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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

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COMMENTS ON THE POSSIBLE ELEMENTS FOR AN INTERNATIONAL LEGALLY BINDING
INSTRUMENT FOR THE APPLICATION OF THE PRIOR INFORMED CONSENT PROCEDURE
FOR CERTAIN HAZARDOUS CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE
IDENTIFIED BY THE AD HOC WORKING GROUP

Note by the Secretariat

Introduction

1. On 14 July 1994, the Executive Director of the United Nations Environment Programme (UNEP) sent a letter to all Governments and the European Commission inviting their comments on possible elements which might be included in an international legally binding instrument for the application of the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade (hereinafter referred to as the PIC instrument in the present document) which were identified by the Ad Hoc Working Group of Experts on the Implementation of the Amended London Guidelines and the task force established by the Working Group (see UNEP/PIC/WG.1/4/5, annex). By 30 November 1995, the following Governments and the European Commission had provided their responses:

Australia, Bulgaria, Canada, Cape Verde, Colombia, Croatia, Cyprus, Czech Republic, Gambia, Guinea, Kuwait, Malaysia, Netherlands, Philippines, Republic of Korea, Saint Vincent and the Grenadines, Singapore, Slovakia, South Africa, Sweden, Switzerland, Thailand, Uganda, United Kingdom, United States of America, Uruguay, Zambia.

2. This note summarizes the comments and views expressed in the responses received, with the focus on some of the issues identified by an informal consultative meeting to consider major issues related to the development of the PIC instrument held by UNEP and FAO in December 1994 (see UNEP/PIC/CONS.5/3). It should be noted that a number of Governments, without providing specific comments, identified the elements for the PIC instrument set out in the annex of document UNEP/PIC/WG.1/4/5 as an adequate basis considering the provisions of the PIC instrument.

I. GENERAL VIEWS ON THE PIC INSTRUMENT

3. In commenting on the objectives and other possible elements of the PIC instrument, a number of Governments expressed views on how the framework of the PIC instrument could be defined and what its components would be. With regard to the PIC procedure, there were generally two views:

- The existing voluntary PIC procedure, as set out in the amended London Guidelines for the Exchange of Information on Chemicals in International Trade and the International Code of Conduct on the Distribution and Use of Pesticides, should be the basis;
- There may be variations from the existing voluntary PIC procedure if experiences in its implementation indicate the need for them.

4. In addition to consideration of the operation of the PIC procedure, the comments indicated the need for due consideration of the following:

- National measures, to be undertaken by each Party, to ensure the effective implementation of the PIC procedure (such as enhancement of relevant laws and regulatory measures and institutions);
- International actions, to be carried out by the Parties collectively, to ensure compliance with the provisions of the PIC instrument (such as technical assistance, a financial mechanism and compliance measures) or to undertake supplementary measures (such as the export notification system);
- Institutional arrangements (such as a Conference of the Parties and a Secretariat of the PIC instrument).

5. The comments also suggested that the following be taken into account:

- Special situations of developing countries, such as the lack of adequate capacities and capabilities to manage chemicals safely or control international trade, or the need to use, for economic and social development, certain hazardous chemicals that are banned or restricted in other countries;

- Need to avoid overlap with the scope of existing legally binding instruments;
- The principles of the General Agreement on Tariffs and Trade/World Trade Organization rules.

II. SCOPE

Banned or severely restricted chemicals

6. Many Governments expressed their views concerning the scope of the PIC instrument. Several Governments stated that it should cover chemicals banned or severely restricted for health and environmental reasons by domestic regulatory measures. It should be clearly stated that the instrument covers both pesticides and industrial chemicals. Due consideration should be given to the definition of "banned" or "severely restricted" chemicals.

Hazardous pesticide formulations

7. A number of Governments emphasized that the PIC instrument should cover hazardous pesticide formulations which may be causing environmental problems under conditions of use in countries that do not have adequate infrastructure. On the other hand, the view was expressed that setting out a provision concerning "hazardous pesticide formulations" seemed superfluous, since the chemicals covered by the PIC instrument should ultimately be defined in a list set out in an annex to it.

