



United Nations
Environment Programme



UNEP



Food and Agriculture
Organization of the United
Nations

Distr.
GENERAL

UNEP/FAO/PIC/INC.1/7
22 December 1995

ORIGINAL: ENGLISH

INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN
INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR
THE APPLICATION OF THE PRIOR INFORMED CONSENT
PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND
PESTICIDES IN INTERNATIONAL TRADE

First session
Brussels, 11-15 March 1996

RELATIONSHIP BETWEEN THE EXISTING INTERNATIONAL LEGALLY BINDING INSTRUMENTS
AND AN INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR THE APPLICATION
OF THE PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN HAZARDOUS
CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE

Note by the Secretariat

Introduction

1. The present document sets out information on several existing international legally binding instruments that contain provisions which might be relevant to an international legally binding instrument for the application of the prior informed consent (PIC) procedure for certain hazardous chemicals and pesticides in international trade (hereinafter referred to as the PIC instrument). The information addresses issues related to the scope of the PIC instrument and relevant regional agreements.

2. Matters related to the General Agreement on Tariffs and Trade are contained in document UNEP/FAO/PIC/INC.1/8, entitled "Trade-related issues", which has been made available to the Committee.

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I. ISSUES RELATED TO THE SCOPE OF THE PIC INSTRUMENT

A. Chemical wastesBasel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

3. The Ad Hoc Working Group of Experts on the Implementation of the Amended London Guidelines, during its deliberations on possible elements of the PIC instrument, identified the need to take fully into account the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and, in particular, to identify the scope of the PIC instrument (UNEP/PIC/WG.1/4/5, annex, paragraphs 10, 11, 21, 22, 25 and 73).

4. For the purposes of the Basel Convention, the following wastes that are subject to transboundary movements are identified as "hazardous wastes": wastes that belong to any category contained in its Annex I 1/, unless they do not possess any of the characteristics contained in Annex III 2/; and wastes that are not covered under the above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit (Article 1, paragraph 1).

Prior written consent on a shipment-by-shipment basis

5. In its Articles 4.1(c) and 6, paras. 1-3, the Basel Convention sets forth the obligation governing prior written consent on a shipment-by-shipment basis concerning transboundary movements of hazardous wastes. The Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes (Article 4.1(c)). The States of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. Such notification shall contain the declarations and information specified in annex V A to the Convention, written in a language acceptable to the State of import. Only one notification needs to be sent to each State concerned (Article 6.1). In response, the State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the State of import shall be sent to the competent authorities of the States concerned which are Parties (Article 6.2). The State of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that the notifier has received the written consent of the State of import and the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound

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management of the wastes in question (Article 6.3). The principle of prior written consent applies also to the State of transit (see Article 6.4).

Wastes disguised as products

6. Regarding the issue of chemical wastes disguised as products, the following provisions of the Basel Convention may be taken into account:

- Any transboundary movement of hazardous wastes or other wastes "with consent obtained from States concerned through falsification, misrepresentation or fraud" or "that does not conform in material way with the documents" shall be deemed illegal traffic (Article 9, paragraphs 1 (c) and (d));
- Each Party shall take appropriate measures to cooperate in activities with other Parties and interested organizations, directly and through the Secretariat, including the dissemination of information on the transboundary movement of hazardous wastes and other wastes, in order to improve the environmentally sound management of such wastes and to achieve the prevention of illegal traffic (Article 4, paragraph 2(h)).

7. To avoid trade of wastes disguised as products in an attempt to avoid control under the Basel Convention, the possible elements for the PIC instrument, as contained in the annex to the report of the Ad Hoc Working Group of Experts at its fourth session (UNEP/PIC/WG.1/4/5), in paragraph 21 note that consideration should be given to the development of a precise definition of substances and preparations in commerce, i.e. which are manufactured according to good manufacturing practices, which meet appropriate specifications, which are appropriately and accurately labelled, and which are not obsolete or out of date.

Obsolete pesticides

8. Regarding problems relating to the shipment and stockpiling of "obsolete pesticides", it might be necessary to clarify the meaning of "obsolete pesticides" in order to identify whether such substances are considered as wastes covered by the Basel Convention.

