



Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

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Chemical Review Committee

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**Review of the outcome of the fourth meeting of the
Conference of the Parties to the Rotterdam Convention
relevant to the Committee's work**

Additional legal opinion on intentional misuse and the application of criterion (d) of Annex II to the Convention

Note by the Secretariat

1. In considering a notification of final regulatory action from Thailand regarding the chemical endosulfan, the Chemical Review Committee at its second meeting discussed extensively the term “misuse” as used in criterion (d) of Annex II to the Rotterdam Convention. To capture the Committee’s discussion and to clarify the matter for future meetings, a working paper on misuse was prepared and forwarded to the Conference of the Parties. It was understood that future notifications relating to misuse should be considered on a case-by-case basis and the working paper should evolve as further experience was gained.
2. At its third meeting, the Conference of the Parties agreed that the Committee would continue to consider notifications involving intentional misuse on a case-by-case basis but that a legal opinion from the United Nations Environment Programme (UNEP) legal office to clarify the meaning of the term “intentional misuse” should be obtained and made available to the Committee to inform future discussions. Accordingly, the legal opinion was made available to the Committee at its third meeting (document UNEP/FAO/CRC.3/INF/7) and subsequently included in the working paper on the application of criterion (d) of Annex II, which may be found in the compilation of working procedures and policy guidance for the Committee (document UNEP/FAO/RC/CRC.6/INF/3). A further copy of this legal opinion may be found in Annex II to the present note. The legal opinion has not been formally edited.
3. In considering the inclusion of endosulfan in Annex III to the Convention, the Conference of the Parties, by its decision RC-4/6, requested Parties and interested observers to provide the Secretariat with their considered views on the application of criterion (d) of Annex II. It further requested the Secretariat both to ask the UNEP legal office to review its previous advice to the Committee and to communicate such a legal opinion, when completed, to the Committee, as well as to all Parties and interested observers. Annex I to the present note contains the additional legal opinion on intentional misuse and

* UNEP/FAO/RC/CRC.6/1.
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the application of criterion (d) of Annex II as provided by the UNEP legal office. The legal opinion has not been formally edited.

4. In accordance with the above-mentioned decision, the Committee should take the legal opinion into account when considering the application of criterion (d) of Annex II to the Convention.

Annex 1

Supplementary legal opinion concerning the clarification of the meaning of “intentional misuse” and the application of criterion (d) in Annex II of the Convention

I. Introduction

1. The Conference of the Parties, in decision RC-4/6, requested that Parties and interested observers provide to the Secretariat their considered views on the application of criterion (d) in Annex II of the Convention, and requested that the Secretariat provide such views to the UNEP legal office for it to review its previous advice to the Chemical Review Committee (CRC) contained in the information document on the subject provided to the Committee for its third meeting regarding clarification of the meaning of “intentional misuse” and the application of criterion (d) in Annex II of the Convention.

2. Consequently, the UNEP legal office, having received from the Secretariat the views submitted by a number of Parties and interested observers on this matter in accordance with the decision, reviewed its previous legal opinion provided to the CRC at its third meeting. On the basis of this review, the UNEP legal office concluded that its legal opinion provided to the CRC at its third meeting should be maintained, but it might be necessary to further clarify certain issues which provided the underlining basis to form the previous legal opinion but might not be explicit. The purpose of the present note is to provide supplementary legal opinion to that end, which should be read together with the previous legal opinion. It does not supersede or replace the previous legal opinion, but merely to complement it.

II. Supplementary legal opinion

A. Basis for interpretation

3. The Vienna Convention on the Law of Treaties codifies internationally recognized norms and practices regarding treaties which are applicable to the Rotterdam Convention. The Vienna Convention, in Articles 31, sets out general rule of interpretation. In accordance with its paragraph 1 “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” As specified in its paragraph 2, the context for the purpose of the interpretation of a treaty shall comprise the text, including its preamble and annexes, and also any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty as well as any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Together with the context, in accordance with its paragraph 3, the following must be taken into account: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties. In accordance with its paragraph 4, “[a] special meaning shall be given to a term if it is established that the parties so intended.” Furthermore, the Vienna Convention, in its Article 32, envisages supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from

the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

B. Objective of the Rotterdam Convention

4. As stated in its Article 1, the objective of the Rotterdam Convention is “to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision making process on their import and export and by disseminating these decisions to Parties.”

5. In concluding the Rotterdam Convention, as stated in its preamble, the Parties are “[a]ware of the harmful impact on human health and the environment from certain hazardous chemicals and pesticides in international trade,” and “[d]etermined to protect human health, including the health of consumers and workers, and the environment against potentially harmful impacts from certain hazardous chemicals and pesticides in international trade.”

6. The above objective and the fundamental intent of the Parties to protect human health and the environment from potential harm of certain hazardous chemicals and pesticides in international trade provide the foundation upon which the provisions of the Convention as contained in its various articles and annexes ought to be understood and interpreted.

C. Circumstances and particular requirements of developing countries and countries with economies in transition

7. In concluding the Rotterdam Convention, the Parties, as stated in the preamble, took into account “the circumstances and particular requirements of developing countries and countries with economies in transition, in particular the need to strengthen national capabilities and capacities for the management of chemicals, including transfer of technology, providing financial and technical assistance and promoting cooperation among the Parties”. In addition to the specific provisions to address problems and special needs of developing countries and countries with economies in transition, such as the procedures governing severely hazardous pesticide formulation (Article 6) and technical assistance (Article 16), the circumstances and particular requirements of developing countries and countries with economies in transition need to be taken into account in the application of the provisions contained in the text and annexes of the Convention, where relevant.

