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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN
INTERNATIONAL LEGALLY BINDING INSTRUMENT
FOR IMPLEMENTING INTERNATIONAL ACTION ON
CERTAIN PERSISTENT ORGANIC POLLUTANTS

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Item 4 of the provisional agenda*

PREPARATION OF AN INTERNATIONAL LEGALLY BINDING INSTRUMENT
FOR IMPLEMENTING INTERNATIONAL ACTION ON CERTAIN
PERSISTENT ORGANIC POLLUTANTS

Reference in the future convention on persistent organic pollutants to the Basel Convention on the
Control of Transboundary Movements of Hazardous Wastes and their Disposal

Note by the secretariat

I. INTRODUCTION

1. At its fourth session, the Intergovernmental Negotiating Committee requested the secretariat to prepare and circulate, for consideration at its fifth session, an analysis of the questions and options relating to the issue of whether the reference to the Basel Convention on the Control of Transboundary Wastes and their Disposal (Basel Convention) in article D, paragraph 4 of the draft text of the future convention on persistent organic pollutants (POPs) (UNEP/POPS/INC.4/5, annex II) was adequate, and, in particular, whether it would include adequate reference to decisions of the Conference of the Parties of the Basel Convention and its technical guidance. The Committee had also requested advice on what the legal implications were of having a reference to the Basel Convention in article D of the draft text of the POPs convention and on appropriate language (UNEP/POPS/INC.4/5, paras. 51 and 52). In response to that request the secretariat has prepared the analysis that follows.

II. BACKGROUND

2. At its fourth session, the Committee requested the legal drafting group to analyse the questions referred to above. The legal drafting group set up a contact group for that purpose. The contact group prepared a brief analysis which the Committee recommended for use as the basis for further negotiations and

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for incorporation into the draft text of the legally binding instrument for consideration at its fifth session. The analysis can be found under article D, paragraph 4, footnote 10 of the draft text of the POPs convention.

3. In his report to plenary at the fourth session of the Committee, the Chair of the legal drafting group underlined the complexity of the questions raised by the Committee, which the group considered to have policy undertones rather than purely legal implications. He added that even though the Parties to the Basel Convention and the future Parties to the POPs convention would not necessarily be identical, that did not rule out the possibility of cross-referencing between the two conventions. A further issue for consideration was whether the legal status of any decision or guidelines under the Basel Convention would have legal implications for the POPs convention. He recommended that the Committee give further consideration to the matter.

III. CROSS-REFERENCING IN INTERNATIONAL INSTRUMENTS

4. Cross-referencing in international instruments on the environment is used as a tool to avoid unnecessary repetition of principles, rules and obligations adopted and accepted in international environmental law and to avoid restatement of the same. Reference to adopted international instruments may facilitate interpretation of definitions and some obligations for instruments under development. (Examples of cross-referencing in multilateral environment agreements are provided in the annex to the present document.)

5. A reference in one international instrument (referencing instrument) to another international instrument (referenced instrument) can:

(a) Make the application of the referenced instrument, in its entirety, become part of the respective obligation under the referencing instrument;

(b) Make certain provisions, definitions, and/or annexes of the referenced instrument become part of the respective obligation under the referencing instrument; or

(c) Subject the implementation of certain obligations under the referencing instrument to application of general principles and purposes set by the referenced instrument.

6. The application of such references can be used to ensure that certain provisions of the referencing instrument do not contradict with the referenced instrument, either in its entirety or specified provisions, definitions or annexes therein. Amendments to the referenced instrument can be taken into account by the referencing instrument's Conference of the Parties and its implementing bodies.

7. The legal status of decisions or guidelines, including technical guidance, adopted under the referenced instrument depends on the manner in which the instrument is referenced. If the reference is to an instrument in its entirety, it could be assumed that the reference includes the entire regime under the referenced instrument, including decisions of its bodies, guidelines and possible amendments. If only certain provisions, definitions or annexes are referenced, it could be assumed that only those decisions and guidelines under the referenced instrument that relate to the referred obligations, are included. If the reference is to subject certain obligations of the referencing instrument to general principles and purposes of the referenced instrument, decisions and guidelines adopted by bodies of the referenced instrument would have only an indicative effect on the implementation of the referencing instrument.

