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Masa Nagai

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# NATIONAL IMPLEMENTATION OF THE INTERNATIONAL PRIOR INFORMED CONSENT PROCEDURES CONCERNING HAZARDOUS CHEMICALS AND WASTES

by Masa Nagai\*

## INTRODUCTION

**H**ealth and environmental risks associated with hazardous chemicals or hazardous wastes move across international borders through trade or transboundary shipments. Lack of the knowledge of such risks could result in serious injuries or damages. Yet, it is not always easy to collect and manage information on such risks. Evaluations of acceptable levels of risk or the threshold of determining unacceptable risks in local environments require expertise, resources, and time. Integrating the results of such risk evaluations into policies and adequate legislation tailored to unique circumstances of a given country, would be a further challenge. Effective implementation and enforcement of those policies and legislation require appropriate institutional arrangements with lasting capacity and resources.

Targeted at such challenges, an international prior informed consent procedure is set out in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>1</sup> in the field of hazardous chemicals, as well as in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal<sup>2</sup> in the field of hazardous wastes.

Under the international prior informed consent procedures of the Rotterdam and Basel Conventions, authoritative information is exchanged between Parties as well as within each Party. It provides a knowledge-based, decision-making tool and helps relevant national authorities in those countries evaluate risks associated with certain hazardous chemicals in international trade or hazardous or other wastes in transboundary movements, and to make necessary decisions.

## REQUIRED NATIONAL ACTIONS

The international prior informed consent procedures contained in the Rotterdam Convention and the Basel Convention provide for the respective notification procedures to be followed by Parties to those conventions. In principle, these procedures provide each Party to the respective Conventions with an opportunity to make its own decisions on whether it permits or prohibits to bring into the country, by trade or transboundary movements, certain hazardous chemicals or hazardous wastes, with the knowledge of those chemicals or wastes (except, in the case of the Basel Convention's 1995 Amendment not permitting the transboundary movements of hazardous wastes and other wastes within the scope of the Convention from a certain group of developed countries).

There are certain differences, however, between the international prior informed consent procedure of the Rotterdam Convention and that of the Basel Convention, because of the difference in the respective scopes of those conventions. Regarding the Rotterdam Convention, in return for better protection from potential hazards from certain hazardous chemicals, the procedure of the Convention requires each Party to take certain national actions on a regular basis to keep the flow of relevant authoritative information.<sup>3</sup>

In order to make a chemical subject to the prior informed consent procedure under the Rotterdam Convention, each Party is to notify the Secretariat in writing of a final regulatory action adopted by the Party to ban or severely restrict chemicals.<sup>4</sup> For developing countries or transitional countries with problems caused by a severely hazardous pesticides formulation under conditions of use in its territory, a proposal to include into the procedure is to submit to the Secretariat the severely hazardous pesticides formulation.<sup>5</sup> The notifications or proposals provided by the respective Parties are checked by the Secretariat to determine whether they conform to the format and contain the information required by the Convention, and subsequently submitted to the Chemicals Review Committee for consideration. Decision guidance documents, to be prepared by the Chemicals Review Committee and approved by the Conference of the Parties, provide authoritative information sources on certain hazardous chemicals made subject to the procedure. Official circulation to all Parties of the decision guidance document on a chemical triggers the prior informed consent procedure with respect to that chemical.<sup>6</sup>

With regard to the application of the prior informed consent procedure for imports and exports, each Party is to implement appropriate legislative or administrative measures to ensure timely decisions with respect to the importation of chemicals under the prior informed consent procedure.<sup>7</sup>

In addition, each Party is to undertake the following actions regarding imports:

- Transmit to the Secretariat a response concerning the future import of the chemical concerned. A response is to consist of either: (a) a final decision,

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\*Masa Nagai is Head of the International Legal Instruments Unit Division of Policy Development & Law at United Nations Environment Programme ("UNEP") in Nairobi, Kenya. The views expressed in this article are those of the author and do not necessarily represent the views of UNEP.

pursuant to legislative or administrative measures to consent to import, not to consent to import, or to consent to import only subject to specified conditions; or (b) an interim response, which may include an interim decision consenting to import with or without specified conditions, or not consenting to import during the interim period (in the form of a statement that a final decision is under active consideration, a request to the Secretariat, or to the Party that notified the final regulatory action, for further information) or, a request to the Secretariat for assistance in evaluating the chemical. A response is required to relate to the category or categories specified for the chemical (i.e. pesticide, industrial or severely hazardous pesticide formulation). A final decision should be accompanied by a description of any legislative or administrative measures upon which it is based. If this response is modified, submit the revised response to the Secretariat. Make its responses available to those concerned within its jurisdiction, in accordance with its legislative or administrative measures.<sup>8</sup>

