The draft annex on arbitration and other annexes to the Draft Negotiating Text

Note by the Bureau

1. At its meeting in Antalya held on 28 January–1 February 2013, the Intergovernmental Negotiating Committee for a Legally Binding Agreement on Forests in Europe invited the Bureau to develop the draft annexes to the agreement.

2. This document presents the draft annex on arbitration, which has been prepared on the basis of the current version of the Draft Negotiating Text (Doc2/INC3add.1) and examples of existing arbitration procedures in multilateral agreements (such as those of the Rotterdam Convention and the Convention on Biological Diversity). It should be noted that other examples of arbitration procedures exist and may be considered by the Committee.

3. In accordance with the current version of the Draft Negotiating Text, an annex on indicators and an annex on conciliation are to be developed by the Conference of the Parties (ref. Doc2/INC3add.1 General provisions, paragraph 8, and Settlement of disputes, paragraph 9). The Bureau therefore understands that these two documents should be developed after the agreement is concluded.

4. With regard to an annex containing Forest Europe signatories/states and regional economic integration organization(s), the Bureau considers Annex II of the Oslo Mandate as a basis for developing such an annex. It should be noted, however, that provisions on signature in the Draft Negotiating Text are still pending. Should the agreement be brought under the UN umbrella, the provisions on signature, membership and/or territorial applications would need to be harmonized with the rules and principles of the UN entity chosen to adopt/host the agreement. The Bureau therefore recommends deferring development of the annex in question until the provisions on signature, membership and territorial applications are resolved.

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ANNEX ON ARBITRATION

Article 1

The claimant Party shall notify the secretariat that the Parties are referring a dispute to arbitration pursuant to Article...1. The notification shall state the subject matter of arbitration and include, in particular, the Articles of the Agreement or of any related legal [instrument] [document] adopted by the Conference of the Parties2, the interpretation or application of which are at issue. If the Parties do not agree on the subject matter of the dispute before the President of the tribunal is designated, the arbitral tribunal shall determine the subject matter. The secretariat shall forward the information thus received to all Parties to this Agreement or to the legal [instrument] [document] concerned3.

Article 2

1. In disputes between two parties, the arbitral tribunal shall consist 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 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.

2. In disputes between more than two Parties, Parties in the same interest shall appoint one arbitrator jointly by agreement.

3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the [...]4 shall, at the request of a Party, designate the President within a further two-month period.

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 [...] who shall make the designation within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of this Agreement, any related legal [instrument] [document] adopted by the Conference of the Parties5 concerned, and international law.

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1 Put a cross-reference to the Article of the Agreement governing settlement of disputes.

2 To be harmonized with the final language of paragraph 1 of the Article of the Agreement governing settlement of disputes.

3 Id.

4 Reference to be made to an eminent independent person taking into account, if appropriate, the organization invited to host the agreement. For example: the Secretary General of the United Nations, the Director-General of the Food and Agriculture Organization of the United Nations, the Executive Secretary of the Economic Commission for Europe or the President of the International Court of Justice.
Article 5

Unless the Parties to the dispute otherwise agree, 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

Any Party to this Agreement 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.

Article 11

The arbitral tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by a majority vote of its members.

Article 13

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 make its award. Absence of a Party or a failure of a Party to defend its case shall not constitute a bar to the proceedings. Before

5 Id.
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 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.

Article 17

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 arbitral tribunal which rendered it.