23 May 2017
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)

Tuesday, 23 May 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) on 23 May 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 primarily on the final provisions of the compilation text (articles 19 to 25) and 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 was thankful for the high participation and presented the objectives of the meeting.

Chile and Costa Rica, as co-chairs of the Presiding Officers, welcomed participants and recalled that, although no decisions were taken at intersessional meetings, these had proven to be important spaces to clarify doubts, examine the topics in greater depth and learn the different points of view of the countries. This would allow for a successful negotiation round in Buenos Aires (31 July to 4 August 2017) and the conclusion of the text of the agreement by December 2017, as agreed by the Negotiating Committee.

Santiago Villalpando, Chief of the Treaty Section of the United Nations Office of Legal Affairs was grateful for the invitation and recalled that his office exercises the depositary functions of the Secretary General in more the 560 multilateral treaties. Such functions included the custody of the original treaty

and the management of participation matters (signature, ratification, accession, etc.). In this context, he said that if the regional agreement being negotiated at ECLAC was adopted as a legally binding instrument and the Secretary General was designated as the depositary (as foreseen in the current draft), his office would perform the depositary functions of the Agreement.

He added that the Treaty Section would play a central role in the application of the final provisions of the agreement (on, *inter alia*, signature, entry into force and amendments). To ensure the good functioning of the final provisions included in any agreement concluded in the framework of the United Nations, every United Nations office, such as ECLAC, had to submit the final provisions of any treaty negotiated in the framework of the United Nations to the Treaty Section for its review and comments.

Mr. Villalpando then made a commented reading on articles 19 to 25 of the text compiled by the Presiding Officers (text that serves as a basis for the negotiation), and answered the questions received to date by the countries and the public on those provisions. He began his reading in article 20 that governs the first moment in the life of a treaty. Paragraph 1, he said, fulfill two functions. Firstly, it determines when and where the Agreement will be open for signature. Secondly, it determines who can participate in the treaty. On the first issue, although the date when the Agreement will be open for signature was left to the discretion of the negotiators, it would have to take place at least four weeks after its adoption to allow his office to prepare the original Agreement and circulate certified true copies. With regard to the place, he stated that the Agreement should necessarily remain open for signature in New York, given that it is where the original would be kept in custody. However, it was possible to organize an opening for signature ceremony at a different headquarters. Regarding who can participate in the Agreement, he added that the annex does not leave any doubts as to the States to which the negotiators intended to leave open the Agreement. The annex had the advantage of being clear. It also implied that the only way to change the personal scope of the Agreement would be through an amendment to the annex, which would require, according to the current draft, following the procedure of article 19. He added that, if necessary, other alternatives could be considered.

He clarified that paragraph 2 specified that the Agreement will be subject to ratification, acceptance, approval or accession, which meant that, in accordance with general practice in multilateral agreements, the sole signature of the Agreement would not be sufficient to express the consent of the State to be bound by the Agreement. Signature expressed the intention of the State to put in place the internal procedures for ratification, acceptance or approval of the treaty. According to paragraph 1, the Agreement would remain open for signature only for a specific time period (normally one year). As established in paragraph 2, once elapsed, a State may become a Party to the treaty in a one-step procedure: accession. On the question regarding the difference between the terms ratification, acceptance, approval and accession, all of them serve to express the consent of the State to be bound by the Agreement. Ratification, acceptance and approval are preceded by signature. The difference between them is dependent upon the national law of each State. As for accession, the difference is that it is not preceded by signature (that is, the State will become a Party to the Agreement in a one-step procedure). However, it has the same legal effects as ratification, acceptance or approval.

On paragraph 3, he pointed out that it included a request to States to transmit to the Secretariat, at the time of expressing its consent to be bound by the Agreement, information on the measures they would take to comply with the Agreement. He added that as it was drafted in paragraph 3, this communication shall be sent to the Secretariat (ECLAC) and not to the depositary (Treaty Section). By using the verb “encourage”, the provision indicated that this communication was not a requirement to become a Party to the Agreement and, as a result, the depositary would not reject an instrument of ratification, acceptance, approval or accession without it.

