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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

Third session
Geneva, 26-30 May 1997

CONVENTION SCOPE AND EXEMPTIONS

Note by the secretariat

INTRODUCTION

1. Article 3 of the draft text for an international legally binding instrument for the application of the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade (UNEP/FAO/PIC/INC.2/7, annex I), referred to as the PIC convention, defines the scope of the convention. Paragraph 1 of Article 3 lists the groups of chemicals and pesticides to which the convention applies. Paragraph 2 then sets forth the categories of substances to which the PIC convention does not apply, in most cases because they already are covered by another international legal regime.
2. Questions have arisen concerning the extent to which the scope of the PIC convention may overlap or duplicate that of other international legal instruments. This paper attempts to clarify further the respective chemical scope of such instruments and thereby the international legal context into which the PIC convention would fit. It supplements an earlier note by the secretariat (UNEP/FAO/PIC/INC.1/7) on the 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.
3. As already indicated, the issue of the scope of the PIC convention is closely linked to its relationship with other international legal instruments. Accordingly, the text of Article 3 should be considered in the context of, and made consistent with, any other articles which might address the effect of the

I. CONTENT OF ARTICLE 3

4. The present draft text of Article 3 reads as follows:

"Scope of the Convention

"1. This Convention applies to:

"(a) Banned or severely restricted chemicals; and

"(b) [Acutely] hazardous pesticide formulations.

"2. This Convention does not apply to:

"(a) Narcotic drugs and psychotropic substances;

"(b) Radioactive materials; and

"(c) Wastes;

"[(d) Chemical weapons and their precursors;]

"(e) Pharmaceuticals, including human and veterinary drugs;

"[(f) Chemicals used as food additives;]

"(g) Chemicals imported for the purpose of research or analysis in quantities not likely to affect the environment or human health; and

"(h) Chemicals imported by an individual for his or her own personal use in quantities reasonable for such use and in quantities not likely to affect the environment or human health."

5. With regard to the current draft text, consideration could be given to other drafting options. These include, first, deleting paragraph 2 of Article 3 and using the definitions of "chemical" and other terms to identify those substances to which the proposed convention does not apply or, second, making a separate article on the subject of exemptions.

II. SUBSTANCES EXEMPTED FROM THE PIC CONVENTION

6. The following section summarises the existing legal regimes which govern the production, distribution, consumption, handling transport and disposal of various hazardous substances and materials. It should be read in conjunction with the matrix provided in the annex to this document. Such information is intended to assist the Intergovernmental Negotiating Committee in taking decisions concerning the appropriate scope of the PIC convention and how that could best be reflected in the language of Article 3 or other convention text.

A. Narcotic drugs and psychotropic substances

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7. Instruments that are relevant to this category include:

(a) The 1986 United Nations Convention Against Illicit traffic in Narcotic Drugs and Psychotropic Substances;

(b) The 1971 Convention on Psychotropic Substances; and

(c) The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol.

8. The objectives of the 1988 Convention are to prevent and combat drug abuse through controlling the illicit supply of narcotic drugs and psychotropic substances and to prevent trade in and the diversion of materials and equipment for their illicit production or manufacture. The objective of the 1961 and 1971 Conventions is to control the lawful supply of narcotic drugs (including preparations) and psychotropic substances, respectively.

9. The 1988 Convention reinforces and supplements the measures provided in the 1961 and 1971 Conventions. It covers, in addition to narcotic drugs and psychotropic substances, those substances frequently used in their illicit manufacture. Generally, "narcotic drugs" include opium, morphine, codeine, heroin, methadone, pethidine, cannabis and cocaine. "Psychotropic substances" include mainly hallucinogens, stimulants and depressants. Under the 1988 Convention, a system of permits was established primarily to control production, consumption and distribution within and between Parties.

B. Radioactive materials

10. Over the last three decades, international cooperation to ensure the safe use of nuclear energy has produced a growing regime of legally binding rules and advisory standards, primarily developed under the auspices of the International Atomic Energy Agency (IAEA). Of special interest in the context of the PIC convention are those legal provisions related to radioactive waste management and the transport of radioactive materials.

11. Initial legal instruments dealing with nuclear energy addressed the physical protection of nuclear material and the handling of nuclear accidents or radiological emergencies. More recently, a convention has entered into force which covers the safe management of civil nuclear installations. In 1993, the IAEA General Conference requested the Director General to initiate preparations for a convention on the safety of radioactive waste management and an open-ended group of technical and legal experts is now working to prepare such a convention.

12. In 1990, the IAEA General Conference adopted a Code of Practice on International Transboundary Movement of Radioactive Waste. The Code's purpose is to provide preventive measures against any uncontrolled international movement and disposal of such waste.

13. The transport of radioactive material is addressed by a number of conventions, including:

(a) 1974 International Convention for the Safety of Life at Sea, which regulates, inter alia, the transport of dangerous goods, including radioactive materials;

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(b) 1982 United Nations Convention on the Law of the Sea, which, in Article 23 regulates the operation of foreign nuclear-powered ships or ships carrying nuclear substances, including the right of innocent passage through the territorial sea of States; and

(c) 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter which prohibits the dumping of listed wastes or other matter which contain levels of radioactivity greater than de minimis concentrations as defined by the IAEA and adopted by the Parties.

