UNITED NATIONS

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ORIGINAL: SPANISH

Intersessional meeting of the negotiating committee
of the regional agreement on access to information,
participation and justice in environmental matters
in Latin America and the Caribbean (virtual)

Thursday, 13 July 2017

[This document has not been subject to editorial review]

MINUTES – SUMMARY OF THE MEETING

1. BACKGROUND

At the sixth meeting of the Negotiating Committee of the regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean held in Brasilia from 20 to 24 March 2017, the countries decided to call an intersessional meeting of the Negotiating Committee (virtual) in July 2017. Pursuant to the Organization and Work Plan of the Negotiating Committee, no decisions are to be taken at virtual meetings.

As agreed by the Presiding Officers of the Negotiating Committee, the objective of the meeting was to clarify doubts on articles 11 to 25 as a whole as well as on the administrative, financial and budgetary implications of the future agreement. The delegations and the public were encouraged to send their questions and comments before the meeting in order to discuss them at the intersessional meeting.

Annex 1 contains the list of participants of the meeting.

2. DEVELOPMENT OF THE MEETING

In the opening remarks, ECLAC recalled the objectives of the meeting and introduced the two panelists, both of which had great experience in the development and implementation of international treaties: Dr. Concepción Escobar, member of the United Nations International Law Commission and Chair of International Law of the National Distance Education University of Spain (UNED); and Ms. Ella Behlyarova, Secretary to the Aarhus Convention of the United Nations Economic Commission for Europe.

It noted that the meeting aimed to deepen the discussions held in Brasilia where Dr. Escobar had already made comments on articles 11 to 25 and facilitate the negotiation of these articles at the next meeting of the Committee in Buenos Aires (31 July to 4 August 2017). Given that at the last virtual meeting, held on 23 May 2017, Mr. Santiago Villalpando, Chief of the United Nations Treaty Section, had dealt with articles 19 to 25, in this opportunity the panelists would focus on articles 11 to 18 that included the institutional and financial aspects of the future agreement. The panelists would make comments and

answer the questions made by the delegations and the public prior to the meeting. However, additional questions could be made in the open discussion that would follow.

Chile and Costa Rica took the floor in their capacity as co-chairs of the Presiding Officers. The delegates welcomed the participation of the experts, thanked the Secretariat for the organization of the meeting and underscored the importance of articles 11 to 25 as they would allow giving effect to the other provisions of the agreement. They also said that this meeting would provide delegations and the public with a more complete view of these articles, which would in turn contribute to the negotiation in Buenos Aires.

Dr. Escobar thanked the secretariat, the delegations and the public for the opportunity to participate and made a commented reading of articles 11 to 18 based on her experience and international practice. She also replied to the questions made previously on each article. She noted that the questions on the participation of the public would be dealt jointly at the end of her intervention.

She began her reading with article 11 (resources), which contains provisions on the funding of the different activities that would support the application of the Agreement. To this end, the article establishes a clear distinction between the funding of internal activities within each State and the funding of the remaining activities supporting the Agreement. In the first case, funding would be the sole responsibility of each State, subject to flexibility (budgetary availability, national policies, priorities, plans and programmes). However, it does not expressly state how the activities of a more general nature would be funded, leaving to the Conference of the Parties the creation of a Fund to be defined at its first meeting, as well as “other financial provisions” and “technical assistance mechanisms”. Lastly, it mandates it with exploring other means and funding.

She indicated that this provision was essential given that, generally, every agreement that foresaw implementation and training mechanisms required autonomous, specific and stable funding both for national activities and activities of common interest to all Parties. Leaving funding to each State was not possible, and a collective funding system was needed, especially for regional activities. In this sense, the creation of a fund was necessary. Such fund could have (i) mandatory contributions; (ii) voluntary contributions; or (iii) a mix of both. A system of voluntary contributions would be the most flexible one and has the advantage of recurring to the funding of interest third parties. However, a voluntary fund was always subject to changing circumstances and could become very unstable and non-operational, hindering the implementation of the Agreement. States had to be mindful of this when taking a decision on the nature of the fund.

The expert also drew attention to the fact that it was the first Conference of the Parties that would make a decision on the fund. In her view, it was convenient to define such arrangements beforehand. Waiting to the first Conference of the Parties would delay the adoption of a key decision and could create a temporary vacuum. Furthermore, it could send the message that the fund is secondary in the Agreement, when, on the contrary, it is highly important for it to render its effects.

