

TWENTY-FOURTH REGULAR SESSION
26-30 October, 1998
Tegucigalpa, Honduras

OEA/Ser.L/XIV.2.24
CICAD/doc.996/98
28 October 1998
Original: Spanish

**REPORT OF THE CHAIRMAN OF THE GROUP OF EXPERTS
TO CONTROL PRECURSOR CHEMICALS AND CHEMICAL SUBSTANCES,
MACHINES AND MATERIALS
ON THE DRAFT NEW MODEL REGULATIONS**

Twenty-fourth regular session of CICAD, Tegucigalpa, Honduras

October 28, 1998

1. INTRODUCTION:

The Group was convened by the Commission at its twenty-first regular session. it met in Fort de France, Martinique, on June 24 - 27, 1997; in Washington on April 29 - May 1, 1998; and in Santa Cruz, Bolivia on September 29 - October 2, 1998.

The main task that the Group took on was to review and amend the "Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials", adopted by the General Assembly in 1990.

There were various reasons to undertake this revision, but chief among them was the idea that the Regulations should be adapted to new circumstances and needs and should reflect the experience acquired since the first version was adopted.

Now that the Group has completed its work, its Chairman considers it advisable to provide a written explanation of the grounds and arguments reviewed for each of the main amendments contained in a new draft of the Regulations presented to the Commission for its approval.

2. GENERAL ASPECTS:

The new Regulations are arranged somewhat differently. A more logical order is used to classify the old and the new regulations under 15 sections, each of which deals with a separate topic. There are 39 articles in all.

Furthermore, the Introduction has been amended and updated, particularly in the sense that the Anti-Drug Strategy in the Hemisphere has been included as one of the foundations of the new Regulations.

The further recommendations made by the experts at the end of the Regulations have also been replaced and updated. The three new tables classifying chemical substances have also been added.

3. DELETION OF "MACHINES AND MATERIALS"

Although it is true that Article 13 of the 1988 Convention recommends taking steps to prevent the diversion of "material and equipment" to be used in illicit manufacturing of drugs, the Group considered that the provisions in the Regulations referring to "machines and materials" were inapplicable, particularly inasmuch as they restrict trade in them with measures as drastic as those applicable to the precursors contained in former List 1.

The Group was not informed of any diversion or confiscation of such materials, nor of any country in the Hemisphere that had applied the regulations proposed in the regulations.

Furthermore, it was agreed that there are only a few machines serving criminal purposes, such as those used for packaging capsules, tablets or pills.

Consequently, and for the sake of ensuring that the regulations are coherent and contain norms that really do justify their application, it was agreed to delete the systems for control and all other references and regulations dealing with "machines and materials" and which do not in fact coincide with the reality, experience, needs, and effective control capabilities of States in this area. The fact is: there were never any grounds for their mention, since they went well beyond the 1988 Convention and later U.N. recommendations on the subject.

Nevertheless, the Group did leave the updating or adoption in domestic legislation of criminal provisions to prevent and sanction the diversion of machinery used for packaging capsules or similar products, as a further recommendation.

Naturally, the title of the Regulations was amended to reflect this decision.

4. "PRECURSORS AND CHEMICAL SUBSTANCES":

The Group considered that the expression "chemical substances" was sufficiently generic to include "precursors", which led to the conclusion that it was unnecessary to maintain the distinction. What is more, both precursors and other chemical substances are contained in the first two lists, so that there were no grounds for distinguishing them.

For its part, the 1988 Convention uses as a generic term "substances that are frequently used in the illicit manufacture of a narcotic drug or psychotropic substance."

The United Nations and most of the legislations in the Americas use the same expressions.

Consequently, there being no reason to maintain the distinction, the new draft replaces it with the generic expression of "chemical substances frequently used in the production, manufacturing, or illicit preparation of narcotics and psychotropic substances or others having a similar effect."

This second decision determined the new title of the Regulations.

5. NEW TOPICS:

5.1.- It is to be observed that articles 8 and 9 in Section IV contain regulations regarding "substances under surveillance", which apply to substances in List III, some of which are subject to diversion.

Irrespective of the recommendation to keep close tabs on these substances, it is recognized that particular circumstances in a given State could warrant subjecting them to stricter control measures.

5.2. Incorporating progress achieved at the United Nations level and bearing in mind current circumstances in some countries, a special regulation has been included for the so-called "mixtures", the definition of which has been included in Section II.

Section V recommends subjecting mixtures to the control measures of Section VI, whenever they contain substances listed in Table 1, regardless of the percentage. If they contain over 30% Table 11 substances, they are subject to the controls applying to that Table.

However, a general norm recognizes the right of States to establish different percentages in their domestic laws and to consider other circumstances in determining what controls to apply to mixtures. The surveillance measures of Section IV are also applied to mixtures containing Table III substances.

Finally, on this topic, Article 12 contemplates the case of mixtures that are unlikely to be used in the illicit production of drugs, and excludes them from surveillance and control systems..