14. In 1993, a Joint Working Group of IAEA, the International Maritime Organization (IMO) and UNEP elaborated a draft Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste in Flasks on Board Ships. The Code has been adopted by the IMO General Assembly and the policy-making organs of IAEA.

C. Wastes

15. Elements of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal that could be relevant to a PIC convention were discussed in some detail in the note by the secretariat (UNEP/FAO/PIC/INC.1/7), cited in paragraph 2 above. At the second session of the Intergovernmental Negotiating Committee, the Secretariat presented an additional note on the Basel Convention on the Control of Transboundary Movements of hazardous Wastes and Their Disposal and its relevance to chemical wastes (UNEP/FAO/PIC/INC.2/5).

16. Both notes indicate the need for clarifying "chemicals" covered by the PIC convention vis-à-vis "wastes" covered by the Basel Convention, particularly with regard to, first, wastes disguised as products, second, obsolete pesticides and, third, chemical wastes not covered by the Basel Convention.

D. Substances used as or to produce chemical weapons

17. After World War I, outrage at the effects of chemical weapons led to the signing of the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare. This protocol bans the use of chemical weapons in war, but does not prohibit the development, production or possession of such weapons.

18. The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction will enter into force on 29 April 1997. Its preamble states the determination of States Parties to prohibit and eliminate all types of weapons of mass destruction. It recalls the Geneva Protocol of 1925 and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction of 1972, both of which are multilateral instruments pertinent to the Convention. The Preamble also recognizes the prohibition, embodied in agreements and relevant principles of international law, of the use of herbicides as a method of warfare and expresses the desire of States Parties to enhance their economic and technological development.

19. The basic obligations of a Party under the Convention are, first, not to develop, produce, acquire, stockpile, transfer or use chemical weapons and, second, to destroy chemical weapons on its territory. Three schedules to the Convention list toxic chemicals (such as sulphur, mustard or phosgene) and their precursors which might be used as chemical weapons. Part VI of the Annex on Implementation and Verification explains that substances listed in Schedule 1 to the Convention may be produced, acquired, retained, transferred or used if:

(a) They are applied to research, medical, pharmaceutical or protective purposes; and

(b) The types and quantities of the chemicals are strictly limited to those which can be justified for such purposes; and

(c) The aggregate amount of such chemicals at any given time for such purposes is equal to or less than 1 tonne; and

(d) The aggregate amount for such purposes acquired by a State Party in any year through production, withdrawal from chemical weapons stocks and transfer is equal to or less than 1 tonne.

E. Parmaceuticals, including human and veterinary drugs

20. The 1975 Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce, developed under the auspices of the World Health Organization (WHO), provides an administrative mechanism whereby a country can, first, obtain assurance that the imported pharmaceutical product is authorised to be sold in the market of the exporting country; second, obtain assurance that the manufacturing plant in which the product is being manufactured is subject to periodic inspections and conforms to the WHO guidelines on Good Practices in the Manufacture and Quality Control of Drugs; and, third, exchange information on the implementation of inspection and controls in the exporting country.

21. For the purpose of the Certification Scheme, the term "pharmaceutical products" covers any medicine in its finished form, dosage forms of veterinary products administered to food-producing animals and those starting materials (basic drugs) used in the manufacture of pharmaceutical products that are subject to control by legislation in the exporting country.

F. Chemicals used as food additives

22. There are currently no legal instruments at the global level which cover food additives. The subject of pesticide residues on food products, however, should be distinguished from the subject of food additives.

G. Chemicals imported for the purpose of research or analysis in quantities not likely to affect the environment or human health and chemicals imported by an individual for his or her own personal use in quantities reasonable for such use and in quantities not likely to affect the environment or human health

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23. It should be noted that the exemptions listed in paragraph 2 of Article 3 are both qualitative and quantitative in nature. Although it might be argued that subparagraphs (g) and (h) do not concern the substantive scope of the PIC convention, both subparagraphs effectively operate as exemptions to the chemical categories listed in paragraph 1 of Article 3. Specifically, subsections (g) and (h) concern de minimis quantities of those chemicals which technically are covered by the PIC convention. If included, however, the tracking and reporting of such small amounts could hamper countries' practical implementation of their convention obligations. There have been earlier discussions about establishing a threshold level (e.g., 10 kg) for de minimis quantities but, as yet, no consensus has been reached.

24. Further consideration should be given both to the formulation of subparagraphs (g) and (h) as well as the appropriate article under which to include them.

H. Additional considerations

25. Although no exemption yet has been made in the draft text for ozone-depleting substances, concern has been voiced about the relationship of the PIC convention to the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. It is likely that chemicals which qualify as controlled substances under the Montreal Protocol also would qualify as chemicals under the PIC convention. This means a provision may be needed which exempts Montreal Protocol substances from the PIC convention. On the other hand, the ozone-depleting potential of a chemical may not be its only hazard and its other hazards might appropriately be covered under the PIC convention. For these reasons, consideration should be given to drafting convention text which would clarify the relationship between the Montreal Protocol and the PIC convention.