Such urgency does not exist with the other financial provisions provided for in article 11.3. Although it is extremely useful to keep the current wording in article 11.3, there would be no harm in leaving its definition to the Conference of the Parties as these would be additional means that would not affect the activation of the Agreement.

Articles 12, 13 and 14 were commented jointly given their clear interconnection. Article 12 on the Conference of the Parties was a complete article that established the Conference, determined when it was going to meet and defined its functions.

The holding of the first Conference of the Parties no later than one year after the entry into force reflects common international practice. However, the countries must consider the following: (i) the need to prepare a great number of substantive documents to be presented at the first Conference, including the regulations for such Conference (the secretariat's support would be key); (ii) the need to have a provisional body that acts between the entry into force and the first Conference. According to practice, that body can be a provisional bureau or a preparatory commission, depending on whether the aim is to only have formal contact between the Secretariat and the Parties (provisional bureau) or if the preparation of substantive documents is needed (preparatory commission). The second option does not exclude the first one; both can exist. But it is important to define this aspect. This does not necessarily have to be defined in the Agreement, it could be done so in the final act of the diplomatic conference that adopts the Agreement (in the act or in a resolution annexed to the act).

As for the subsequent conferences, these would be held at the intervals that decides the Conference. This has the advantage of providing flexibility, but not fixing such periodicity in the Agreement raises doubts as to whether this will be determined on a permanent basis at the first Conference or if those intervals would be decided after each Conference. This indetermination is not desirable as it hinders the effectiveness of the agreement and hampers the fulfillment of its functions that require a certain periodicity such as those outlined in article 12.5. Establishing those intervals is also fundamental, for example, for the preparation of amendments that have to be presented six months before the Conference of the Parties at which they are proposed for adoption. The practice is to establish an ordinary interval in the Agreement, although there is diversity on the timelines (the intervals can be annual, every two or three years, etc.). It could be established in any case that the Conference of the Parties may modify such intervals if it considers it necessary at a later stage. The expert had not comments on article 12.3 as it was a very common and standards provision.

On the mandate of the Conference, Dr. Escobar said that it was a decision that should be adopted by States, but it was important to differentiate (as did the text in articles 12.4 and 13.5) the mandatory functions of the first Conference, which are essentially procedural and organizational and would require preparation in advance, from those ordinary functions. For this reason, it was fundamental to keep the open provision in article 12.5 g).

As for article 13 (right to vote), in response to one of the questions received on the need to include this article, the expert indicated that although taking decisions by consensus was common, there were some decisions that would require voting. For example, in the amendments, a certain quorum would be needed when consensus is not reached. Furthermore, it was a political right of the States, and should be maintained. On the possibility to include decisions that are only taken by consensus, she explained that this formula is possible but would be difficult to implement as there would be decisions were it would be extremely hard to reach consensus. For this reason, she discouraged this option. The formula to make every effort to reach consensus and, if no agreement is reached, have a majority regime (even if that regime is a qualified one) is common and has worked well in the law of treaties.

With regard to article 14 (Presiding Officers), one question was received on its usefulness and functions. In reply, the expert stated that it was reasonable to have a coordination body that would foster developments, especially intersessionally. In response to the questions on its nature and the situation in which a member delegation would be, she said that the presiding officers were a subsidiary body of the Conference of the Parties. The Conference would have to assume all the functioning costs, but its members normally carried out their functions ad honorem. As for the second question, the expert replied that the delegates that were part of the presiding officers acted in such capacity and did not represent their States in their decisions. Other delegates should assume that role in the Conference. This guaranteed the neutrality of the Presiding Officers. She added, in response to another question, that the Presiding Officers

did not require autonomous rules of procedure, as these specific rules could be included in the regulations of the Conference of the Parties, as usual.

Article 15 established the secretariat and its functions. In the opinion of Dr. Escobar, this was a common provision. In response to the question on whether regulations were necessary for the secretariat and who would compose it, the expert answered that that would depend on whether ECLAC assumed the secretariat or an autonomous secretariat would be established. If ECLAC continued to be the technical secretariat, that would be determined by its own rules. It would be sufficient to refer to this in the Final Act and include a provision in the regulations of the Conference of the Parties. If ECLAC was not the secretariat, the countries needed to consider that it would be necessary to adopt regulations, elect a secretary and take decisions on funds and funding, considering all this entailed (headquarters, materials/operational and staff costs, such as salaries, health insurance, pensions, etc.).