B. Hazardous chemicals

International Labour Organization (ILO) Conventions Concerning Safety in the Use of Chemicals at Work (ILO No. 170) and concerning the Prevention of Major Industrial Accidents (ILO No. 174)

9. Each ILO member State having ratified the Convention (No.170) Concerning Safety in the Use of Chemicals at Work (adopted 1990) assumes, inter alia, the obligations to set up a classification system, based on specific appropriate criteria, for the determination of whether a chemical is hazardous, to establish chemical safety data sheets for hazardous chemicals,

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including detailed information on hazards, safety precautions and emergency procedures recommended for such a chemical, and to label hazardous chemicals so as to provide essential information regarding the hazards they present and the safety precautions to be observed. (Articles 5, 6, 7 and 8 of Convention No.170).

10. In Convention No.170, the term "hazardous chemical" is defined as follows:

"The term "hazardous chemicals" includes any chemical which has been classified as hazardous in accordance with Article 6 [of the present convention] or for which relevant information exists to indicate that the chemical is hazardous" (Article 2 (b)).

11. Article 6, paragraph 2, of the Convention states that:

"Systems and specific criteria appropriate for the classification of all chemicals according to the type and degree of their intrinsic health and physical hazards and for assessing the relevance of the information required to determine whether a chemical is hazardous shall be established by the competent authority, or by a body approved or recognised by the competent authority, in accordance with national or international standards."

12. Convention No.170, under the "General principles" in its Part II, provides the basis for decision-making concerning chemicals management and in its Article 5 states that the "competent authority shall have the power, if justified on safety and health grounds, to prohibit or restrict the use of certain hazardous chemicals, or to require advance notification and authorisation before such chemicals are used."

13. ILO Conventions No. 170 and No. 174 set out provisions obligating an exporting ILO member State to undertake export notifications as follows:

- "When in a exporting member State all or some uses of hazardous chemicals are prohibited for reasons of safety and health at work, this fact and the reasons for it shall be communicated by the exporting member State to any importing country" (Convention No. 170, Article 19).
- "When, in an exporting member State, the use of hazardous substances, technologies or processes is prohibited as a potential source of a major accident, the information on this prohibition and the reasons for it shall be made available by the exporting member State to any importing country" (Convention No. 174, Article 22).

14. In Convention No. 174, Article 3(a), "hazardous substance" is defined as "a substance or mixture of substances which by virtue of chemical, physical or toxicological properties, either singly or in combination, constitutes a hazard".

C. General information exchange on chemicals/technical assistance

Lomé IV Convention (Fourth Africa-Caribbean-Pacific (ACP)-European Community Convention)

15. In its Article 40, under Title I "Environment", the Lomé IV Convention (adopted in 1989) states that "at the request of the ACP States, the Community shall provide available technical information on pesticides and other chemical products with a view to helping them to develop or reinforce a suitable and safe use of these products. Where necessary and in accordance with the provisions for development finance cooperation, technical assistance can be given in order to ensure conditions of safety at all stages, from production to disposal of such products".

D. Chemicals controlled under other instruments

Montreal Protocol on Substances that Deplete the Ozone Layer

16. As the ozone-depleting substances covered by the Montreal Protocol are being controlled for phase-out, those substances are likely to be banned or severely restricted through national regulations by the Parties to the Protocol, which may trigger the notification of national control action under the PIC procedure. This fact might be considered with a view to harmonizing of the PIC instrument with regulatory measures undertaken to comply with the Montreal Protocol.

ILO Conventions

17. Where chemicals are carcinogenic, the provisions of the ILO Convention Concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents (No.139) (adopted 1974) relating to prohibitions and controls may be taken into account. The Convention Concerning Protection Against Hazards of Poisoning Arising from Benzene (No.136) (adopted 1971) addresses that particular chemical.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction

18. Under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, certain toxic chemicals will be subject to strict national control measures. To the extent that such chemicals are banned or severely restricted, consideration similar to those for the Montreal Protocol may be given.

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II. RELEVANT REGIONAL AGREEMENTS

A. Regional application of the PIC procedureCouncil Regulation (EEC) No.2455/92 adopted by the Council of the European Communities on 23 July 1992, concerning the export and import of certain dangerous chemicals

19. The objectives of Council Regulation (EEC) No.2455/92 are to establish a common system of notification and information for imports from and export to third countries of certain hazardous chemicals which are banned or severely restricted on account of their effects on human health and the environment and to apply the international notification and PIC procedure established by UNEP and FAO (Article 1.1). Its purpose is also to ensure that the provisions of Directive 67/548/EEC on the classification, packaging and labelling of substances dangerous to man or the environment when they are placed on the market in the European Union member States shall also apply to such substances when they are exported from the member States to third countries.