8. Some international instruments include provisions concerning their relationship to other international agreements. As a general rule such provisions ensure that the instrument does not alter the rights and obligations of its Parties which arise from other agreements compatible with the instrument and which do not affect the enjoyment by other Parties of their rights or the performance of their obligations under the instrument. They may also ensure that Parties can enter into other international agreements provided that such agreements are compatible with the instrument.

IV. REFERENCE TO THE BASEL CONVENTION IN THE FUTURE CONVENTION ON PERSISTENT ORGANIC POLLUTANTS

9. The reference to the Basel Convention under article D, paragraph 4 of the draft text of the POPs convention at the fourth session of the Committee was as follows:

"In order to ensure that stockpiles, wastes, as well as products and articles upon becoming wastes, consisting of or containing a substance listed in Annex A, B [or C] are managed in a manner protective of human health and the environment against the adverse effects that may result from that substance, each Party shall [, consistent with its capabilities and subject to the availability of technical and financial assistance]:...

"[(c) Take measures to ensure that wastes, as well as stockpiles, products and articles upon becoming wastes, are:...

"(ii) managed so that the persistent organic pollutant content is destroyed or otherwise transformed into substances that do not possess the properties of persistent organic pollutants as specified in Annex D or, when appropriate, otherwise disposed of in an environmentally sound manner consistent with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;]"

10. As noted by the legal drafting group during the fourth session of the Committee, there were differences in interpretation as to whether the current formulation of the reference to the Basel Convention included decisions of the Conference of the Parties of the Basel Convention or its guidelines. In the event that the present formulation were to be retained, the interpretation would remain unclear as to whether the manner in which the substances are disposed of ought to be consistent with the provisions of the Basel Convention only or also with the additional instruments and documents adopted by its Conference of the Parties. In order to prepare a text that adequately reflects the policy intention of the Committee, clear policy guidance from the Committee is required.

11. If the intention is to establish a certain standard for the environmentally sound disposal of the substances in question, making a reference to the Basel Convention would be one way of achieving it. Options for such a reference range from requiring the obligatory application of the Basel Convention to setting a non-obligatory indicative standard that should be followed. The text to be adopted could:

(a) Cover the whole existing regime of hazardous waste management, with particular reference to the Basel Convention:

For example:

"...in an environmentally sound manner taking into account the provisions of relevant international agreements, in particular the Basel Convention...";

(b) Cover the regime of the Basel Convention, including decisions of its Conference of the Parties, other bodies and technical guidance:

For example:

".. in an environmentally sound manner taking into account the regime of the Basel Convention as set forth in the provisions of the Basel Convention, decisions of its Conference of the Parties and technical guidance...";

- (c) Cover the text and annexes of the Basel Convention:

For example:

".. in an environmentally sound manner in conformity with the provisions of the Basel Convention....";

"...in an environmentally sound manner taking into account the provisions of the Basel Convention...";

- (d) Cover certain substantive provisions of the text of the Basel Convention and respective decisions of its Conference of the Parties:

For example:

".. in an environmentally sound manner in accordance with Articles 1 to 11 of the Basel Convention...";

".. in an environmentally sound manner in accordance with Articles 1 to 11 of the Basel Convention including pertinent decisions of its Conference of the Parties...";

- (e) Cover principles and purposes of the Basel Convention:

For example:

".. in an environmentally sound manner, in accordance with principles and purposes of the Basel Convention...";

".. in an environmentally sound manner, in accordance with principles and purposes as embodied in Articles 1 to 11 of the Basel Convention...".

- (f) Define certain terms, such as "waste", "disposal", "environmentally sound" in the way they are defined in the Basel Convention either by reference or by copying the actual text of the relevant definitions from the Basel Convention:

For example:

"...in an environmentally sound manner. For the purpose of this article, the terms "waste", "disposal" and "environmentally sound" shall be interpreted as defined in the Basel Convention";

"...in an environmentally sound manner. For the purpose of this article, the terms "waste", "disposal" and "environmentally sound" mean (insert actual texts of these definitions from the Basel Convention); or

- (g) Defer the decision regarding the scope of coverage of the reference by referring it to the Conference of the Parties 1/ by adding the phrase:

1/ Given the non-binding nature of the technical guidelines of the Basel Convention and related decisions of the Conference of the Parties (except for those on the amendment to the Convention), should the Committee decide to refer to them in the future POPs convention, a careful consideration would be required to identify the appropriate wording for this.

