



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18/01/08

CAHDI (2007) 20 rev

**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

LISTS OF ARBITRATORS AND CONCILIATORS NOMINATED BY STATES

Document prepared by the Secretariat of the CAHDI

Foreword

1. A considerable number of treaties and other instruments provide for the maintenance of lists of arbitrators or conciliators nominated by States. The precise status of the lists varies, but typically they are to be drawn upon by a nominating authority (e.g. the President of the International Court of Justice) when called upon to appoint a member of an arbitral tribunal or conciliation commission where a party to the dispute has not made an appointment. They may also be a useful guide for States when they have to choose an arbitrator or conciliator. The lists, therefore, have an important role in the dispute settlement system of the instrument.

2. The present papers deals only with the maintenance of such lists of potential arbitrators and conciliators, not with the separate issue of the appointment of persons to be members of an arbitral tribunal or conciliation commission.

3. *Appendix 1* comprises a preliminary 'list of lists'.

4. *Appendices 2 to 4*, by way of example, indicate to what extent Council of Europe member States have in practice nominated (and kept up-to-date) arbitrators/conciliators under three important but very different treaties:

- *Appendix 2*: Convention for the Pacific Settlement of International Disputes 1899/1907 (Permanent Court of Arbitration);
- *Appendix 3*: United Nations Convention on the Law of the Sea, 1982, annex VII (arbitration);
- *Appendix 4*: Vienna Convention on the Law of Treaties (conciliation).

5. The CAHDI may wish to have an exchange views on practical matters relating to the nomination of qualified persons to these lists. Among the matters that might be discussed are:

- a. Whether States are aware of the provisions for making (and keeping up-to-date) nominations to the various lists?
- b. Whether it would be useful to try to compile as complete a list as possible of the provisions concerned (i.e. to complete Appendix 1), and to consider further examples at future meetings of the CAHDI?
- c. Whether to consider a recommendation of the Committee of Ministers on the subject? For a possible draft, see *Appendix 5*.

Appendix 1**NOMINATION OF ARBITRATORS AND CONCILIATORS:
LIST OF TREATIES AND OTHER PROVISIONS**

1. Convention for the Pacific Settlement of International Disputes 1899/1907: Articles 23/44, four Members of the PCA
2. Convention on the Settlement of Investment Disputes between States and nationals of Other States, 1965: article 13, four conciliators
3. Convention on the Settlement of Investment Disputes between States and nationals of Other States, 1965: article 13, four arbitrators
4. Vienna Convention on the Law of Treaties, 1969: annex, paragraph 1, two conciliators
5. Vienna Convention on Succession of States in Respect of Treaties, 1978: annex, paragraph 1, two conciliators
6. United Nations Convention on the Law of the Sea, 1982: annex V, article 2, four conciliators
7. United Nations Convention on the Law of the Sea, 1982: annex VII, article 2, four arbitrators
8. United Nations Convention on the Law of the Sea, 1982: annex VIII, article 2, eight experts
9. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983: annex, paragraph 1, two conciliators
10. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986: annex, two arbitrators/conciliators
11. Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes relating to Natural Resources and /or the Environment: article 8(3), list of arbitrators maintained by the PCA Secretary-General
12. Convention on Conciliation and Arbitration within the OSCE, 1992: article 3, two conciliators
13. Convention on Conciliation and Arbitration within the OSCE, 1992: article 4, one arbitrator and one alternate
14. Protocol on Environmental Protection to the Antarctic Treaty, 1991: article 2 of the Schedule, at least one arbitrator, up to three.
15. OECD Convention on the Establishment of a Security Control in the Field of Nuclear Energy, 1957: article 12 (a), a list comprising one judge proposed by each Government party to the present Convention.

16. Convention on International Carriage by Rail, 1980: article 14, two arbitrators, specialists in international transport law, nominated to the panel of arbitrators kept up to date by the Central Office.
17. Agreement relating to the International Telecommunications Satellite Organization, 1971: Annex C, article 3 (a), not more than two legal experts for the list of nominees to serve as presidents or members of tribunals, prepared by the executive organ.

Appendix 2

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 1907 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 1899 (List of members of the Permanent Court of Arbitration)

1. Article 44 of the Convention for the Pacific Settlement of International Disputes of 1907 provides that:

“Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.

The persons thus elected are inscribed, as Members of the [Permanent] Court [of Arbitration], in a list which shall be notified to all the Contracting Powers by the Bureau.

(...)

(...) The Members of the Court are appointed for a term of six years. These appointments are renewable.

Should a Member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.”

Article 23 of the 1899 Convention is to similar effect.

2. Article 45 of the 1907 Convention provides that, when the Contracting Powers wish to have recourse to the Permanent Court of Arbitration (PCA) for the settlement of a difference, ‘the Arbitrators called upon to form the Tribunal with jurisdiction to decide the difference must be chosen from the general list of Members of the Court’. Article 24 of the 1899 Convention is to the same effect.

3. An important function of the ‘national groups’ in the PCA (i.e. the Members of the PCA selected by a particular State) is to nominate candidates for election to the International Court of Justice in accordance with Articles 4 to 6 of the Statute of the International Court of Justice.

4. Of the 47 member States of the Council of Europe, 38 are parties to one or both Conventions. Five member States - Croatia, Greece, Italy, Montenegro, Turkey - are parties to the 1899 Convention, but not to the 1907 Convention.

5. The nine member States of the Council of Europe which are not parties to either Convention are:

Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Monaco, San Marino.