Industrial chemicals which may be causing health and/or environmental problems under conditions of use in countries that do not have adequate infrastructure

8. There were pro and con opinions on the subject of industrial chemicals which may be causing health and/or environmental problems. The respective arguments were as follows:

Pro: Support their inclusion, as developing countries may not have adequate infrastructure to deal with such problems. In such a case, a set of criteria to identify such industrial chemicals may be necessary.

Con: Object to the inclusion of such chemicals, as the emphasis should be on addressing unreasonable risks, rather than any intrinsic hazard. In the context of industrial chemicals, exposure cannot be assumed, because there is no broad-scale deliberate release as there is with pesticides.

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Unregistered pesticides

9. One view held that unregistered pesticides could still be included in the scope of the instrument upon notification of a decision concerning a domestic ban or restriction of such chemicals.

10. It was pointed out that the inclusion of such pesticides in the scope of the instrument would require the definition of a "well-developed registration system".

Industrial chemicals which are not used in the country of manufacture/unregistered chemicals (other than pesticides)

11. There was support for, as well as objection to, a proposal to cover industrial chemicals which are not used in the country of manufacture for health or environmental reasons.

12. The view was expressed the chemicals already banned or severely restricted and those which had not been registered in the country of manufacture for environmental and health reasons should be included in the PIC procedure. It was stated that this question might partly be resolved by extending the definition of "ban" to include governmental refusal of registration or voluntary withdrawal of a registration application.

List of chemicals subject to the PIC procedure

13. A number of Governments, assuming the compilation of a list of chemicals subject to the PIC procedure (hereinafter referred to as the PIC List in the present document), provided the following comments:

- Notification of a domestic ban or severe restriction should remain the trigger for listing chemicals in the PIC procedure;
- Specified procedures for nomination and recommendation of chemicals for inclusion in and deletion from the PIC List may be set out in the PIC instrument. Such procedures should be transparent;
- The PIC List should be:
 - Open-ended rather than confined to particular end-use categories (such as industrial chemicals);
 - Kept to a minimum, targeted at particularly dangerous chemicals that are strictly regulated;
 - Constantly updated, without having to pass through administrative steps required for ratification of its amendment.

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14. One view held that the PIC List should not be limited to those chemicals for which Decision Guidance Documents (DGDs) had been prepared, since there might be delays in the preparation and distribution of DGDs following notification of a control action.

Hazardous chemicals

15. A number of Governments objected to extension of the scope to include hazardous chemicals that did not give rise to significant risks under normal conditions of use, believing that the PIC procedure should be targeted only at specific chemicals causing health and/or environmental problems, on the basis of the notification of national control actions. If all chemicals, other than those banned and severely restricted but likely to cause health or environmental problems, were to be included in the PIC procedure, then the PIC List would be overwhelmed by sheer numbers.

Chemical wastes

16. Many Governments emphasized that chemical wastes should not be included in the scope of the PIC instrument, as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal adequately addressed the problem of chemical wastes. Overlapping, duplicative regimes should not be created. There was a proposal explicitly to exempt the wastes covered by the Basel Convention.

17. On the other hand, one Government suggested the inclusion of both chemical wastes and hazardous chemicals in the scope of the instrument.

18. There was a proposal to develop a precise definition of substances and preparations in commerce in order to address the problem of chemical wastes traded as disguised products. It might be necessary to address possible problems caused by the lack of clear delineation of the boundaries between the system governing the transboundary movements of wastes under the Basel Convention and the PIC procedure governing chemicals in international trade.

General information exchange

19. Several Governments addressed the pros and cons of a provision concerning general information exchange, giving the following arguments:

Pro: The exchange of information on chemical safety in general would guarantee the effective implementation of the PIC procedure.

Con: Chemicals not qualified for inclusion in the PIC procedure need not be considered within the scope of the PIC instrument. As general information exchange involves a broad range of controversial matters of vast technical detail, it cannot be comprehensively addressed in the instrument.

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Views on prohibition of use or the phasing out of hazardous chemicals

20. With regard to a suggestion that provisions for prohibition of use or for the phasing out of hazardous chemicals be incorporated, the comments made by several Governments may be generally summarized as follows:

Pro: Support this view, referring to the sovereign right of States to ban the importation, use and disposal of hazardous chemicals. If such an option is considered, only some chemicals that are the most toxic to human beings and the environment should be considered.

