to the dispute in shares agreed by them. The Commission shall keep a record of all its costs and shall furnish a final statement thereof to the Parties.