On article 16, related to subsidiary and consultative bodies, Dr. Escobar said the current text followed international practice. However, she would replace “or” with “and” in the title of the article, as these bodies could have complementary functions. Subsidiary bodies normally had a more permanent nature, whereas consultative one could be temporary or for specific situations. Responding to questions on when and where they would be established, the expert said it was a decision that the Conference of the Parties should make. As for the doubt on the usefulness of such bodies, its members and functions, the expert explained that such bodies were not autonomous as they were dependent on the Conference of the Parties and its functions would vary from case to case as determined by the Conference.

As for article 17 (implementation, monitoring and evaluation), the expert noted that it was necessary to distinguish between the functions of the Conference of the Parties and those of the Facilitation Committee. The Conference of the Parties was a general body that carried out the evaluation and monitoring, whereas the Committee had a specific and subsidiary mandate and was answerable to the Conference of the Parties. In response to the question on the need to create the Facilitation Committee if the Conference of the Parties was the one making recommendations, Dr. Escobar explained that the committee could work on more continued basis and follow more closely and periodically implementation, which the Conference was not in a position to accomplish due to temporary and operational reasons. The Conference could not meet on a monthly or semi-annual basis, and should have a specialized subsidiary body, even if the Conference would reach agreements and adopt recommendations. On the question about the difference between individual and collective recommendations, she said it was very common to have these two categories. The recommendations could refer to one country, to a group of countries or to all States Parties. The recommendations were not binding according to international law, unless expressed otherwise, but they could guide States and define a common course of action. Therefore, it was important to keep such reference.

According to the current text, the Committee was a subsidiary body of the Conference of the Parties and was non-contentious, being extremely useful to provide assistance and guidance to States. The expert considered it to be a key body in the architecture of the future agreement. In addition to keeping it, she recommended to indicate its basic composition in the agreement (for example, if it would be composed of experts, from which regions, etc.) and provide greater detail on its functions. The composition and functions would provide clarity to States before ratification.

Answering a question on whether the Committee could receive communications or requests from States and the public, she said that was a political decision by States. However, considering the matters dealt with in the agreement, the fact that the agreement was aimed at the public and the public had participated actively in its negotiation, it would be not be understandable to exclude the public from its implementation and follow-up. It would be, thus, logic and coherent that the public have access to the Committee. More than including or excluding the public, the important aspect to define would be in

which way the public could participate. The committees created by human rights treaties could offer very useful models in this regard.

On article 18 (settlement of disputes), the expert mentioned that it was a standard article that did not pose any difficulty in its current wording as it offered a very flexible system and recourse to justice was voluntary. In response to a question on the need to establish a means to settle disputes, she stated it was necessary to include it as there could be differences of interpretation, for example. The expert, however, suggested to delete the need to establish specific rules on arbitration in article 18.2 b) as these rules already existed and were entrenched. Simply referring to those established rules could be envisaged.

Finally, Dr. Escobar referred to the questions on public participation. She recalled that if there should be such participation and how that participation would be was a decision that purely depended upon States. However, she insisted that if the agreement was for the public, its implementation necessarily required its support and the public had always been involved in the negotiation. Therefore, it would not be logical to exclude it from the treaty bodies. She highlighted several examples of how such participation had taken shape, such as in the Assembly of States Parties of the Rome Statute of the International Criminal Court that had a standing invitation to non-governmental organizations, or in the recently adopted Paris Agreement. With respect to the funding of public participation, she said this could be considered when establishing the fund and it would be possible to do so by introducing a line of action of the fund that would then be included in its budget.

Ella Behlyarova (Aarhus Convention Secretariat) then took the floor, thanked the organizers and congratulated participants for the progress made in the negotiation process. She pointed out that the Economic Commission for Europe had been following closely the process and was impressed and very enthusiastic with the results that could be achieved shortly. The Aarhus Convention would celebrate its twentieth anniversary next year and she saw many similarities with the regional negotiation process. She wished the same success to the regional process as the Aarhus Convention had had.

