



BASEL COP-5 HIGHLIGHTS WEDNESDAY, 8 DECEMBER 1999

Delegates met in Plenary to consider: the adoption of decisions and the report of the meeting; implementation and monitoring; legal matters; institutional, financial and procedural arrangements; challenges of the Basel Convention (BC) for the next decade; and the Draft Protocol on Liability and Compensation (the Protocol). The Legal Working Group (LWG) considered and agreed on Protocol provisions on: the preamble; financial limits for liability (Protocol Article 13); insurance and other financial guarantees (Protocol Article 15); exemption of application of the Protocol to bilateral, regional and multilateral agreements (Protocol Article 3.6); financial mechanism (Protocol Article 16) and a related draft decision on the BC Technical Cooperation Trust Fund; and conflicts with other liability and compensation agreements (Protocol Article 12). The Financial Working Group (FWG) continued consideration of a draft decision on institutional, financial and procedural arrangements. The contact group on the ministerial declaration continued considered of the draft declaration and draft decision on environmentally sound management.

PLENARY

ADOPTION OF DECISIONS AND THE REPORT: The Plenary adopted the draft report of COP-5 (UNEP/CHW.5/L.1).

IMPLEMENTATION AND MONITORING: On implementation of issues related to decision II/12 and the amendment contained in decision III/1 (ban amendment), the Plenary took note of the submission made by Israel in which it withdraws its proposal for an amendment to BC Annex VII (EU, OECD and Liechtenstein) (UNEP/CHW.5/CRP.1). On capacity-building activities within the BC, President Roch said the Plenary would consider a new draft decision concerning regional centres for training and technology transfer at its next session. On international cooperation, the Plenary adopted the draft decision concerning cooperation with UNEP on activities undertaken at the global level on persistent organic pollutants (UNEP/CHW.5/CRP.2) as well as the draft decisions on cooperation with: the Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade; the World Customs Organization; the OECD; and UN bodies, specialized agencies, regional systems and organizations and others (decisions 18, 19, 20 and 21 in UNEP/CHW.5/27).

On information management and dissemination, the Plenary adopted: the draft decision concerning transmission of information (UNEP/CHW.5/CRP.3); and the decision concerning the development of the information system on hazardous wastes and their management, as amended by the RUSSIAN FEDERATION. The amendment deletes the specification that the three-level questionnaire is intended to facilitate compliance "in particular for Parties that are developing countries and countries with economies in transition" (UNEP/CHW.5/11).

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Paola Bettelli <pbettelli@iisd.org>, Richard Campbell <richcam@hotmail.com>, Valerie Colas de Thibouville <vcolas@iisd.org> and Juliette Voinov <cedrickohler@email.msn.com>. The Editor is Pamela Chasek, Ph.D. <pam@iisd.org> and the Managing Editor is Langston James "Kimo" Goree <kimo@iisd.org>. Digital editing by Kenneth Tong <k80@interlog.com>. Logistics coordinated by P.J. Goldfefer (pjgold14@aol.com). The Sustaining Donors of the *Bulletin* are The Netherlands Ministry of Foreign Affairs, the Government of Canada (through CIDA), the United States (through USAID), the Swiss Agency for Environment, Forests and Landscape, the United Kingdom Department for International Development (DFID) and the European Commission (DG-XI). General Support for the *Bulletin* during 1999 is provided by the German Federal Ministry of Environment (BMU) and the German Federal Ministry of Development Cooperation (BMZ), the Danish Ministry of Foreign Affairs, the Government of Australia, the Ministry of Environment of Austria, the Ministries of Foreign Affairs and Environment of Norway, the Ministry of Environment and Foreign Affairs of Finland, the Government of Sweden, the United Nations Development Programme (UNDP), the Global Environment Facility (GEF) and BP Amoco. The *Bulletin* can be contacted by e-mail at <enb@iisd.org> and at tel: +1-212-644-0204; fax: +1-212-644-0206. IISD can be contacted by e-mail at <info@iisd.ca> and at 161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba R3B 0Y4, Canada. The opinions expressed in the *Earth Negotiations Bulletin* are those of the authors and do not necessarily reflect the views of IISD and other funders. Excerpts from the *Earth Negotiations Bulletin* may be used in non-commercial publications only and only with appropriate academic citation. For permission to use this material in commercial publications, contact the Managing Editor. Electronic versions of the *Bulletin* are sent to e-mail distribution lists and can be found on the Linkages WWW server at <http://www.iisd.ca/linkages/>. The satellite image was taken above Basel (c)1999 The Living Earth, Inc. <http://livingearth.com>. For information on the *Earth Negotiations Bulletin*, send e-mail to <enb@iisd.org>.

