



CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/ICCP/1/5
30 September 2000

ORIGINAL: ENGLISH

INTERGOVERNMENTAL COMMITTEE FOR THE CARTAGENA PROTOCOL ON BIOSAFETY

First meeting
Montpellier, France, 11-15 December 2000
Item 4.3 of the provisional agenda*

DECISION-MAKING PROCEDURES (ARTICLE 10, PARA. 7)

Facilitating decision-making by Parties of import

Note by the Executive Secretary

I. INTRODUCTION

1. In accordance with its work plan adopted in decision V/1 of the Conference of the Parties, the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) is to consider Article 10, paragraph 7, at its first meeting and, if necessary, at its second meeting as well. In particular, the Conference of the Parties requested the ICCP to consider, “identification of basic elements for appropriate procedures and mechanisms to facilitate decision-making by Parties of import”.

2. The present note has been prepared by the Executive Secretary to assist the ICCP in this task. Section II briefly describes measures taken under two other conventions that place similar requirements or demands on Parties in terms of decision-making, namely, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Section III lists some basic elements for appropriate procedures and mechanisms to facilitate decision-making in the context of Article 10 of the Cartagena Protocol. In section IV, the Executive Secretary proposes for the consideration of the ICCP a process for considering these elements, centred on submissions by Parties regarding those outlined in the note.

II. OVERVIEW OF RELEVANT INITIATIVES UNDERTAKEN UNDER OTHER CONVENTIONS TO FACILITATE DECISION-MAKING BY PARTIES

3. Paragraph 7 of Article 10 provides that the Conference of the Parties to the Convention serving as the meeting of the Parties to the Protocol shall, at its first meeting, “decide upon appropriate procedures and mechanisms to facilitate decision-making by Parties of import”. The specific purpose of this paragraph becomes clearer by reference to the overall decision-making process outlined in Article 10. Under this procedure, the Party of import is required to respond to the notifier within the time specified in paragraph 3 of Article 10 (i.e., 270 days from receipt of notification). Pursuant to paragraph 5 of the

* UNEP/CBD/ICCP/1/1.

/...

same article, failure by the Party of import to communicate its decision within this specified period “shall not imply its consent to the importation of LMOs”. This presumption regarding the consent of the Party of import is reinforced in paragraph 4 of Article 9, which explicitly provides the same with respect to the obligation of a Party of imports to acknowledge receipt of a notification.

4. Paragraph 7 of Article 11 also establishes similar requirements for living modified organisms intended for direct use as food or feed or for processing (LMO-FFPs), although in this case there is no requirement that the meeting of the Parties consider appropriate procedures within a specific time frame.

5. Unlike the prior informed consent (PIC) procedures developed for certain hazardous chemicals and pesticides and for hazardous wastes pursuant to the Rotterdam and Basel conventions, there is no explicit obligation in the Protocol that export or import can or cannot take place without the permission of the Party of import. In practice though, for many situations the transboundary movement will not be able to take place without the express consent of the Party of import, as a result of either general import, custom or quarantine requirements or other rules governing the handling, transport and shipment of goods in general or LMOs in particular. A review of relevant international standards in this respect is contained in the note by the Executive Secretary on compliance (UNEP/CBD/ICCP/1/6), which has been prepared for consideration under item 4.5 of the provisional agenda.

6. The decision-making procedure currently outlined in Article 10 therefore potentially allows for a situation whereby import of an LMO is suspended, or not allowed, indefinitely in the absence of any decision by the Party of import. Were such a situation to occur, it may not only be contrary to other international rules, but would also run counter to the intent and purposes of the Protocol.

7. Similar requirements or demands on Parties in terms of decision-making are found in other international conventions, especially those that use the PIC procedure. The two most relevant in this regard are the Rotterdam Convention and Basel Convention.

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

8. The objectives of the Rotterdam Convention are 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.

9. According to the Convention, export of a chemical subject to the PIC procedure** can only take place with the prior informed consent of the importing Party. The PIC procedure is a means for formally obtaining and disseminating the decisions of importing countries as to whether they wish to receive future shipments of a certain chemical and for ensuring compliance with these decisions by exporting countries. The aim is to promote a shared responsibility between exporting and importing countries in protecting human health and the environment from the harmful effects of such chemicals.