Con: Object to the incorporation of such provisions in an instrument dealing with the PIC procedure. It may be simpler and less controversial not to introduce provisions for bans, but to consider this an issue for a possible future protocol.

III. EXEMPTIONS

Chemicals imported for the purpose of research or analysis

21. Regarding the exemption of chemicals imported for the purpose of research or analysis, it was proposed that certain measures should be set out in order to avoid possible misuse of such exemption. To clarify "quantities for research or analysis not likely to affect the environment or human health", there was a proposal to define the terms "health and environmental problems"; however, there was one objection to the drawing up of such a definition.

Chemicals imported as personal or household effects

22. Regarding the exemption of chemicals imported as personal or household effects in quantities reasonable for these uses, there was a view that such quantities may need further definition. There was a proposal to exclude from the exemptions such chemicals, because: small quantities of some chemicals could cause serious damage to human health and the environment; there is a lack of clarity in verifying such purposes; there is the possibility that prohibited chemicals could be imported disguised as personal effects.

Veterinary chemicals

23. While it was considered that veterinary chemicals should be included in the PIC procedure, as there was a possibility that such chemicals could have detrimental effects on the environment, another view was expressed that veterinary chemicals should be exempted from the PIC procedure, as they are often already covered under existing regimes.

Cosmetics

24. The pros and cons of exempting cosmetics from the scope of the PIC instrument were considered.

Threshold

25. There was a proposal to set a threshold for quantities to which exemptions could apply.

IV. DEFINITIONS

26. In addition to the terms listed in the annex of document UNEP/PIC/WG.1/4/5, there was a proposal to add terms to be defined. They may include: chemical product, pharmaceutical, obsolete chemical, registration and hazardous wastes. One view held that the definition of "chemical product", as contrasted with "chemical wastes", was likely to be difficult and should be undertaken in close consultation with other international organizations.

V. GENERAL OBLIGATIONS

27. The view was expressed that some of the elements concerning general obligations might not have a direct reference to the amended London Guidelines, but such elements could be necessary to enhance the PIC instrument.

28. In making proposals concerning general obligations, the following points were raised:

- Emphasis should be on the importance of information on effective or environmentally safer replacements to protect human health and the environment;
- It was necessary to strengthen national infrastructures and institutions in both importing and exporting countries regarding pesticides, taking fully into account the International Code of Conduct on the Distribution and Use of Pesticides;
- When considering the promotion of voluntary agreements and initiatives by industry, the focus should be on strengthening the application of the PIC procedure.

Access to information

29. Different views were given in support of and objecting to provisions regarding access to information related to the chemicals on the PIC List.

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VI. PIC PROCEDURE

30. With regard to the operation of the mandatory PIC procedure, the following points for consideration were referred to:

- Appropriate number of designated national authorities in a Party;
- Possible cooperation between the Parties and the Secretariat of the PIC instrument in developing DGDs;
- With regard to import decisions:
 - An import response form should indicate the conditions of use to which import decisions apply;
 - The arrangement for the exchange of information between the Secretariat and the Parties should be clearly defined to enable the prompt flow of information;
 - It is necessary to ensure an appropriate transfer of technology and resources to developing countries to enable them to make import decisions in compliance with relevant provisions governing imports;
 - An appropriate and realistic period for making import decisions should be considered.
 - It is important to ensure that the provisions of import decisions are conformity with the provisions of GATT;
- Regarding the status quo, the obtaining of explicit consent of an importing Party with regard to pesticides;
- Regarding national measures in exporting countries: to allow the Parties options for compliance without necessarily requiring regulations, for example through memoranda of understanding between the Government and industry;
- Regarding national measures taken by importing countries: to give consideration to possible conflict with the principles of GATT.

Appeal

31. On the subject of appeal concerning the chemicals on the PIC List, several Governments' comments may be divided into pros and cons as follows:

Pro: Provide a mechanism for removal of a chemical from the PIC List, on the basis of the existing voluntary PIC procedure. This might require referring back to the Government that made the decision to control the chemical in question for consideration and re-evaluation, in which case national legislation would have to be harmonized

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accordingly. Modalities may be established to regularly re-evaluate the chemicals, based on new scientific data.