- In the case of a Party that decides not to consent to the import of a chemical, or to consent to its import only under specified conditions, that party is required to simultaneously prohibit or to make subject to the same conditions, import of the chemical from any source, and domestic production of the chemical for domestic use.<sup>9</sup>

In addition, each Party is to undertake the following actions regarding exports:

- Implement appropriate legislative or administrative measures to communicate the import responses, forwarded by the Secretariat, to those concerned within its jurisdiction; take appropriate legislative or administrative measures to ensure that exporters within its jurisdiction comply with decisions in each response; advise and assist importing Parties, upon request and as appropriate, to obtain further information to help them make decisions concerning imports, and to strengthen their capacities and capabilities to manage chemicals safely during their life-cycle.<sup>10</sup>
- Ensure that a chemical subject to the prior informed consent procedure 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 it is a chemical that, at the time of import, is registered as a chemical in the importing Party, or it is a chemical for which evidence exists that it has previously been used in, or imported into, the import-

ing Party and in relation to which no regulatory action to prohibit its use has been taken, or explicit consent to the import has been sought and received by the exporter through a designated national authority of the importing Party.<sup>11</sup>

Under the Basel Convention, the control measures concerning transboundary movements of hazardous wastes and other wastes are set out together with the obligations to each Party to take appropriate measures to minimize the generation of such wastes, ensure disposal of such wastes in an environmentally sound manner, and reduce the transboundary movements of such wastes. With this background, the prior informed consent procedure of the Basel Convention is linked to stringent measures to control transboundary movements of hazardous wastes

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*Implementation of the international prior informed consent procedure at the national level requires evaluating potential risks and considering multiple unique factors...*

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and other wastes on a shipment-by-shipment basis, which might be highlighted as follows:

- Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal are required to inform the other Parties. Parties are required to prohibit or to not permit the export of hazardous wastes and other wastes to the Parties that have prohibited the import of such wastes, when notified.<sup>12</sup>
- Parties are required to prohibit or not to permit the export of hazardous wastes and other wastes if the importing State does not consent in writing to the specific import, in the case where that importing State has prohibited the import of such wastes.<sup>13</sup>
- Each Party is required not to allow the export of hazardous wastes or other wastes to a State or a group of States, which have prohibited by their legislation all imports, or if it has reason to believe that wastes in question will not be managed in an environ-

tally sound manner according to criteria decided by the Conference of the Parties.<sup>14</sup>

- Each Party is required to prevent the importation of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.<sup>15</sup>

Each Party must do the following regarding exports, imports, and transit:

- The exporting State is to notify, or to require the generator of wastes or exporters to notify, in writing, through the channels of the competent authority of the exporting State, the competent authority of the States concerned of any proposed transboundary movements of hazardous wastes and other wastes. The notification needs to contain the declarations and information on the wastes as well as details of modalities of shipment.<sup>16</sup>
- The importing State is to respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the importing State is to be sent to the competent authorities of the States concerned that are Parties.<sup>17</sup>
- The exporting State is not to allow the generator or exporter of the wastes to commence the transboundary movement until it has received written confirmation that the notifier has received the written consent of the importing State; and the notifier has received from the importing State confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.<sup>18</sup>
- Each State of transit which is a Party is required to promptly acknowledge to the notifier receipt of the notification, and may subsequently respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The exporting State is not to allow the transboundary movements to commence until it has received the written consent of the State of transit. If at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit of transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, the Party is required to inform the other Parties of its decision. In this latter case, if no response is received by the exporting State within a given period, the exporting State may allow the export to proceed through the State of transit.<sup>19</sup>

- The exporting State may, subject to the written consent of the State concerned, allow the generator or the exporter to use a general notification where hazardous wastes or other wastes having the same physical and chemical characteristics are shipped regularly to the same disposer via the customs office of exit of the exporting State via the same customs office of entry of the importing State, and in the case of transit, via the same customs office of entry and exit of the State or States of transit. Such written consent to the use of general notification is subject to the supply of certain relevant information, such as the exact quantities or periodical lists of such wastes to be shipped. The general notification and written consent may cover multiple shipments of such wastes for a maximum period of one year.<sup>20</sup>