With regard to article 21 (entry into force), he said that this article specified the moment in which the Agreement would render legal effects, imposing obligations and granting rights to the Parties. As in many multilateral treaties, the draft Agreement required a certain critical mass (five States in the current wording). In response to the questions raised on the reasons for setting that threshold and its comparison with other multilateral environmental agreements, he indicated that this decision was at the absolute discretion of the negotiators since there were no specific requirements in the law of treaties. There were agreements that required only three ratifications (the minimum needed for an agreement to be multilateral), others required a high number of ratifications and others added other conditions The threshold was dependent upon the will of the negotiators, but the total number of States to which the Agreement was open (in this case 33) should be considered. A high threshold will delay entry into force of the Agreement, even for those States that had already accepted the Agreement. Paragraph 2 established the entry into force for those States that ratified after the entry into force of the Agreement.

On article 22 (reservations), he noted that the article foresaw that no reservations could be made to the Agreement. A reservation is a unilateral declaration with the aim of excluding or modifying the legal effects of certain provisions of the treaty. If such a provision did not exist, the customary rule in the law of treaties is that reservations are admitted, unless they are contrary to the object or purpose of the treaty. The majority of recent multilateral agreements in environmental protection matters prohibit reservations. The idea of this prohibition is that the agreement is a package deal, resulting from the negotiation and with its own internal balance, that States accept or not in its entirety, without taking out any specific part. Thus, all Parties are bound by the same legal regime.

Regarding article 19 (amendments), he asserted that, once the Agreement had entered into force, it was possible that throughout its lifetime, there would be a need to modify certain provisions.

Asked whether the regime for entry into force of an amendment foreseen in the current text was in accordance with international practice in environmental matters, he recalled that the negotiators were free to choose the amendment procedure that better suited their objectives and that there was no practice that imposed a specific procedure over another. The procedure provided for in the draft agreement can be found in several other multilateral agreements in environmental matters. On the question regarding the situation in which a Party does not ratify an amendment due to its organization or regulatory framework, he indicated that this problem did not arise in the amendment procedure established in article 19, given that according to the latter, an amendment would not enter into force for a Party that has not accepted it.

He highlighted two matters on the procedure. First, an amendment to the Agreement could take a long time to be implemented, as it required a detailed procedure and strict conditions for its entry into force. Second, once an amendment entered into force, two regimes under the Agreement could coexist: the amended regime for those States that have accepted the amendment; and the original regime for those that did not accept it. For this reason, some agreements foresee a simplified amendment procedure for institutional provisions (such as those that change the composition of a body of the Agreement) or its annexes. In a simplified procedure, for example, an amendment could enter into force for the Parties that had not opposed to the amendment within a certain timeframe or could enter into force for all Parties if there are no objections within that timeframe.

With regard to article 23 on withdrawal, he said that the article established that a Party can withdraw from the Agreement by providing a notification to the depositary with two conditions: the withdrawal of the Agreement is not possible within the first three years after the entry into force of the Agreement with respect to a Party; and, the withdrawal will take effect one year after being notified. These conditions are in other multilateral agreements on environmental matters.

In article 24 (depositary), the Secretary General is designated as depositary. He pointed out that the decision of the Secretary General to accept the depositary functions for an agreement is discretional, but that in practice it accepted those functions for regional agreements concluded in the framework of United Nations Regional Commissions such as ECLAC.

As for article 25 (authentic texts), he stated that the draft Agreement foresees two authentic texts of the Agreement: English and Spanish. He explained that according to the law of treaties, this meant that the text were equally valid in both languages for interpretation purposes, not prevailing one over the other. The decision on which languages are authentic rested with negotiators, according the objectives sought and the scope of application of the agreement. However, in its current practice, the Secretary General did not accept depositary functions for agreements that had authentic texts in a language different from the six official languages of the United Nations. This was due to the fact that the Treaty Section could not ensure the exercise of the depositary functions (such as the preparation of the original text or the circulation of amendments) in languages that were not official at the United Nations.

After the commented reading and a preliminary clarification of doubts on articles 19 to 25 of the compiled text by the Chief of the Treaty Section, participants were invited to make additional questions.