20. The Regulation includes articles concerning: objectives; definitions; designation of authorities by each member State; exports to third countries; participation in the international notification and PIC procedure; infringements; packaging and labelling; notification from third countries; exchange of information and monitoring; updating of annexes (Articles 1-11). Chemicals covered by the Regulation are set out in its Annexes I and II.

List of banned or severely restricted chemicals

21. Annex I of Regulation No.2455/92 contains a list of chemicals banned or severely restricted to certain use under European Union legislation owing to their effects on health and the environment. This list is subject to review by the European Commission at regular intervals, in light of experience gained in implementing the Regulation. If, for health or environmental reasons, the control action bans or severely restricts the use of a chemical in any one of the three major categories of use (plant protection products, industrial chemicals, consumer products chemicals), the chemical will be included in Annex I (Article 11). "Chemicals subject to the PIC procedure" means the chemicals listed in Annex II of the regulation (Article 2). Annex II contains "the international list of banned or severely restricted chemicals subject to the PIC procedure established by the UNEP and FAO" (Article 5.3).

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B. Possible regional decision-making for import decision

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa

22. Under the Bamako Convention (adopted in 1991), "hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reasons" are defined as "hazardous wastes" (Article 2(d)), and the import into Africa of such substances is prohibited. The Bamako Convention is open to the member States of the Organization of African Unity. When the Bamako Convention enters into force (as at 12 December 1995, not in force), consideration might be given by its Parties with regard to import decisions to be taken as part of the PIC procedure under the PIC Instrument.

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Notes

1/ Annex I of the Basel Convention identifies the categories of wastes to be controlled as follows:

Waste Streams: Clinical wastes from medical care in hospitals, medical centres and clinics; wastes from the production and preparation of pharmaceutical products; waste pharmaceuticals, drugs and medicines; wastes from the production, formulation and use of biocides and phytopharmaceuticals; wastes from the manufacture, formulation and use of wood preserving chemicals; wastes from the production, formulation and use of organic solvents; wastes from heat treatment and tempering operations containing cyanides; waste mineral oils unfit for their originally intended use; waste oils/water, hydrocarbons/water mixtures, emulsions; waste substances and articles containing or contaminated with polychlorinated biphenyls (PCBs) and/or polychlorinated terphenyls (PCTs) and/or polybromated biphenyls (PBBs); waste tarry residues arising from refining, distillation and any pyrolytic treatment; wastes from production, formulation and use of inks, dyes, pigments, paints, lacquers, varnish; wastes from production, formulation and use of resins, latex, plasticizers, glues/adhesives; waste chemical substances arising from research and development or teaching activities which are not identified and/or are new and whose effects on man and/or the environment are not known; wastes of an explosive nature not subject to other legislation; wastes from production, formulation and use of photographic chemicals and processing materials; wastes resulting from surface treatment of metals and plastics; residues arising from industrial waste disposal operations.

Wastes having as constituents: Metal carbonyls; beryllium compounds; hexavalent chromium compounds; copper compounds; zinc compounds; arsenic: arsenic compounds; selenium: selenium compounds; cadmium: cadmium compounds; antimony: antimony compounds; tellurium: tellurium compounds; mercury: mercury compounds; thallium: thallium compounds; lead: lead compounds; inorganic fluorine compounds excluding calcium fluoride; inorganic cyanides; acidic solutions or acids in solid form; basic solutions or bases in solid form; asbestos (dust and fibers); organic phosphorus compounds; organic cyanides; phenols: phenol compounds including chlorophenols; ethers; halogenated organic solvents; organic solvents excluding halogenated solvents; any congener of polychlorinated dibenzo-furan; any congener of polychlorinated dibenzo-p-dioxin; organohalogen compounds other than substances referred to in this Annex.

2/ Annex III of the Basel Convention sets out a list of hazardous characteristics as follows: explosive; flammable liquids; flammable solids; substances or wastes liable to spontaneous combustion; substances or wastes which, in contact with water emit flammable gases; oxidizing; organic peroxides; poisonous (acute); corrosives; liberation of toxic gases in contact with air or water; toxic (delayed or chronic); ecotoxic; capable, by any means, after disposal, of yielding another material, e.g., leachate, which possesses any of the characteristics listed above.