Each Party to the Basel Convention is required to take appropriate legal, administrative, and other measures to implement and enforce the provisions of the Convention, including those referred to above.<sup>21</sup>

## INSTITUTIONAL ISSUES

To implement the international prior informed consent procedures, certain institutional arrangements are required at the national level. For the Rotterdam Convention, each Party is required to designate one or more national authorities that are authorized to act, on behalf of that Party, in the performance of the administrative functions required by the Convention.<sup>22</sup> Each Party is required to seek to ensure that such authority or authorities have sufficient resources to perform their tasks effectively.<sup>23</sup> The name and address of such authority or authorities are given to the Secretariat of the Convention, which will transmit that notification to all Parties.<sup>24</sup> Thus, the contact points of each Party are made known to other Parties as well as to the Convention Secretariat, establishing an international network of formal channels of communications for Parties to exchange official notifications and other relevant information.

Under the Basel Convention, each Party is required to designate or establish one or more competent authorities and one focal point to facilitate the implementation of the Convention.<sup>25</sup> For a State of transit, one competent authority is required to be designed to receive the notification.<sup>26</sup> Each Party is required to inform the Convention Secretariat about the agencies designated as their focal points and their competent authorities.<sup>27</sup> Official notifications are exchanged between those competent authorities of Parties, which is facilitated by the Secretariat of the convention.

Management of the international trade of hazardous chemicals involves a number of sectoral areas, such as environment, public health, agriculture, industry, and trade, which is normally addressed by different government ministries or agencies. Similarly, transboundary movements of hazardous wastes would involve a number of government bodies and agencies, such as those responsible for the environment, public health, transport, industry, trade, customs, and enforcement. While one or a few authorities are expected to act as the focal points for

international exchange of notifications and other relevant information under the prior informed consent procedure, domestic institutional arrangements are likely to involve multiple ministries, government agencies, and other relevant national entities.

Given the multiplicity of those issues and a host of actors involved, regular consultations and coordination among those agencies and entities would help facilitate exchange of relevant information within a country and establish coherent policies and implementation of relevant activities. It is important to institute coordinating arrangements among all those who share interest in the subject. This might take the form of, for example, an inter-ministerial coordinating body within the national Government, which has been established in a number of countries during the period for implementing the voluntary prior informed consent procedures on certain hazardous chemicals.

Implementation of the international prior informed consent procedure at the national level requires each Party to consider and evaluate potential risks for the country and make its own decision concerning international trade in chemicals or transboundary movements in hazardous wastes and other wastes, on the basis of the information given through the procedure (such as decision guidance documents, in the case of the Rotterdam Convention, or relevant information contained in the shipment-based notifications under the Basel Convention) and other means of information exchange as well as relevant information generated by itself. This may involve multiple factors to be taken into account during decision-making, which arise from unique situations of each country, such as climate, components of local ecosystems, population, technology, patterns of economic activities (such as agriculture or industrial processes), and social needs (for example, public health needs in combating diseases vectors, such as malaria). Sustainable institutional capacity to undertake such tasks is called for. Ability to ensure timely flow of relevant information among the authorities concerned would be important.

For effective flow of authoritative information under the procedure and achieving its intended objective of enabling better informed decision-making, it is important also to clearly define the responsibilities and roles of the respective agencies and bodies, which should be made known to each other and to the public.

Since the circumstances surrounding hazardous chemicals in international trade or hazardous wastes and other wastes in transboundary movements are likely to continuously evolve as scientific knowledge and technology progresses, and human activities related to those areas constantly develop, institutional arrangements addressing those issues also need to be kept updated. Provisions for adequate training as well as opportunities to exchange relevant experiences among those who are involved might be necessary with a view to sustaining effectiveness of the procedures. Overall, the relevant authorities need to be provided with adequate human and financial resources in order for them to be able to carry out necessary functions.

National implementation of the international prior informed consent procedure needs corresponding national laws or regulatory frameworks, depending upon the legal system of each country. Both the Rotterdam and Basel Conventions require their respective Parties to implement appropriate legislative or administrative measures to ensure timely decisions and compliance with the requirements under the prior informed consent procedure.<sup>28</sup>

Since the status of development in environmental and environmentally-related laws and regulations is varied among countries, each country needs to assess its own legal requirements and take necessary actions to bring its legislation in line with the requirements under the prior informed consent procedure of the Rotterdam Convention and the Basel Convention. In some countries, existing laws and regulations, with minimal adjustments, might be adequate to accommodate such needs. In some other countries, however, it might be necessary to amend the existing legislation or develop new ones.

