



UNEP



**United Nations  
Environment Programme**

**Food and Agriculture Organization  
of the United Nations**

Distr.: General  
8 March 2007

English only

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

Third meeting

Rome, 20–23 March 2007

Item 3 of the provisional agenda\*

**Review of the outcome of the third meeting of the Conference of the Parties**

## **Legal opinion on intentional misuse**

### **Note by the Secretariat**

At its third meeting, the Conference of the Parties agreed that the Chemical Review 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 “intentional misuse” should be obtained and made available to the Committee in order to inform future discussions. The annex to the present note contains the legal opinion of the UNEP legal office on “intentional misuse”. The annex has not been formally edited.

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\* UNEP/FAO/RC/CRC.3/1.

## Annex

### 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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