LEGAL MATTERS: The Plenary adopted the draft decision on the work programme of the LWG (UNEP/CHW.5/CRP.5). On monitoring the implementation of and compliance with the obligations set out by the BC, the Plenary adopted the draft decision with an amendment stating that the LWG is requested to prepare a "draft" decision establishing a "mechanism for the promotion of the implementation and compliance based on the drafts elements annexed to the present decision" (UNEP/CHW.5/CRP.6).

INSTITUTIONAL, FINANCIAL AND PROCEDURAL ARRANGEMENTS: On institutional arrangements, the Plenary adopted the draft decision with a number of minor amendments (UNEP/CHW.5/CRP.7). FWG Chair de Bruijn reported to the Plenary on the FWG's progress.

CHALLENGES OF THE BASEL CONVENTION FOR THE NEXT DECADE: Chair Myslicki reported to the Plenary on progress in the contact group on the ministerial declaration.

DRAFT PROTOCOL ON LIABILITY AND COMPENSATION: Chair Vargas reported to the Plenary on progress in the LWG.

LEGAL WORKING GROUP

DRAFT PROTOCOL ARTICLE 13 (FINANCIAL LIMITS FOR LIABILITY): The LWG considered draft text on this article and on a related draft Annex (Annex I). The proposed draft article states that financial limits for strict liability (Protocol Article 4) are specified in Annex I to the Protocol and that there shall be no limit for fault-based liability (Protocol Article 5). Annex I states that strict liability shall be determined by national law. It also contains a scale of financial limits for strict liability for any one incident. For the notifier or exporter, this scale ranges from one to 10 million Special Drawing Rights (SDRs), according to shipment weight (from five to 10,000 tonnes) and establishes a maximum limit of 30 million SDRs. For the disposer, Annex I establishes a minimum limit of two million SDRs.

The US drew attention to inconsistencies in Annex I that may suggest unlimited strict liability and noted that the scale for liability based on shipment weight may render insurance for bulk shipments of recyclable wastes costly. ITALY suggested that the scale for liability be differentiated according to modes of transportation and travel distance. SWITZERLAND said the scale is based on consultations undertaken by the Secretariat with the insurance industry. INDIA, with others, indicated that provisions in Annex I should be part of the body of the article. AUSTRALIA noted its reservation regarding the upper limits for liability contained in Annex I. CANADA proposed that the LWG be mandated by the COP to continue working on the Annex. SWEDEN proposed defining SDRs as they are defined by the International Monetary Fund. The draft text on Protocol Article 13 and Annex I were agreed upon with minor amendments.



DRAFT PROTOCOL ARTICLE 15 (INSURANCE AND OTHER FINANCIAL GUARANTEES): The group next considered and agreed on a draft text on this issue resulting from informal consultations conducted by Singapore and Switzerland.

SINGAPORE reported that agreement was reached on the right to assert a claim against any person providing insurance, bonds or other financial guarantees covering their liability under Protocol Article 4 (strict liability), unless a Contracting Party has, when signing, ratifying, approving or acceding to the Protocol, indicated that such a right is not available.

DRAFT PROTOCOL ARTICLE 12 (CONFLICTS WITH OTHER LIABILITY AND COMPENSATION AGREEMENTS): On this issue, the group agreed to text resulting from informal consultations. The text refers to instances where both the provisions of the Protocol and the provisions of a bilateral, multi-lateral or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement. The text states that the Protocol shall not apply provided the other agreement is in force for the Party or Parties concerned and had been opened for signature when the Protocol was opened for signature, whether or not the other agreement was subsequently amended.

DRAFT PROTOCOL ARTICLE 3.6 (EXEMPTION OF APPLICATION OF THE PROTOCOL TO BILATERAL, REGIONAL AND MULTILATERAL AGREEMENTS): The group next considered compromise text on this issue resulting from informal consultations. The key agreed amendments under the compromise are: the Protocol shall not apply provided that the required alternative liability and compensation regime "fully meets, or exceeds the objective of the Protocol by providing a high level of protection to persons who have suffered damage", and the BC Article 11 Party in which the damage has occurred has notified the Depository of the Protocol's non-application; and after such a notification, actions for compensation for damage within the national jurisdiction of any of the BC Article 11 Parties may not be made under the Protocol. The group accepted the compromise proposal.