Before reviewing the articles of the negotiation text, Ms. Behlyarova made some initial considerations. She highlighted that the Aarhus Convention currently has 47 States Parties and has a highly developed institutional structure. The Convention also has the Protocol on Pollutant Release and Transfer Registers with 35 States Parties. She underscored the living, instrumental and cross-cutting nature of the agreement and its contribution to the 2030 Agenda, specifically to Sustainable Development Goal 16. Furthermore, she mentioned that the sense of solidarity and multilateral cooperation it generated had proven to be fundamental and that the Convention had provided for numerous financing and technical support opportunities. This would, undoubtedly also be the case for the Latin American and Caribbean agreement. She added that the Aarhus Convention Parties included not only countries from Western Europe but also from Eastern and South Eastern Europe, Central Asia and the Caucasus, reflecting a very politically, economically and socially diverse region and different levels of development.

With regard to resources (article 11 of the negotiation text), she said that it was important to have a clear understanding on financing, which required both national and regional commitments to implement the agreement. She underscored that the financial arrangements in Aarhus were defined through decisions of the Meeting of the Parties for a period of three years. There was also a voluntary fund with compulsory minimum contributions managed by the Secretariat according to United Nations rules. The fund funded exclusively international activities and included funding of the participation of NGOs in activities. She pointed to the importance that all Parties contribute to the fund, as it would create a sense of ownership and solidarity. However, in her opinion, it would be desirable to establish mandatory contributions to provide stability and predictability.

On the institutional structure of the Aarhus Convention, she noted that there were the Meetings of the Parties, the Working Group of the Parties, the Bureau, the Compliance Committee and three thematic Task Forces.

The Meeting of the Parties was the main decision-making body of the Convention which was composed of all Parties. It met every three years, although it was recently agreed to increase the frequency to four years. Its main function was to continuously review the implementation of the Convention and take the necessary measures to achieve its objectives. The signatories, other States, non-governmental organizations, members of the public and other interested stakeholders participated as observers. Its rules of procedure are general, but provide sufficient details to facilitate their application. The rules of procedure apply to all subsidiary bodies. In addition, there are supplementary decisions adopted by the Meeting of the Parties that provide more specific information on the purpose and functioning of different bodies.

The Working Group of the Parties met every year intersessionally and was composed of all Parties. It was responsible for overseeing implementation of the work programme and take decisions as was mandated by the Meeting of the Parties. The signatories, other States, non-governmental organizations, members of the public and other interested stakeholders participated as observers. There is a specific decision that provides for functioning of the Working Group.

The Bureau had seven members, including a Chair and two Vice-chairs elected by the Meeting of the Parties. Its members acted in their personal capacity and did not represent their countries. Its composition, the duration of its mandate and functions were provided for in the rules of procedure. The meetings of the Bureau are closed, but a representative of non-governmental organizations is invited to participate in the meetings as observer. The Bureau prepares the documents to be considered by the Meeting of the Parties, facilitates implementation of the work programme and takes decisions in accordance with its mandate.

The Compliance Committee was made up of nine members, elected by the Meeting of the Parties. Its members served in their individual capacity and did not represent the State of their nationality. It met four times a year in person and held several virtual meetings. The Compliance Committee was a unique and successful body of the Convention. The public, Parties and the secretariat could trigger cases. It fulfilled a key function in compliance, guiding Parties and reviewing individual cases that could then be brought to the Meeting of the Parties. There is a specific decision that provides for functioning of the Compliance Committee.

Moreover, there were three task forces, one on each right (information, participation and justice), of an open nature (Parties, signatories, other States, non-governmental organizations, members of the public and other interested stakeholders can participate). Their mandate was for three years, between Meetings of the Parties. They met every year or year and a half to address challenges, good practices and make recommendations on matters of common interest identified by Parties and stakeholders.

In relation with the Latin American and Caribbean agreement, the expert considered important that the text be rather flexible but would indicate that the Conference of the Parties should meet at regular intervals not less than two years unless Parties decide otherwise. More details would be specified through the rules of procedure. On subsidiary bodies, she suggested having a flexible text that would allow for their establishment and the participation of the public. It was not necessary to create all subsidiary bodies at the beginning but rather to establish only those considered key (such as Working Group of the Parties (an intersessional decision-making body), the Presiding Officers and Facilitation Committee). All details regarding their functioning could be described in rules of procedure of the Conference of the Parties and specific decisions on different bodies to be prepared for the first meeting of the Conference of the Parties.

Regarding the right to vote, she noted that it was set out in the text of the Aarhus Convention and detailed further in the rules of procedure: substantive ones required a 3/4 majority whereas procedural ones were adopted by simple majority.