10. The Convention contains provisions for the exchange of information among Parties about potentially hazardous chemicals that may be exported and imported and provides for a national decision-making process regarding import and compliance by exporters with these decisions.

11. The provisions regarding information exchange include:

* Following the definitions of the Convention, the term “chemical” as used in the present section includes both pesticides (including severely hazardous pesticide formulations) and industrial chemicals.

** These chemicals are listed in annex III to the Convention. Hereinafter, they are referred to as “chemicals listed in annex III” or as “PIC chemicals”.

(a) The requirement for a Party to inform other Parties of each domestic ban or severe restriction that it imposes on the use of a chemical;

(b) The possibility for a developing country Party or a Party with an economy in transition to inform other Parties that it is experiencing problems caused by a hazardous pesticide formulation under conditions of use in its territory, with a view to having that formulation made subject to the PIC procedure;

(c) The requirement for a Party that plans to export a chemical that is banned or severely restricted for use within its territory, to inform the importing Party that such export will take place, before the first shipment and annually thereafter;

(d) The requirement that, with respect to PIC chemicals and chemicals banned or severely restricted within its territory that are to be used for occupational purposes, each exporting Party shall require that a safety data sheet that follows an internationally recognized format, setting out the most up-to-date information available, is sent to each importer;

(e) The requirement each Party shall require that both PIC chemicals and chemicals banned or severely restricted in its territory are, when exported, subject to labelling requirements that ensure adequate availability of information with regard to risks and/or hazards to human health or the environment.

12. The implementation of the Convention is to be overseen by a Conference of the Parties. It is to be assisted in its work by the Chemical Review Committee (CRC). As of 11 September 2000, the Convention had 73 signatories and had been ratified by 11 countries. The Conference of Plenipotentiaries that adopted the Convention also invited the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO) to continue to convene further sessions of the Intergovernmental Negotiating Committee for the Convention during the interim period prior to the first meeting of the Conference of the Parties. It also agreed to change the existing voluntary PIC procedure, as set out in the UNEP Amended London Guidelines for the Exchange of Information on Chemicals in International Trade and the FAO International Code of Conduct on the Distribution and Use of Pesticides, to bring it in line with the provisions of the Convention. The Intergovernmental Negotiating Committee subsequently held its sixth session from 12 to 16 July 2000. Its seventh session is to take place from 30 October to 3 November 2000.

13. Of particular relevance for the purposes of the present note are the responsibilities of Parties with respect to the import and export of chemicals listed in Annex III. The Chemical Review Committee is charged with the responsibility of recommending chemicals for inclusion in Annex III and preparing a draft decision guidance document (DGD) for each chemical so recommended. Pursuant to its Article 3, the Convention applies to banned or severely restricted chemicals, and severely hazardous pesticide formulations. It does not apply to: narcotic drugs and psychotropic substances; pharmaceuticals, including human and veterinary drugs; chemicals used as food additives; and food.

14. Paragraph 1 of Article 10 obliges Parties to implement appropriate measures to ensure timely decisions with respect to the import of chemicals listed in Annex III. Paragraph 2 requires Parties to transmit to the Secretariat no later than nine months after the date of dispatch of the decision guidance document a response concerning the future import of the chemical concerned. Paragraph 4 lists the types of responses (interim or final in nature). Paragraph 3 provides that the Secretariat shall forthwith address to a Party that has not provided such a response, a written request to do so. The paragraph goes on to say that should the Party be unable to provide a response, the Secretariat shall, where appropriate, help it to provide a response.

15. Under paragraph 2 of Article 11 of the Convention:

“Each Party shall ensure that a listed chemical is not exported from its territory to any importing Party that, in exceptional circumstances, has failed to transmit a response or has transmitted an interim response that does not contain an interim decision, unless:

(a) It is a chemical that, at the time of import, is registered as a chemical in the importing Party; or

(b) It is a chemical for which evidence exists that it has previously been used in, or imported into, the importing Party and in relation to which no regulatory action to prohibit its use has been taken; or

(c) Explicit consent to the import has been sought and received by the exporter through a designated national authority of the importing Party. The importing Party shall respond to such a request within sixty days and shall promptly notify the Secretariat of its decision.”