Because of such uniqueness and diversity in the status of the development of laws and regulations in countries, there appears to be no single definitive model for legislating the required action for the national implementation of the international prior informed consent procedures. However, several aspects might be considered common to such requirements for national legislation.

First, clearly identified flow of information with specific requirements that are tailored to the requirements of the international procedure would facilitate decision-making by the relevant authorities and implementation of legislation. There should be a clear statement of the authority responsible for taking necessary decisions and actions (such as a Minister of the lead Ministry), together with the identification of other relevant entities that might share certain responsibilities in implementing the legislation (for example, the agencies or bodies that are to receive or disseminate relevant notifications, or to lead enforcement measures). In addition, all relevant actors, especially those who may introduce into the country potential risks associated with trade in hazardous chemicals or transboundary movements in hazardous wastes or other wastes, need to be identified in order for them to share responsibilities and be held accountable for the required procedures (for example, exporters or importers).

Second, countries need to build and utilize a knowledge base for decision-making. In a country where relatively advanced chemical management schemes are in place (for instance in many member countries of the Organisation for Economic Cooperation and Development ("OECD")) relevant chemicals legislation might provide for measures to systematically collect health and environmental data of chemicals for evaluating potential risks to health and the environment, before they are produced and traded. Existence of chemicals in the country might be recorded in an inventory or register. Such data may be supplemented by further information on use of such chemicals, including reports on incidents causing injuries to

human health or the environment. Regarding hazardous wastes, information on the generation and generators of such wastes, data on their characteristics or categories, documented record of their shipment and disposal, and information on those who are involved in such activities might be collected under relevant legislation. Information made available from such a knowledge base may be fed into the international prior informed consent procedures and also be utilized to implement the requirements of those procedures.

In many developing countries, however, chemicals or waste management schemes are often not well developed due to the lack of necessary resources and expertise, and a knowledge base on those issues might not be adequate to enable sound decision-making. This could make those countries vulnerable to the threats of potential risks from hazardous chemicals or hazardous wastes that might be imported into the country without knowing much about them. This was the main background of developing the international prior informed consent procedures on those subjects. With the legally binding procedure of the Rotterdam and Basel Conventions, the Parties to those Conventions are to be provided with such knowledge base, through the procedures, as may be required for them to take necessary action concerning international trade in certain hazardous chemicals or transboundary movements of hazardous wastes and other wastes. Legislation or certain administrative actions might be required to enact what is required for the national implementation of the procedures, including those governing procedures for making necessary decisions on the basis of the country's own evaluation of risks and other related factors. Development of legislation in this targeted area, in turn, could become a basis for strengthening the legal basis for developing the knowledge base on those subjects in the country.

Third, consistency and harmonization between relevant legislation may need to be considered. In many countries, sectoral laws and regulations are commonly developed and used to address such issues. For instance, most countries have pesticides legislation, and some of those countries also have legislation on chemicals in general or certain categories of chemicals, while they also have customs and other regulations concerning imports or exports. Management and control of hazardous wastes might be addressed in legislation for which health and environmental authorities are responsible, while their transport might be regulated under legislation governing transport of dangerous goods. In general, a review of the relevant existing laws and regulations would help clarify appropriate measures to bring the country's legislation into line with the requirements for implementing the international prior informed consent procedure. Inter-sectoral issues, such as mutually supportive trade and environmental policies as noted in the Rotterdam Convention,<sup>29</sup> for instance in the form of regulating non-discrimination between domestic production and importation of chemicals, will need to be examined during such exercises. Synergies in national implementation measures among the Rotterdam Convention, the Basel Convention and the Stockholm Convention on

Persistent Organic Pollutants might also be a pertinent issue to consider in this context.

Fourth, measures to ensure compliance and enforcement deserve due consideration. The international prior informed consent procedures of the Rotterdam Convention and the Basel Convention require the respective Parties to take necessary legislative or other measures to ensure compliance with the decisions on the concerned Parties. An important step in this respect is to inform, possibly through a process instituted for this purpose, all those who are involved in the relevant activities about the requirements under the prior informed consent procedure as well as the relevant decisions of Parties, and relevant national measures for their implementation. Legislative measures for ensuring such compliance, combined with established modalities of enforcement, would also be an important backup for the decisions made. Combination of disincentive measures and incentive measures might be also considered.