For example:

"in an environmentally sound manner consistent with the Basel Convention, to be defined by the Conference of the Parties...".

12. The legal drafting group pointed out at the fourth session of the Committee the problem of taking into account any further evolution under the Basel Convention. Future amendments to the Basel Convention, decisions of its bodies or any instruments under the Basel regime adopted after the entry into force of the POPs convention, may be taken into account by the Conference of the Parties of the POPs convention and its implementing bodies. For that purpose an appropriate expedited procedure could be adopted by either the Committee or the Conference of the Parties of the POPs convention.

Annex

Some examples of cross-referencing in multilateral environmental agreements

1. Direct references to the Basel Convention:

(a) Article 3 of the Protocol to the Convention on Long-range Transboundary Air Pollution on Persistent Organic Pollutants (1998) stipulates:

“BASIC OBLIGATIONS

"1. Except where specifically exempted in accordance with article 4, each Party shall take effective measures:...

“(b) (i) To ensure that, when the substances listed in annex I are destroyed or disposed of, such destruction or disposal is undertaken in an environmentally sound manner, taking into account relevant subregional, regional and global regimes governing the management of hazardous wastes and their disposal, in particular the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal”; and

(b) Article 39 of the Fourth ACP-EC Convention of Lomé, as amended on 4 November 1995 states:

"3. The term "hazardous waste" within the meaning of this Article shall cover categories of products listed in Annexes 1 and 2 to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal".

2. Implied reference to principles and rules set by the Basel Convention:

(a) The Montreal Protocol on Substances that Deplete the Ozone Layer (1987) does not include direct reference to the Basel Convention. Some of its provisions cover issues related to the destruction of, disposal of and trade in used controlled substances. In developing those provisions, the Conference of the Parties adopted at its Fifth Meeting decision V/24 in which it noted the report of the secretariat on the applicability of the provisions of the Basel Convention to trade in used substances of the Montreal Protocol and urged the Parties to the Basel Convention to take appropriate decisions, consistent with the objectives of the Basel Convention, in order to facilitate early phase-out of the production and consumption of the controlled substances of the Montreal Protocol. In its decision VII/31 (Status of recycled CFCs and halons under the Basel Convention) adopted at the Seventh Meeting, the Conference of the Parties states that the international transfers of controlled substances of the Montreal Protocol which are recovered but not purified to usable purity specifications prescribed by appropriate international and/or national organizations, including the International Standards Organization (ISO), should only occur if the recipient country has recycling facilities that can process the received controlled substances to these specifications or has destruction facilities incorporating technologies approved for that purpose;

(b) The Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1996) does not include reference to the Basel Convention, but sets certain obligations similar to those included in the Basel Convention; and

(c) The Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (1996) to the Convention for the Protection of the Mediterranean Sea Against Pollution sets certain obligations similar to those in the Basel Convention.

3. Other examples of direct or implied cross-referencing:

(a) The United Nations Framework Convention on Climate Change (1992) and its Kyoto Protocol (1998) contain in several articles references to the Montreal Protocol. Those references consist mainly of reference to greenhouse gases not controlled by the Montreal Protocol and controlled under the United Nations Framework Convention on Climate Change;

(b) The Convention on the Conservation of Antarctic Marine Living Resources (1980) refers explicitly to provisions of the Antarctic Treaty. Article III says:

"The Contracting Parties, whether or not they are Parties to the Antarctic Treaty, agree that they will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty and that, in their relations with each other, they are bound by the obligations contained in Articles I and V of the Antarctic Treaty";

(c) Similar obligations relating to articles IV and VI of the Antarctic Treaty are contained in article IV of the Convention. Specific obligations for non-Parties of the Antarctic Treaty are set in article IV. In addition, article VI indicates that nothing in the Convention "shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals;" and

(d) The Basel Convention does not contain any cross-reference in its text, although some decisions of its Conference of the Parties relate to the harmonization of obligations between the Basel Convention and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (decisions I/4 of 4 December 1992, II/7 of 25 March 1994, III/23 of 22 September 1995), cooperation with the International Maritime Organization on the harmonization of rules relating to the transport of hazardous wastes by sea (decisions I/18 of 4 December 1992, II/24 of 25 March 1994, III/24 of 22 September 1995), and effects of the Basel Convention on transboundary movements of wastes containing substances controlled by the Montreal Protocol (decisions II/5 of 25 March 1994, III/15 of 22 September 1995).