DRAFT PROTOCOL ARTICLE 16 (FINANCIAL MECHANISM): The Group then considered revised text resulting from informal consultations on the Secretariat-prepared draft Protocol Article 16 and the associated decision on enlargement of the scope of the Technical Cooperation Trust Fund. The revised Protocol Article 16 provides that: where compensation under the Protocol does not cover damage costs, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms; and the COP shall keep under review the possibility of improving existing mechanisms or establishing a new mechanism.

THE GAMBIA, supported by CHINA, NIGERIA and SENEGAL, preferred "need for" to "possibility of" improving existing mechanisms. The group accepted "the need for and possibility of". AUSTRALIA introduced amendments to the associated draft decision, including: specifying that enlargement of the trust fund is on an interim basis; separating out provisions for emergency funding and compensation funding; adding transfer of technology as a trust fund use; requesting the Secretariat to provide the evaluation of information related to the trust fund within a year; and providing for the Expanded Bureau to produce guidelines for the Secretariat's use of the trust fund, which include provisions for repayment to the trust fund of emergency funds paid and subsequently recovered.

JAPAN called for provision to allow contributors to earmark voluntary contributions. On the guidelines, he questioned which body would develop them. AUSTRALIA noted potential difficulties with using a body larger than the Expanded Bureau. The US supported using a larger body to include important stakeholders. Chair Vargas noted the Expanded Bureau could consult with interested Parties and important stakeholders. After further informal consultations, AUSTRALIA presented a revised text of the decision. He highlighted that the new text permits contributors to

earmark contributions for purposes specified in the decision. Concerning the guidelines, he added that the new text: provides for consultation by the Expanded Bureau and submission of the guidelines to the COP; and specifies that recovered funds may be used for the purposes specified in the decision. The NETHERLANDS amended the provision to provide that the use of recovered funds for such purposes should respect the original earmarking, where appropriate. The group accepted Protocol draft Article 16 and the decision as amended.

DRAFT PROTOCOL PREAMBLE: Delegates considered text proposals from the UK and the Netherlands. The Netherlands proposal combined clauses from the UK proposal, the BC Preamble and a clause from the BC text noting Principle 13 of the Rio Declaration which addresses liability and compensation. Delegates deleted a clause affirming State liability in international law, re-positioned the clause noting Principle 13 and made some minor amendments. The group accepted the preamble as amended.

FINANCIAL WORKING GROUP

On institutional, financial and procedural arrangements, the FWG came to a consensus on a draft decision to be submitted for adoption to the Plenary, with the exception of the scale of contributions to the two BC trust funds. In drafting the text, delegates considered, *inter alia*: the surplus of carry-over; recognition that voluntary contributions for both trust funds are essential to the BC's functioning; proposals for new activities, such as translation of meeting documents in three or six UN languages, that have financial implications; and concerns over increasing the contributions to the trust funds.

CONTACT GROUP

MINISTERIAL DECLARATION: Delegates in the contact group on the ministerial declaration met throughout the day and evening and made changes, primarily of a drafting nature, to the draft decision and declaration on environmentally sound management. They agreed on the text of the draft declaration. Concerning the draft decision, two issues remain to be agreed upon: the paragraphs on budgetary and institutional matters, and the annex identifying proposed activities to assist in the implementation of the declaration and decision for 2000-2002.

IN THE CORRIDORS

Concerns over lack of remaining time were alleviated Wednesday as the pace of progress in the Legal Working Group quickened and sticking points, such as Protocol exemptions and setting of analogous standards in parallel regimes, were dispatched with unexpected ease. With momentum gathering due to progress on the Ministerial Declaration and adoption of decisions through the evening Plenary, cautious optimism turned to buoyancy as delegates aspirations of a meaningful Convention seemed increasingly well-founded.

THINGS TO LOOK FOR TODAY

PLENARY: The Plenary will convene for its high-level segment from 10:00 am-1:00 pm and 3:00-6:00 pm in the San Francisco room to celebrate the 10th anniversary of the BC. The Plenary is expected to hear statements from: Moritz Leuenberger, Member of the Federal Council of Switzerland and Head of the Federal Department for the Environment, Transport, Energy and Communications; Klaus Töpfer, UNEP Executive Director; Mostafa K. Tolba, former UNEP Executive Director; along with approximately 30 statements by ministers and heads of delegation, and one by an IGO.

LEGAL WORKING GROUP: The LWG is expected to meet from 12:00 pm in the Montreal room.

FINANCIAL WORKING GROUP: The FWG is expected to meet from 10:00 am in Office 10.

CONTACT GROUP: The contact group on the ministerial declaration is expected to meet from 9:00 am in the Montreal room.