Fifth, consideration of resource base to sustain the implementation of relevant legislative or other measures needs to be made. Relevant legislation may contain provisions for securing necessary resources for this purpose (for example, establishing fees for certain administrative actions). In addition to financial resources, securing competent human resources would be also an important point to consider.

## PERSPECTIVES

The international prior informed consent procedures of the Rotterdam and Basel Conventions provide important collective measures operated among the respective Parties to prevent the risks associated with certain hazardous chemicals or hazardous wastes from being introduced into a Party by international trade or transboundary shipment without its knowledge and consent. In retrospect, this is a remarkable milestone since the question of possible hazards of chemicals in developing countries that do not have the knowledge of such chemicals was first debated at the Governing Council of UNEP in 1977. The Montevideo Programme for the Development and Periodic Review of Environmental Law<sup>30</sup> is a long-term strategic guidance for UNEP in the field of environmental law. On the basis of this, the Basel Convention was concluded in 1989 and the legally binding instrument for applying the prior informed consent procedure, the need of which was identified also in chapter 19 of Agenda 21, was concluded in 1998 through the negotiating process jointly organized by UNEP and FAO. The binding international legal frameworks for the prior informed consent procedure are now in place in the fields of international trade in certain hazardous chemicals and transboundary movements of hazardous wastes and other wastes. To advance the implementation of the prior informed consent procedure and achieving its objectives at the national level, further strengthening of international cooperation, in the context of the Rotterdam Convention and the Basel Convention, would be desired in order to further address needs and shortcoming in relevant legislation and institutions particularly in developing countries and countries with economies in transition.



# ENDNOTES: Hazardous Chemicals & Wastes

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<sup>1</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, U.N. Doc. *UNEP/FAO/PIC/CONF/2*, reprinted in 38 I.L.M.1 (1999). Adopted in Rotterdam (Netherlands) in September 1998 by a conference of plenipotentiaries convened by UNEP and FAO, and entered into force on 24 February 2004. 73 Parties as of 1 July 2004 [hereinafter Rotterdam Convention]

<sup>2</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4 (1989). Adopted in Basel (Switzerland) in March 1989 by a conference of plenipotentiaries convened by UNEP, and entered into force on 5 May 1992. 161 Parties as of 1 July 2004.

<sup>3</sup> Specific timeframes for number of actions specified in the Convention, but these are not reproduced in this article. It should be noted also that this article is focused on the actions relating to the prior informed consent procedure, and does not intend to present all aspects of information exchange and other related aspects as contained in the Convention.

<sup>4</sup> *Supra*, note 1, art. 5(1).

<sup>5</sup> *Id.* art. 6(1).

<sup>6</sup> The Rotterdam Convention, in its Annex III, lists those chemicals subject to the prior informed consent procedure. Additional chemicals may be listed in Annex III in accordance with the procedure set out in the Convention.

<sup>7</sup> *Supra*, note 1, art. 10(1).

<sup>8</sup> *Id.* art. 10(2), (4), (6), (8).

<sup>9</sup> *Id.* art. 10(9).

<sup>10</sup> *Id.* art. 11(1).

<sup>11</sup> *Id.* art. 11(2).

<sup>12</sup> *Supra*, note 2, arts. 4(1)(a), (b), 13.

<sup>13</sup> *Id.* art. 4(1)(c).

<sup>14</sup> *Id.* art. 4(2)(e).

<sup>15</sup> *Id.* art. 4(2)(g).

<sup>16</sup> *Id.* art. 6(1).

<sup>17</sup> *Id.* art. 6(2).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* art. 6(4).

<sup>20</sup> *Id.* art. 6(6), (7), (8).

<sup>21</sup> *Id.* art. 4(4).

<sup>22</sup> *Supra*, note 1, art. 4(1).

<sup>23</sup> *Id.* art. 4(2).

<sup>24</sup> *Id.* art. 4(3), (4).

<sup>25</sup> *Supra*, note 2, art. 5(1).

<sup>26</sup> *Id.* art. 5(2).

<sup>27</sup> *Id.*

<sup>28</sup> The Rotterdam Convention, art. 10, 11. The Basel Convention, art. 4(4).

<sup>29</sup> Preamble, eighth recital.

<sup>30</sup> Adopted by the UNEP Governing Council in 1982 as programme for a decade. The second Montevideo Programme was adopted in 1993 after the Rio Summit, and the third in 2001 for the first decade of the twenty-first century.