The Aarhus Convention was adopted in 1998, entered into force in 2001. It was important to have a provisional body that would work between the entry into force and the first Conference of the Parties. In the case of Aarhus, there were meetings of the signatories. The first and second meetings of the Signatories were held in 1999 and 2000. The first Meeting of the Parties to the Convention was held in 2002, a year after its entry into force.

As for the secretariat, Ms. Behlyarova considered important to define where it would be located. In the case of the Aarhus Convention, its hosting at the United Nations Economic Commission for Europe proved to be successful for several reasons. Firstly, for political reasons, as it ensured neutrality and equal treatment of all Parties in accordance with rules of the United Nations. Secondly, because it had an existing framework to handle formal correspondence through diplomatic channel and established work arrangements with Member States and different organizations. Finally, because of funding. The rooms, equipment and editorial staff and interpreters of the United Nations could be used, reducing costs. She stated that, ideally, staff secretariat costs should come from the United Nations regular budget as it was generally easier obtain funds for activities than for staff costs. In the regional agreement, two or three full-time professional staff members and one full-time administrative staff member would be needed at the beginning.

On article 17 of the negotiating text, on implementation and follow-up, in addition to the Facilitation and Follow-up Committee already foreseen, the expert recommended having periodic progress reports in which every Party reported on the implementation of the agreement. In Aarhus, such reports were specified in a decision of the Meeting of the Parties that set common criteria.

With regard to article 18 on settlement of disputes, the expert explained that the Aarhus Convention had an identical provision. Although it was never used in Aarhus, she thought it was fundamental to have this article as there could be differences of interpretation of the Convention. It was better to have clear rules in this regard.

Finally, Ms. Behlyarova recalled that the Aarhus Convention had an article inviting Parties to promote the provisions of the Convention in other international fora. She suggested having a similar provision in the Latin American and Caribbean agreement, considering how positive it had been for the Aarhus Convention.

Ms. Behlyarova concluded her intervention by encouraging countries and the public to continue to work towards a solid and ambitious agreement. From the positive experience of Aarhus in the last 20 years, she expressed her hope that Latin America and the Caribbean would have an equally successful agreement. She offered advisory support and collaboration of the Aarhus Convention secretariat both in the final stage of the negotiation as well as in the implementation of the future agreement.

After the presentations of the panelists, the floor was open for additional questions. The delegate of Mexico congratulated the experts for their presentations and underscored the timeliness and importance of discussing seriously these articles in the current negotiation stage. He said that due to time limitations, his delegation would make their questions in Buenos Aires.

The elected representative of the public from Jamaica asked how to ensure the significant participation of the public in the implementation, monitoring and evaluation of the agreement. She also asked if the application of the modalities of public participation of the negotiation could be presumed to apply in the

Conference of the Parties or if it was necessary to specify this point. Furthermore, she requested the experts' opinion on the participation of the public in the bodies of the agreement, for example participating as observers in the Presiding Officers, being members of the Facilitation and Follow-up Committee or participating in meetings of consultative bodies.

In reply to the questions of the elected representative of the public, Dr. Escobar noted that public participation was crucial and that the framework of the agreement should facilitate such participation. Although this depended upon a decision of States, it would not be reasonable that this be otherwise. Ms. Behlyarova said that in the text of the Aarhus Convention there was a general reference to participation of observers in the work of the Meeting of the Parties, but the right to vote was only attributed to Parties. She highlighted that in practice the bodies of the Convention are widely open to public participation. For example, non-governmental organizations can appoint an observer to the Bureau, nominate experts to the Compliance Committee on equal footing with States and participate in different meetings. Detailed provision of public participation in different bodies should be further detailed in rules of procedure and specific decisions on these bodies.

3. CLOSING OF THE MEETING

To end the session, ECLAC thanked the experts and participants for their active participation. It also invited delegates to continue reflecting on these articles in preparation for the Seventh Meeting of the Committee in Buenos Aires.

Annex 1

LIST OF PARTICIPANTS

A. Países signatarios de la Declaración
Signatory countries of the Declaration

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ECUADOR

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B. Secretaría de las Naciones Unidas
United Nations Secretariat

Comisión Económica para Europa / Economic Commission for Europe

- Ella Behlyarova, Secretariat of the Aarhus Convention

C. Invitados especiales
Special guests

- Concepción Escobar, Catedrática de Derecho Internacional Público, UNED, España, y miembro de la Comisión de Derecho Internacional de las Naciones Unidas, email: cescobar@der.uned.es

C. Otros participantes
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D. Secretaría
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