Con: An appeal against the listing of a chemical under the PIC procedure, triggered by national notification, would be inappropriate.

Application of PIC to all sources

32. The opinion was held that the PIC principle should be applied to all sources of supply in order to ensure the effectiveness of a mandatory PIC procedure.

State of transit

33. There was a proposal that, in addition to the States of export and import, consideration should be given to the application of the PIC procedure to the State of transit.

VII. EXPORT NOTIFICATION

34. Several Governments, supporting the setting out of provisions concerning export notification, believed that export notification would reinforce the effectiveness of the PIC procedure. In this regard, knowledge could be drawn from the experience within the European Union in implementation of Council Regulation (EEC) 2455/92 concerning the export and import of certain dangerous chemicals. Information on quantities of chemicals and the name and address of the importer could be included in the export notification.

VIII. CONFIDENTIAL DATA

35. Concerning confidential data, there was a proposal to set out criteria for the identification of non-confidential data, taking into account relevant national policies.

IX. CLASSIFICATION, PACKAGING AND LABELLING

36. Several Governments provided comments on this subject as follows:

Pro: Propose setting out provisions concerning the harmonized classification, packaging and labelling of chemicals on the PIC List. Another view proposed setting out provisions governing labelling for such chemicals. Such measures would ensure better control of such chemicals, in particular at the point of entry in importing countries.

Con: Although closely related and usefully linked to the PIC procedure, classification, packaging and labelling are part of the information exchange process, rather than the PIC procedure, and should be considered beyond the scope of the PIC instrument.

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X. MONITORING AND COMPLIANCE MEASURES

37. Views on the subject of monitoring and compliance measures fell under the following three options, as presented in the annex of document UNEP/PIC/WG.1/4/5:

- Defer, until the first meeting of the Conference of the Parties, any decision regarding procedures and institutional mechanisms for determining non-compliance and treatment of Parties found to be in non-compliance;
- Set out specific provisions governing such aspects as monitoring and reporting procedures. Procedures and institutional mechanisms may also be set out for identifying non-compliance with the provisions of the instrument and for treatment of Parties found to be in non-compliance;
- Set out obligations for Parties to take appropriate legal or administrative action in the event of infringement of the provisions of the instrument.

XI. LIABILITY AND COMPENSATION

38. A view was expressed that liability and compensation issues should be considered by the Conference of the Parties. It would be necessary to clarify the scope and type of liability envisaged.

XII. TECHNICAL ASSISTANCE

39. Many Governments provided comments supporting the inclusion of provisions concerning technical assistance, with or without an indicative list of the categories of technical assistance. There was a proposal to draw upon the experience gained in the implementation of the Montreal Protocol's financial mechanism and its indicative list of technical assistance, which latter would require careful elaboration.

40. The Governments of a number of developing countries identified the following points for consideration:

- Implication of the mandatory application of the PIC procedure to developing countries and the need for developing countries to have easy access to technical assistance;
- Need to establish or improve ways and means for developing countries to control imports of chemicals;
- Need to identify affordable and safe alternatives;
- Need to promote environmental monitoring and analysis;

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- Assistance in legal and institutional strengthening, especially for countries which do not have an adequate national chemical legislation;
- Need for training, technical and financial assistance for developing countries, particularly for risk assessment and evaluation of alternative chemicals subject to the PIC procedure;
- Strengthening of relevant regional research/technical institutes to assist developing countries in enhancing national chemical programmes.

Clearing-house mechanism

41. Several Governments suggested that the Conference of the Parties at its first meeting designate a competent international organization(s) to undertake the functions of a clearing-house mechanism to promote and facilitate technical assistance. A single competent international organization with a highly efficient secretariat and appropriate technical resources might be able to carry out the functions of the clearing-house mechanism. The Secretariat of the PIC instrument might be an appropriate focal point for the activities under the PIC instrument.

XIII. RELATIONSHIP WITH NON-PARTIES

42. According to one view, it was vital for decisions on import and use of chemicals to apply to all sources of supply, and not only to sources in countries party to the PIC instrument.