16. The Article further states that the above obligations of exporting Parties shall apply with effect from the expiration of a period of six months from the date on which the Secretariat first informs the Parties, in accordance with paragraph 10 of Article 10 of the Convention, that a Party has failed to transmit a response or has transmitted an interim response that does not contain an interim decision, and shall apply for one year.

17. In accordance with paragraph 10 of Article 10, the Secretariat advises Parties, through the *PIC Circular*, of the importing country responses received from States, together with information on cases of failure to transmit a response through the, which its publishes every six months. For each chemical, The *PIC Circular* identifies each Party and gives a date on which the Secretariat first informed the Parties, through the publication of the *PIC Circular*, that the Party had failed to transmit a response. Also, any response listed in the *PIC Circular* not addressing importation is considered as an interim response that does not contain an interim decision.

18. The Secretariat has prepared an overview, as of 31 May 2000, of the number of import responses so far submitted by Parties and verified by the Secretariat, together with a break down of the types of responses provided (UNEP/FAO/PIC/INC.7/14). Totals for the 29 PIC chemicals were: 362 consent responses, 1524 no-consent responses, 90 responses that did not address importation and 2600 cases of failure to provide a response.

19. In addition to these activities, the Convention and the process as a whole has a number of activities and measures designed to assist Parties in developing the necessary capacities to implement the Convention and take decisions pursuant to its provisions. A particularly important activity for the Convention is the development of decision guidance documents referred to in paragraph 13 above. To date, there are six such documents covering some 29 substances. The Secretariat has also produced forms and instructions for notifications of final regulatory action to ban or severely restrict a chemical and importing country responses. In addition to these specific procedures to assist decision-making the Secretariat has published a booklet for the Convention and organized regional and subregional workshops to assist Parties in implementing the PIC procedure.

B. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

20. The Basel Convention contains a PIC-type procedure for transboundary movement of hazardous wastes. The principal obligations in this respect are contained in Article 6. Paragraph 1 of this Article provides that the Party of export or the exporter is required to notify the Party of import of any proposed transboundary movement of waste. Paragraph 2 requires the Party of import to respond to this

notification. Paragraph 3 provides that the Party of export shall not allow the export to commence until it has received the consent of the Party of import. Similar requirements pertain with respect to waste passing through or transiting Parties, so that transboundary movements will require the prior approval of Parties of transit as well as the Party of import.

21. The focus of attention for the Conference of the Parties to the Basel Convention and Parties with respect to decision-making procedures under the Convention has largely been on the “ban amendment” to the Convention. At its second meeting, the Conference of the Parties adopted a decision establishing the immediate prohibition of all transboundary movements of hazardous wastes for final disposal from countries members of the Organisation for Economic Co-operation and Development (OECD) to non-OECD countries. Transboundary movement of hazardous wastes from OECD to non-OECD countries destined for recycling or recovery operations was to be phased out by 31 December 1997. At its third meeting, the Conference of the Parties adopted the ban as an amendment to the Convention. The amendment has not yet entered into force. The amendment establishes an annex to the Convention (annex VII) listing countries that may not export hazardous wastes to countries not on the list. It currently includes Parties and other States that are members of OECD, the European Community and Liechtenstein. The ban does not prohibit movement of wastes between annex VII or non-annex VII countries.

