



Earth Negotiations Bulletin

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A Reporting Service for Environment and Development Negotiations

BASEL COP-5 HIGHLIGHTS MONDAY, 6 DECEMBER 1999

On the opening day of the Fifth Conference of the Parties (COP-5) to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (SBC), delegates met in Plenary to hear opening statements and to consider organizational matters, institutional, procedural and financial arrangements, implementation and monitoring, and the 10th anniversary celebration of the adoption of the SBC. The working group on legal matters considered the organization of its work and began consideration of pending articles of the Draft Protocol on Liability and Compensation. The working group on financial matters considered the 2001-2002 budget.

PLENARY

Philippe Roch, State Secretary, Head of the Swiss Agency for the Environment, Forests and Landscape, speaking on behalf of the government of Switzerland, welcomed delegates to COP-5. He said the SBC was a model convention coming to fruition that required more intensive cooperation with the industry sector. He added there was a need for good coordination, through UNEP, between the SBC and other international legal instruments dealing with chemicals. He also stressed that the SBC dealt with both environmental and trade issues.

Jorge Illueca, speaking on behalf of UNEP Executive Director Klaus Töpfer, said the future of the SBC should follow a bipolar strategy responding to the needs of developed as well as developing countries. It should therefore focus both on the classification or characterization of wastes and on their environmentally sound management. He added that the adoption of the Protocol would constitute a major advancement in international law and complete the set of tools under the SBC to ensure the protection of human health and the environment.

COP-4 President Ibarahim Rosnani (Malaysia) considered the new millennium as a pertinent time to reflect on the SBC past and future. Noting progress in minimizing dumping of hazardous wastes, she said the stage is set to implement the ban amendment and to turn to the priorities of capacity building, illegal traffic and technology transfer, and stressed completion of the Protocol.

On organizational matters, the COP adopted the provisional agenda and elected Philippe Roch (Switzerland) as COP-5 President. The COP elected the Bureau members and Chairs of its four working groups. The Vice-Presidents elected were: Arturo Navarro (Costa Rica), Vlastimila Mikulová (the Czech Republic) and Mohamed El Zarka (Egypt). Indrani Chandrasekaran (India) was elected Rapporteur. The COP also elected the following Chairs: Everton Vargas (Brazil) for the working group on legal matters; Dick C. de Bruijn (the Netherlands) for the working group on

financial matters and John Myslicki (Canada) for the working group on the ministerial declaration. Nomination of the candidate from the Asian Group to chair the working group on technical matters was deferred. The COP then heard a report from Chair Vargas on the organization of work of the working group on legal matters.

INSTITUTIONAL, FINANCIAL AND PROCEDURAL ARRANGEMENTS: On the mandate of the subsidiary bodies of the COP, delegates expressed broad support for the draft decision on institutional arrangements put forward by the Secretariat. Following suggestion for minor amendments, President Roch invited the Secretariat to consult with interested delegations and to incorporate their proposals in a new draft decision.

IMPLEMENTATION AND MONITORING: On capacity building activities within the SBC, delegates considered the report on regional and subregional centres for training and technology transfer and the corresponding draft decision. EGYPT, supported by SENEGAL, NIGERIA and ALGERIA, said equality between the different regions was needed, as well as establishment of training centres in Africa. SENEGAL, with others, stressed the problem of financing the centres and suggested a working group be established on this issue. The RUSSIAN FEDERATION, supported by CHINA, opposed the creation of new centres and said the functioning of existing centres should be ensured. She called on the Secretariat to tackle the financing issue as opposed to leaving centres to find individual solutions. SENEGAL agreed to chair a drafting group to finalize the text of the draft decision.

On international cooperation, the RUSSIAN FEDERATION suggested the Secretariat continue its cooperation with a view to building the capacities of developing countries "and other countries in need" to manage waste persistent organic pollutants.

10TH ANNIVERSARY CELEBRATION OF THE ADOPTION OF THE CONVENTION: On the draft declaration and draft decision on environmentally sound management, The GAMBIA said the strategies for the next decade should be built on the achievements of the previous decade and, supported by DENMARK, said waste minimization is as important as waste management. COLOMBIA, supported by VENEZUELA and LEBANON, called for a reference to the ratification of the ban amendment. BRAZIL said emphasis should be put on capacity building and financial assistance for projects involving Small and Medium Enterprises. President Roch said the working group on the ministerial declaration would consider this item further.

WORKING GROUP ON LEGAL MATTERS

The working group on legal matters, chaired by Vargas, and tasked with developing the Draft Protocol, met in the morning to organize its work and identify pending issues. The group agreed to

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set a work schedule not conflicting with the Plenary or the working group on the ministerial declaration and to focus on the following pending Protocol provisions: Articles 3.5 and 3.6 (instances where the Protocol does not apply); Article 12 (conflicts with other liability and compensation agreements); Article 15 (insurance and other financial guarantees); Article 16 (compensation mechanism) and Article 31 (reservations and declarations); and an annex to Article 13 on financial limits to liability. Chair Vargas noted the need for an article on the Meeting of the Parties (MOP) to the Protocol. The group agreed to work on the basis of the draft Protocol text forwarded by the 10th session of the *Ad Hoc* Working Group of Legal and Technical Experts and on a Secretariat's draft text on: Protocol Articles 3.5 and 3.6 (instances where the Protocol does not apply); and a provision on emergency and compensation measures. Chair Vargas reported these outcomes back to the Plenary.