6. According to the list of Members of the PCA as of 11 June 2007 (on the PCA website), of the 38 member States of the Council of Europe which are parties to one or both Conventions, 35 have nominated Members of the PCA. The three that have not are:

Iceland, Liechtenstein, Montenegro.

7. However, of those that have made nominations, some have nominated less than four Members of the PCA. And in a number of cases, some or all of the nominations have passed the six-year time-limit.

8. The five observer States are all parties and have nominated members to the PCA.

Summary of the position

9. Nine member States of the Council of Europe are not parties either to the Convention for the Pacific Settlement of International Disputes of 1907 or to the Convention for the Pacific Settlement of International Disputes of 1899. Three of those that are parties to one or both Conventions have not nominated Members of the PCA.

10. In some other cases less than four Members have been nominated. Some of the nominations are over the six-year time-limit.

Appendix 3

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982 (List of arbitrators under Annex VII)

1. Part XV of the United Nations Convention on the Law of the Sea, 1982, provides *inter alia* for ad hoc arbitration in accordance with annex VII of the Convention.

2. Article 2 of annex VII reads as follows:

‘1. A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list.

2. If at any time the arbitrators nominated by a State Party in the list so constituted shall be fewer than four, that State Party shall be entitled to make further nominations as necessary.

3. The name of an arbitrator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such arbitrator shall continue to serve on any arbitral tribunal to which that arbitrator has been appointed until the completion of the proceedings before that arbitral tribunal.’

3. Under article 3(b), (c) and (d) of annex VII, the parties to the dispute are to appoint arbitrators ‘preferably’ from the list. Under article 3 (e), however, the appointing authority, if called upon to act, must appoint from the list.

4. The list is therefore crucial where an appointing authority is involved. Persons remain on the list until they are withdrawn (or die or resign). But it may nevertheless be thought desirable to review nominations from time to time to ensure the continuing suitability of the persons on the list.

5. According to the UN Multilateral Treaties website, as of 19 June 2007, 26 of the 155 States Parties to UNCLOS have nominated arbitrators, in some cases less than the four permitted. Of the 40 Council of Europe member States which are States Parties to UNCLOS, 15 have nominated arbitrators. The following have not done so:

Albania, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, Georgia, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Romania, Serbia, Slovenia, the former Yugoslav Republic of Macedonia, Ukraine.

Summary of the position

6. Of the 40 Council of Europe member States that are States Parties to UNCLOS, 25 have not nominated annex VII arbitrators.

Appendix 4

VIENNA CONVENTION ON THE LAW OF TREATIES (List of conciliators under the Annex)

1. Article 66 (b) of, and the annex to, the Vienna Convention on the Law of Treaties provides for the compulsory conciliation of certain disputes concerning the interpretation or application of the articles of Part V of the Convention (Invalidity, Termination and Suspension of the Operation of Treaties) other than articles 53 or 64 (jus cogens).

2. The annex provides, at paragraph 1, that –

“A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.”

3. Under paragraph 2, each party to a dispute is required to appoint two conciliators, one of whom must be from the list. The conciliators appointed by the parties are required to appoint a conciliator from the list to be chairman. If the chairman has not been appointed within a certain time, the Secretary-General is required to appoint the chairman either from the list or from the membership of the International Law Commission.

4. These provisions contain some unusual features. First, it is open to all Members of the United Nations to appoint persons to the list, not just parties to the Vienna Convention. Second, those appointed automatically cease to be on the list when their five-year term ends.

5. According to the UN Multilateral Treaties website, as of 19 June 2007 ten States (all of which are among the 108 parties to the Convention) currently have persons on the list:

Austria, Croatia, Denmark, Germany, Paraguay, Slovakia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia.

6. The website also lists conciliators whose nominations were not renewed after five years. These include those nominated by:

Cyprus, Finland, Italy, Japan, Mexico, Netherlands, United Kingdom.

Summary of the position

7. Of the 37 members of the Council of Europe that are parties to the Vienna Convention on the Law of Treaties, nine currently have persons on the list of conciliators. (Another five did so in the past, but the nominations have lapsed.)

Appendix 5**PRELIMINARY DRAFT RECOMMENDATION REC(2007)... OF THE COMMITTEE OF
MINISTERS TO MEMBER STATES ON THE NOMINATION OF INTERNATIONAL
ARBITRATORS AND CONCILIATORS**

1. The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe;
2. *Considering* that the aim of the Council of Europe is to achieve a greater unity between its members;
3. *Having regard* to the work of the Committee of Legal Advisers on Public International Law (CAHDI);
4. *Bearing in mind* the Conventions for the Pacific Settlement of International Disputes of 29 July 1899 and 18 October 1907;
5. *Bearing in mind* the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (ETS 23);
6. *Having regard to* the Charter of the United Nations and in particular to Article 33, paragraph 1;
7. *Bearing in mind* United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970 adopting the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*;
8. *Recalling* the United Nations Decade of International Law, which had as one of its main purposes the promotion of means and methods for the peaceful settlement of disputes between states;
9. *Bearing in mind* the 2005 World Summit Outcome, adopted by General Assembly resolution 60/1 of 16 September 2005, emphasizing the obligation of States to settle their disputes by peaceful means;

* * *

10. Recommends that the Governments of member States maintain, and keep under review, a list of treaties and other instruments which provide for the nomination of arbitrators or conciliators for inclusion in lists maintained for the purpose of implementing provisions concerning the peaceful settlement of disputes;
11. Recommends further that the Governments of member States consider nominating arbitrators and conciliators in accordance with the instruments in question, and that they keep such nominations under review.
12. Requests the Secretary General to forward this Recommendation to the Secretary-General of the United Nations.