5.3.- In line with the 1988 Convention and convinced that notification prior to shipment of chemical substances constitutes a valuable aid in preventing diversion, the new Regulations have introduced Section VIII, which regulates "prior notification" for all products in List I and two substances in List 11, setting a deadline for replies and consequences if that deadline is not met. In the same vein, rules have been included regarding the necessary respect for the confidential nature of the information received.

It should be pointed out that, according to a note from the Executive Secretariat, the obligatory inclusion of two Table 11 substances under the control mechanisms for Table I substances is due to the need to control them, based on both the experience of several countries in the Americas and U.N. recommendations. This express provision, along with the consequences of failure to reply, were inadvertently omitted from the text adopted in Santa Cruz.

Nevertheless, the Chair has agreed with the Executive Secretariat of CICAD that they be included in the text submitted to consideration by the Commission, in order for that body to take a decision on the matter, irrespective of their inclusion in the report as a special note also. Articles 26 and 27 contain both innovations.

5.4. A new Section IX groups together the so-called "reports on irregular movements". Composed of three articles, this section obliges those involved in production, sales, and transport of chemical substances to report to the authorities if, in the course of the transactions they engage in, they consider there are reasonable grounds to suspect that the substances may be diverted. A few cases of what could

constitute reasonable grounds are described. Likewise, the authority concerned is obliged to forward the information, once it has been verified, to the authorities in the country of origin, destination or transit. The principle of the confidentiality of the information is also introduced along with indications when it can be divulged.

We must admit that still pending is the inclusion of norms exonerating from any kind of legal liability the pharmaceutical company, transport services and anyone else who collaborates by informing the authorities of the existence of operations suspected to involve diversion. Exoneration of liability should also have been contemplated in cases of refusal to sell based on the existence of such suspicions.

This Chair considers that it is absolutely necessary to contemplate these norms if the intention is to include in domestic legislation the obligation to report "irregular movements" in the terms referred to in Section IX of the Regulations.

5.5.- On the subject of criminal offenses, now found in Section X, some amendments have been made:

The criminal offense of diversion of chemical substances, like the 1988 Convention, requires for its configuration "knowledge" of the illicit destiny of the substances. It was considered that such substances are frequently produced, sold, and transported by legitimate means which may involve a large number of people who could only be considered accessories to the extent that it is shown that they acted in full knowledge that the substances would be diverted.

Furthermore, and bearing in mind the eminently international nature of this crime, the Group included in the definition of this criminal offense the possibility that it could be configured when the illicit activity of producing drugs took place outside the country in which the -- to put it in general terms --- diversion took place. In other words, it suffices to prove that an individual knew that the substances were destined for illegal production of drugs, be it in the same territory or abroad.

Even though there are proposals for amending paragraphs B,C, and D of article 32, the Group considered that it had neither the time nor the expertise needed to make changes and agreed that they should therefore remain as drafted in the current Regulations. This topic will be the subject of a thorough and enlightening scrutiny at some later date.

5.6. A new Section XI recommends, under the heading "investigation and proving of crimes", that, to the extent that a country's legal code permits it, domestic laws should be extended to authorize for investigative purposes controlled deliveries of chemical products, the interception of private communications, and undercover agents and informers.

A provision was also added granting probative value and such admissibility as domestic laws allow to acts established through the use of these techniques.

5.7. Extradition and mutual legal aid were incorporated as a specific recommendation in Section XII, since they were considered absolutely necessary for adequate prevention and control of these crimes, despite the fact that these matters are dealt with in greater detail and generically in the 1988 Convention and in numerous bilateral treaties.

In this way, the Group wished to draw special attention to the need for these two factors in the case of this kind of crime.

5.8. Section XIII contains the other civil, administrative, or criminal infractions deriving from noncompliance with the norms regarding controls established by national laws.

5.9. The designation of competent authorities to comply with requests for information and international cooperation, notification of the U.N. and the OAS, their appointment, and the changes that may occur are dealt with in new Section XIV. There appears to be no need to substantiate this new norm, given its obvious importance.

5.10. Finally, Section XV was devoted, albeit briefly, to establishing the suitability of member states encouraging voluntary collaboration with the private sector engaged in activities related to those discussed in these Regulations.

6. ADAPTATION OF OTHER NORMS

6.1. The requirements governing imports, exports, transit and transfer applicable to Table I chemical substances have been grouped together in Section VII, since the same control systems are applicable to all these operations. Likewise the deadlines were altered to match the realities of international trade; the references that ought to appear in requests and notifications have been amplified and adapted; and the competent authorities have been authorized to suspend transactions if there are reasonable grounds to think that the substances may be diverted.

6.2. Norms involving the chemical substance Tables were grouped together and supplemented. In order to improve controls, it was established that they should be classified in accordance with the World Customs Organization system, which should also be used for statistical records and international trade and customs operations.

The new regulations incorporate the need to notify the OAS, through CICAD, of any changes made in the national Tables listing the different substances and they round off the mechanism for requesting changes in the Model Regulations Tables, bringing them into line with the 1988 UN Convention.