22. More generally, the Conference of the Parties also has taken a number of decisions to develop the capacities of developing country Parties and those with economies in transition. An important element of this support is a series of documents that have been adopted by the Conference of the Parties to assist policy makers, experts and technicians with the implementation of the Convention and the environmentally sound management of hazardous wastes and their disposal. Such documents include: Model National Legislation on the Management of Hazardous Wastes and Other Wastes as well as on the Control of Transboundary Movements of Hazardous Wastes and Other Wastes and Their Disposal; Guide to the Control Systems (Movement Documents and Notification Documents) and various Technical Guidelines on Disposal Operations, Waste Streams and Definitions of Hazardous Wastes. Of particular relevance to the present note is the Manual for the Implementation of the Basel Convention, which aims to assist Parties and non-Parties, the private sector, non-governmental organizations and individuals to understand the obligations of the Convention. It explains the provisions of the Convention in simple language and gives examples of situations covered by the Convention (e.g., actions by the States of export, import and transit, as well as the exporter, importer, carrier, generator, disposer, etc.) related to the environmental sound management of hazardous wastes and their disposal.

23. The Secretariat also provides support to Parties to solve specific problems related to the management of hazardous wastes. The Secretariat also assists with the obtaining financial and technical support to organize national and subregional seminars on the implementation of the Convention.

24. Article 14 of the Basel Convention also calls for the establishment of regional or subregional centres for training and technology transfer. Centres around the world have been established with varying degrees of resources and activities.

III. CONSIDERATION OF BASIC ELEMENTS FOR APPROPRIATE PROCEDURES AND MECHANISMS TO FACILITATE DECISION-MAKING BY PARTIES OF IMPORT

25. There may be many reasons for the failure of the Party of import to respond to a notification within the specified time. The experience of the PIC procedures in the Basel Convention and the Rotterdam Convention illustrate that important reasons in their case are lack of capacity within the Parties of import or that the specified time-frame for the decision is not sufficient for the particular substance. As the advance informed agreement (AIA) procedures under the Cartagena Protocol on Biosafety place similar demands on Parties in terms of decision-making, it is probable that similar problems may arise in the implementation of the Protocol.

26. In complex areas such as that governed by the Protocol, effective and timely decisions by Governments are linked to adequately resourced institutions, access to information, access to relevant expertise, clear allocation of responsibilities and transparency in decision-making. Most of these capacities are also essential for effectively implementing the other requirements of the Protocol. The general subject of capacity-building for the implementation of the Cartagena Protocol is being considered under item 4.2 of the provisional agenda, and relevant activities are described in the note by the Executive Secretary prepared for consideration by the ICCP under that item (UNEP/CBD/ICCP/1/4).

27. The experience of the Basel Convention and the Rotterdam Convention also demonstrates that whilst general efforts for capacity-building are vital for the effective implementation, it has nevertheless been deemed necessary within both processes to undertake a number of activities specifically designed to assist with decision-making of the Parties of import.

28. The following is a list of basic elements for appropriate procedures and mechanisms to facilitate decision-making by Parties of import based on the experience of other relevant instruments. They take into account the nature of the decision-making procedures of the Protocol and biotechnology and biosafety issues generally. Their order approximately reflects the ease of development, the level of resources they would require to implement and their normative importance:

- (a) Introductory material on decision-making procedures;
- (b) Case-studies of existing measures and procedures for decision-making by Parties of import;
- (c) Model legislation and administrative measures for implementing decision-making procedures in line with the Protocol;
- (d) Voluntary guidelines on aspects of the procedure, which could benefit from further guidance (i.e., risk assessment);
- (e) Decision guidance documents that provide guidance on certain classes of LMOs;
- (f) Lists of centres of excellence that can provide assistance;
- (g) Developing shared regional capacities and focal points;
- (h) Financial and technical assistance for Parties;
- (i) Training workshops;
- (j) Bilateral and multilateral partnerships between Parties;
- (k) Committees or working groups established by the instrument that provide technical assistance with decision-making;

29. Another measure or procedure relevant to the issue of decision-making used by the Rotterdam Convention, but which may be more relevant to the issue of monitoring and enforcement, is the establishment of a procedure for the withdrawal of the protection of the instrument after a certain period of time if a Party of import fails to respond after repeated notifications.

IV. RECOMMENDATIONS

30. In the light of the foregoing, the ICCP may wish to invite Parties and other relevant organizations to consider the proposed basic elements outlined above and advise the Executive Secretary of their views regarding the appropriateness of undertaking any of the measures proposed to enable him to prepare a synthesis of these views, as well as other relevant information, for the consideration of the ICCP at its second meeting.