In the afternoon, the group discussed Protocol Articles 3.5 and 3.6. The Secretariat's proposed Article 3.5 states that the Protocol shall not apply to damage caused by wastes considered as hazardous by national legislation of the Party of export, import or transit, unless those wastes have been notified in accordance with SBC Article 3 (notification) by the State of export and/or import and the damage arises in the territory of that State. In this case, liability shall be channeled in accordance with Protocol Article 4 (strict liability). Regarding Protocol Article 4, AUSTRIA, supported by FRANCE, called for an explicit reference indicating that responsibility shifts from the exporter to the importer in cases where damage is caused by wastes that are not defined as hazardous under national legislation of the exporter. He added that the importer should be strictly liable when required to notify the import of hazardous wastes and omits doing so. The UK said this reference already exists under Protocol Article 4 when it indicates that SBC Article 6.5 (importer/exporter notification requirements) applies *mutatis mutandis* to Protocol Article 3.5. BELGIUM, supported by the US and opposed by AUSTRIA, proposed including a reference stating that the Protocol shall not apply to damage due to wastes defined as hazardous by national legislation "unless the Parties and the Secretariat have been informed about national definitions of hazardous wastes according to SBC Articles 3.2 and 3.3" (national definitions of hazardous wastes). The US observed that wastes under SBC Article 1.1 (b) (defined as hazardous by national legislation) are not commonly considered to be "Basel wastes," and said the only way to know about them was through information provided to the Secretariat by the Parties. The group next considered the exemption of the Protocol's application to damage due to transboundary movements of wastes pursuant to SBC Article 11 agreements or arrangements (Protocol Article 3.6). On the exemption's qualifying proviso requiring existence of a liability and compensation regime applicable to damage from such movements, of two alternatives, COLOMBIA supported the more specific one requiring the regime to provide victims' compensation rights and remedies which meet or exceed those in Protocol Articles 4 (strict liability), 5 (fault-based liability), 13 (financial limits), 14 (time limit of liability), 15 (insurance) and 25 (mutual recognition and enforcement of judgments). SWEDEN, supported by GERMANY, AUSTRIA and SWITZERLAND, proposed, as a compromise, that a provision be added to the requirement for Parties to SBC Article 11 agreements to notify the Secretariat of the non-application of the Protocol and of the applicable regime which would state that, after such notification, claims for compensation may not be brought under the Protocol. COLOMBIA said this proposal was not a compromise and requested the proposal be put in writing for clarification. A number of delegations stressed that it is up to the Party and not courts to decide whether the alternative regime meets the exemption qualifier. COLOMBIA responded that

stating this pointed to a strengthening of the exclusion. AUSTRIA stressed that the exclusion is not a way to opt out of the Protocol and added this could be done by not signing it. The UK underscored that the exemption can only apply within the national jurisdiction of the Parties to SBC Article 11 agreements. The group agreed to consider on Tuesday, 7 December a paper outlining the Swedish proposal.

WORKING GROUP ON FINANCIAL MATTERS

The working group on financial matters, chaired by de Bruijn, was attended by SWITZERLAND, FINLAND, GERMANY, AUSTRIA, BELGIUM, FRANCE, JAPAN, the NETHERLANDS, and the US as a non-Party observer. Regarding financial arrangements, there was a unanimous concern over the lack of developing country representation in the group, especially since the cost of developing country expert participation is the main issue. Delegates considered the budget for the Trust Fund for the implementation of the SBC for 2001-2002. Most delegates expressed their preference for Alternative I (the budget for 2001-2002 is the same as for 2000) over Alternative II (the budget for 2001-2002 is the same as Alternative I with the inclusion of the funding for developing country expert participation). Delegates also briefly considered, *inter alia*: reclassification of two existing UNEP posts; establishment of a new post; and costs of full interpretation and translation of working documents in all subsidiary body meetings. SWITZERLAND noted it was unreasonable to begin substantive discussions on these matters without equal representation of both developed and developing countries.

IN THE CORRIDORS

The opening day of COP-5 drew mixed opinion on the Convention's past achievements and future outlook. Some linked their forecasts and expectations with whether consensus can be reached on the Protocol on Liability and Compensation and perceived the Protocol as a gauge for measuring the effectiveness and future advancement of the Convention. Others voiced concerns over ambiguities surfacing in discussions on vital elements of the Protocol, such as scope, application to wastes considered hazardous by individual Parties and exemption of bilateral, multilateral and regional agreements. Overall, greater expectations for a meaningful Convention hinged on both adoption of the Protocol and entry into force of the ban amendment.

THINGS TO LOOK FOR TODAY

PLENARY: The Plenary is scheduled to meet from 10:00 am-1:00 pm and from 3:00-6:00 pm in the San Francisco room. In the morning Plenary, delegates are expected to consider: implementation of issues related to decision II/12 and the ban amendment contained in decision III/1; information management and dissemination; monitoring implementation of and compliance with the obligations set out by the SBC; analysis of the SBC dispute settlement mechanism; work on the emergency fund and mechanism; and competent authorities and focal points. The Plenary is then expected to focus on: dismantling of ships; the report of the Technical Working Group on its work for the period 1998-1999; bilateral, multilateral and regional agreements; prevention and monitoring of illegal traffic; and hazardous wastes minimization.

WORKING GROUP ON LEGAL MATTERS: The working group on legal matters is expected to continue its deliberations from 10:00-11:30 am in the Montreal room.

WORKING GROUPS: The working groups on financial matters, the ministerial declaration and regional centers are expected to be held throughout the day; information will be posted at the entrance of the San Francisco room.