The delegate from Mexico thanked participants and Mr. Villalpando for the opportunity to discuss these matters and clarify doubts. He indicated that many of these matters required an in-depth discussion in Buenos Aires and expressed surprise for not discussing article 18 on settlement of disputes in this session as it was a legal and not administrative matter and given the participation of an international expert. He asked whether it would be useful to relocate article 19 in the text to give it greater coherence, for example after article 20. Finally, he said that for his delegation, the number of the countries in Latin America and the Caribbean was unequivocal.

The delegate of Peru asked if it would be convenient to increase the number of instruments to be deposited for the entry into force, so as to represent at least one third of the States that had been participating in the negotiation (7 or 8 States of the 23 participating countries).

With regard to the question on article 18, Mr. Villalpando said that the means of settlement of dispute were not within the competencies of the Treaty Section, reason for which he had not dealt with them, except for the notification to the depositary of the declaration provided for in paragraph 2. However, article 18 seemed a standard article. On the placement of article 19, he did not see any inconvenience in keeping it in its current place as many other treaties followed this order. Regarding Annex 1 that includes a list of the countries of Latin America and the Caribbean, he said that it was fundamental that the depositary had not doubt as to who could become a Party to the Agreement. In this sense, the list was wise, clear and useful. In response to the question made by Peru, he stated that there was no specific condition in the law of treaties. However, he stressed that the greater number of countries were included in the critical mass, the greater time it would take for the Agreement to enter into force.

The delegate of Mexico then requested clarification on whether the reference to the secretariat in article 20, paragraph 3, referred to ECLAC or the Treaty Section.

A member of the public from Mexico asked if it was feasible to include a reference in the article on amendments so that the public could be notified as well in case of proposals and wondered if the international expert knew of any international practice in this regard.

In response to the question raised by Mexico on article 20, Mr. Villalpando clarified that, indeed, it referred to ECLAC and not to the Treaty Section. On the question made by the public, he did know of any precedent in this regard. He added that a recommendation could be included in another part of the

Agreement, not necessarily in the article on amendments, or in the rules of procedure of the Conference of the Parties.

The delegate of Trinidad and Tobago asked whether the mechanisms provided for in article 18, paragraph 2 (b) (arbitration in accordance with the procedures that the Conference of the Parties will establish), was the same as that included in article 17, paragraph 4, and if it would be advisable to make a cross reference. Mr. Villalpando specified that article 17 referred to implementation and compliance matters of the Agreement, whereas article 18 dealt with the mechanisms proposed for the settlement of disputes (differences of opinion on the interpretation of the treaty, for example).

A member of the public from Brazil congratulated the countries for the progress made in the discussions of the institutional matters of the future agreement and recalled that the public called for a legally binding treaty. She asked about good practices on public participation at the Conference of the Parties in other international treaties.

In response to the question from the public of Brazil, Mr. Villalpando said that the procedure of the Conference of the Parties was not a matter dealt by the Treaty Section but by the substantive secretariat. However, civil society participated at meetings of the Conference of the Parties in other treaties such as in climate change.

The representative from ECLAC added that article 12, paragraph 4, established that at its first meeting, the Conference of Parties would discuss and approve the rules of procedure for subsequent meetings, including modalities for significant participation by the public.

A member of the public from Argentina asked if before the entry into force there were actions or strategies that the secretariat could take to implement the agreement and strengthen civil society. Mr. Villalpando replied that no State was legally bound until the treaty entered into force, and that the rights, obligations or mechanisms foreseen would be applicable. However, nothing in the Agreement prevented a State that had ratified to enact the internal legislative measures to comply with the provisions of the Agreement. A specific provision on provisional application could also be established for those States that wanted to implement the Agreement before its entry into force. In addition, transitional measures could be provided for such as the creation of a preparatory committee to support the preparation of States and civil society for the entry into force of the agreement.

3. CLOSING OF THE MEETING

At the end of the session, Chile and Costa Rica thanked Mr. Villalpando for his presentation and clarification of doubts. They were also thankful for the participation of delegations and the public and ECLAC’s support in organizing the session. Furthermore, they reiterated the commitment of their countries with the negotiation process. ECLAC recalled that the next intersessional meeting would take place on Tuesday, 11 July 2017 in which articles 11 to 25 as a whole as well as the administrative, financial and budgetary implications of the agreement would be discussed.

Annex 1

LIST OF PARTICIPANTS

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