8. In this context, the CRC, when it considers the final regulatory action notified by Parties in accordance with criteria set out in Annex II, is required to give consideration to the circumstances and particular requirements of developing countries and countries with economies in transition, including when it considers the conditions prevailing in the Party in question in connection with its action required under Annex II. This might have direct bearing on consideration of what might constitute “use” or “misuse” or “intentional misuse”, and the application of the criterion contained in paragraph (d) of Annex II. As stated in the previous legal opinion, even when the chemical is “misused” in a strict sense, it may not constitute the act of “intentional misuse” of the chemical by a person, given the prevailing

circumstances in a developing country or country with economies in transition, if the person believes that he/she is using the chemical in a manner as designed for its use due to its common use in his/her community, or the person does not have specific knowledge concerning the law or regulation governing the chemical or the use for which the chemical is designed, and therefore he/she is not able to ascertain its legitimate use, or simply believes that common use of a chemical in his/her community is legitimate use because of illiteracy or lack of understandable means for communicating the legitimate use.

D. Application of criteria in Annex II

9. The CRC is required to undertake actions listed in paragraphs (a) to (d) of Annex II in reviewing the notifications forwarded by the Secretariat pursuant to paragraph 5 of Article 5. These actions are to: (a) confirm that the final regulatory action has been taken in order to protect human health or the environment; (b) establish that the final regulatory action has been taken as a consequence of a risk evaluation. This evaluation shall be based on a review of scientific data in the context of the conditions prevailing in the Party in question; and (c) consider whether the final regulatory action provides a sufficiently broad basis to merit listing of the chemical in Annex III. In accordance with criterion (d), the CRC is to take into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III. The CRC, while considering those criteria, is required to bear in mind the objective and the fundamental intent of the Parties to protect human health and the environment from potential harm of certain hazardous chemicals in international trade.

10. It should be noted that the criteria contained paragraphs (a), (b) and (c) require the CRC to confirm, establish or consider relevant facts with regard to the final regulatory action notified by Parties. On the other hand, the criterion contained in paragraph (d) requires the CRC to remain conscious of the condition that intentional misuse is not in itself an adequate reason to list a chemical in Annex III. Given the text of Annex II, and by reading it in ordinary meaning to the respective terms in this context, and in light of the objective of the Convention, in the event where the criteria under paragraphs (a), (b) and (c) are met, it appears that the criterion contained in paragraph (d) cease to take effect. On the other hand, where those criteria in paragraphs (a), (b) and (c) are not met, and the only the reason for the final regulatory action in question is “intentional misuse” as such, the criterion in paragraph (d) would take effect. With this background, the previous legal opinion stated as follows:

“It does not exclude the possibility that a banned chemical, which might have satisfied the criteria (a) to (c) of Annex II, might be intentionally misused. In this case, the incidents of intentional misuse associated with the chemical should not be construed to disqualify that chemical for listing in Annex III. On the other hand, if intentional misuse is the sole reason for the final regulatory action on the chemical and criteria (a)-(c) are not satisfied, it might be considered that there is no adequate reason for listing the chemical in Annex III.”

Annex 2 - Legal opinion on intentional misuse, as contained in document UNEP/FAO/RC/CRC.3/INF/7, dated 8 March 2007

Intentional misuse

Issue: With regard to the application of criterion (d) of Annex II, there is the need to clarify the meaning of “intentional misuse”, which is also referred to in Part 3, criterion (e) of Annex IV.

Legal opinion:

Under Annex II, the CRC is required to undertake actions listed in paragraphs (a) to (d) of Annex II in reviewing the notifications forwarded by the Secretariat pursuant to paragraph 5 of Article 5. In other words, at its deliberations on the notifications, the CRC needs to examine them on the basis of all the criteria listed in Annex II.

Regarding criterion (d) of Annex II, the following may be observed:

- It does not exclude the possibility that a banned chemical, which might have satisfied the criteria (a) to (c) of Annex II, might be intentionally misused. In this case, the incidents of intentional misuse associated with the chemical should not be construed to disqualify that chemical for listing in Annex III.
- On the other hand, if intentional misuse is the sole reason for the final regulatory action on the chemical and criteria (a)-(c) are not satisfied, it might be considered that there is no adequate reason for listing the chemical in Annex III.

Regarding the question of “intentional misuse” of a chemical, the following should be considered:

Meaning of “**misuse**”:

- Where a law or regulation governing the use of the chemical exists in a country, the chemical is used for the purposes not permitted under the law or regulation; or
- The chemical is used in a manner not intended or reasonably foreseeable by the manufacturer of the chemical, irrespective of whether there is a law or regulation governing the use of the chemical in the country.

Meaning of “**intentional**”:

- A person who uses the chemical is in the state of mind in which he/she seeks to accomplish certain results (i.e. the act is to be done or omitted) through a course of action. In other words, he/she desires to cause consequences of his/her act or he/she believes consequences are substantially certain to result by using the chemical.

With regard to “**intentional misuse**”:

For a person to commit “intentional misuse” of the chemical, the following conditions should be met:

- The person knows the legitimate use of the chemical, as permitted under the relevant law or regulation, or otherwise as specified in the label or other means of communication accompanying the chemical; and
- The person purposefully uses the chemical in contravention of the legitimate use of the chemical, with the knowledge or belief that such illegitimate use of the chemical will cause the result that he/she so desires.

Even when the chemical is “misused” in a strict sense, it may not constitute the act of “intentional misuse” of the chemical by a person, given the prevailing circumstances, if:

- The person believes that he/she is using the chemical in a manner as designed for its use (e.g. as many people use the chemical in his/her community and no one has been punished for using it) ; or
 - The person does not have specific knowledge concerning the law or regulation governing the chemical or the use for which the chemical is designed, and therefore he/she is not able to ascertain its legitimate use (e.g. illiteracy, lack of understandable means for communicating the legitimate use).
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