Control of trade with non-Parties

43. Views differed concerning the control of trade with non-Parties, as follows:

- Because of the complexity of the subject, before deciding on the modalities of dealing with non-Parties, there should be thorough examination of the issue, possibly in a study group;
- Restrict trade with non-Parties;
- Any trade control should provide for a grace period prior to implementation;
- Allow trade with non-Parties as long as the non-Parties agree to abide by the PIC procedure and the requirements under the procedure.

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XIV. RELATIONSHIP TO THE SCOPE OF OTHER INSTRUMENTS

44. It was pointed out that any overlap with existing instruments, such as those concerning wastes (see paragraphs 16-18 above), ozone depletion (the Montreal Protocol on Substances that Deplete the Ozone Layer, which lists controlled substances) and narcotics should be avoided.

International trade rules and measures

45. Several Governments pointed to the need to take fully into account the relevant rights and obligations under GATT/WTO rules, as well as the objectives of the PIC instrument. Appropriate trade control measures, for example those designed for effective customs control, might also be elaborated.

XV. INSTITUTIONAL ARRANGEMENTS

Conference of the Parties

46. Regarding the functions of the Conference of the Parties, the view was expressed that amendment of the PIC List by the Conference of the Parties seemed inappropriate. Amendment of the PIC List was essentially a product of the PIC process itself. However, for the adoption of new annexes or schedules and a concomitant broadening of the PIC procedure, a decision by the Conference of the Parties might be appropriate.

Secretariat

47. A number of Governments provided comments on the institutional arrangements, functions, and interim modalities of the Secretariat of the PIC instrument, as follows:

- Regarding institutional arrangements, there were two views:
 - Specifically identify UNEP and FAO as potential organizations to undertake the functions of Secretariat of the instrument;
 - Without specifying the organizations, refer only to "a competent organization" with qualified staff and appropriate means for carrying out Secretariat functions for the interim period, and the Conference of the Parties at its first meeting will designate the organizations.
- The functions of the Secretariat may include ensuring prompt communication between the Parties, compiling relevant data and keeping a record related to non-compliance and regularly publishing statistics concerning international trade in the chemicals on the PIC List.

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XVI. FINANCIAL ISSUES

48. In one view, the administrative costs of operating the PIC instrument, should be kept to a minimum in order to encourage the widest possible participation.

49. There were generally two views for or against the establishment of a new financial mechanism:

Pro: An independent financial mechanism seems the most effective way forward for capacity-building for management of chemicals and implementation of the PIC procedure. It should be closely linked to the clearing-house functions;

Con: Existing financial mechanisms should be used in order to ensure the widest possible participation of States in the PIC instrument.

XVII. OTHER ISSUES

Preamble

50. The following points were raised among the comments and proposals on the preamble:

- Focus on the specific issues relevant to the PIC instrument and avoid references to very general principles;
- Identify the responsibility of States whose activities could cause transboundary environmental problems, in particular the responsibility of the State of export of a chemical in providing the State of import with relevant information concerning the chemical;
- Emphasize the importance of information exchange on environmentally safer alternatives to banned and severely restricted chemicals and environmentally preferable alternative food production and pest management technologies;
- Recognize the inadequate capacities and capabilities of developing countries, including financial resources, and the essential importance of international cooperation, including regional cooperation, in providing technical assistance for the enhancement of the environmentally sound management of chemicals;
- Refer to the provisions/principle of relevant international legal instruments as they relate to the PIC instrument;
- Note the sovereignty of States in adopting more stringent regulatory measures than those agreed at the international level;

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- Note the need for international action to put toxic and dangerous products under more stringent control;
- Consolidate those paragraphs that address the same or very similar issues.

Annexes

51. The view was held that a simplified process for adoption and amendment of the annexes might be appropriate for annexes on information management and procedural bureaucratic matters, such as notification/response forms and drafting procedures for DGDs. Such a simplified amendment process would be appropriate only for technical annexes. Amendment of non-technical annexes should be considered by the Conference of the Parties and may be adopted by consensus or a two-thirds majority vote.

52. It was pointed out that the annexes should include: a form for information regarding export and a flow-chart of the PIC procedure, the procedure for removing a chemical in PIC and the modalities of appeal.
