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Meeting of Legal Experts on the Draft
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"NEW INSTALLATIONS":
AN OUTLINE OF SOME EXISTING DEFINITIONS

(Note prepared by WHO Secretariat)

1. One of the key substantive Articles in the Preliminary Draft Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources is Article 6 (Discharges from new installations). a/ The formulation of a definition of the term "new installations" gave rise to some discussion at the Second Intergovernmental Consultation concerning a Draft Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Venice, 17-21 October 1977). It was clear that further work was required in order to formulate a definition that would be acceptable to the Mediterranean Coastal States for the purposes of the Protocol. Each of the delegations present at Venice was invited to transmit to WEO any existing regulatory provisions (or Ministerial circulars, etc.) that might prove helpful in drafting an adequate definition. At the same time, the WEO Secretariat endeavoured to compile regulatory texts from a number of non-Mediterranean States in the hope that they might help to elucidate the various problems to be resolved in the drafting of a definition. On the basis of the information collected, a preliminary version of this Note was prepared and brought to the attention of (although not distributed to) the Intergovernmental Review Meeting of Mediterranean Coastal States on the Mediterranean Action Plan, Monaco, 9-14 January 1978. The latter meeting did however concur with WEO's proposal that the results of its work on this matter be circulated prior to the convening of the working groups of Governmental juridical and technical experts. b/

2. This Note is intended to assist the working groups in their consideration of, and discussions on, item (c) of Article 4 (Definitions) of the Preliminary Draft Protocol, i.e. the tentative definition of "new installations". This reads as follows:

[(c) "new installation" means:

1. any establishment used for whatever purpose:

- (i) for which a building contract is concluded or a construction permit granted more than . . . after the entry into force of the Protocol, or
- (ii) for which construction or site works are begun after the time limit indicated above or which are not completed three years after the entry into force of the Protocol;

2. any extension or conversion of existing installations resulting in:

- (i) an increase of more than 25 per cent in production capacity or the amount of waste discharges; or
- (ii) a change in the nature of the discharges.] c/

a/ It should be pointed out that, at the time of preparation of this Note, this Article was in brackets.

b/ See in this connexion paragraph 16 of the Inventory of areas of disagreement and of points requiring clarification regarding the preliminary draft protocol for the protection of the Mediterranean Sea against pollution from land-based sources.

c/ It should be pointed out that, at the time of preparation of this Note, this item was in brackets.

3. The initial text of the above definition was drafted in the light of the very limited amount of documentation on the subject available to the Secretariat prior to the Venice Consultation; some revisions were made in the light of the discussions at Venice, while non-substantive linguistic changes were introduced by the working group convened in Geneva on 8-9 November 1977. a/

4. The observations that follow are based on an examination of relevant provisions and procedures (existing or proposed) in a number of jurisdictions, some of which are non-Mediterranean. These jurisdictions have, in general, not been identified since some of the texts have not yet been promulgated and since they are presented only as models that might help to advance the negotiating process whereby a definition may be reached that is satisfactory to all the negotiating Parties. The only exceptions that have been made are in the case of an IMCO instrument (Example 1) and an EEC Directive (Example 2).

5. The examples cited reflect the diversity in the legal and administrative approaches that have been taken in different countries to deal with sources of pollution that were in existence prior to the adoption of a given legal text. In some instances, the interpretative provisions place emphasis on new installations, sources, or discharges, whereas elsewhere "new installations" may not be defined while the concept of existing installations, sources, or discharges is formally clarified. Conversions or modifications of existing installations, etc. receive special attention in some jurisdictions, since it is clear that national authorities are in practice called upon to determine cases where modifications or extensions to an existing installation are of such magnitude as to require a licence or permit that corresponds to that issued for a new installation. Even such apparently clear terms as "begun" or "commenced" have been defined in some jurisdictions.

6. While most of the examples cited are taken from texts dealing with water pollution control, some of them are also taken from texts on air pollution control. Although control strategies differ, the basic philosophies underlying the classification of sources can be regarded as similar, at least in those respects that are relevant to this Note.

a/ Document UNEP/IG.11/3/Annex III (p. 6, paragraph 21).

EXAMPLE 1

The Regulations for the Prevention of Pollution by Sewage from Ships (Annex IV to the International Convention for the Prevention of Pollution from Ships, 1973) contain the following definitions in Regulation 1:

"'New ship' means a ship:

- (a) for which the building contract is placed, or in the absence of a building contract, the keel of which is laid, or which is at a similar stage of construction, on or after the date of entry into force of this Annex; or
- (b) the delivery of which is three years or more after the date of entry into force of this Annex."

"'Existing ship' means a ship which is not a new ship."

EXAMPLE 2

Directive No. 78/176/EEC of the Council of the European Communities on waste from the titanium dioxide industry establishes a distinction between "existing industrial establishments" and "new industrial establishments" in two preambular paragraphs. The definition of "new industrial establishments" given in item (e) of Article 2 of the Directive is as follows:

"'new industrial establishments' means those industrial establishments which are in the process of being set up on the date of entry into force of this Directive or which are set up after that date. Extensions to existing industrial establishments leading to an increase of 15 000 tonnes per year or more in the titanium dioxide on-site production capacity of the establishment concerned shall be treated as new industrial establishments."

EXAMPLE 3

The country from which this example emanates has a comprehensive statute on water pollution control, promulgated in 1974. One of the principal substantive provisions prescribes that no person may, without the previous consent of the competent authorities, "bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well or begin to make any new discharge of sewage or trade effluent into a stream or well." The following definitions apply for the purposes of this provision:

"the expression 'new or altered outlet' means any outlet which is wholly or partly constructed on or after the commencement of [the Act] or which (whether so constructed or not) is substantially altered after such commencement;

the expression 'new discharge' means a discharge which is not, as respects the nature and composition, temperature, volume and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge."

EXAMPLE 4

In this case, the country's Water Pollution Law dates from 1971 while the basic implementing ordinance was issued in 1972 and amended in 1974. The country has a federal structure and major responsibility for implementation of technical measures for water pollution control devolves upon the regional jurisdictions. The Law itself contains two sections dealing respectively with new cases of waste water discharge and existing cases, as follows:

"Discharge of waste water: new cases

15. Liquids or gases, and especially waste water, originating from the drainage systems of localities, dwelling-houses, work sites, large-scale or small-scale industrial undertakings, agricultural undertakings, vessels, or other facilities, may not be discharged into water unless they have been treated in accordance with [regional] legislation. The discharge of waste water shall be subject to authorization by the competent [regional] authority."

"Discharge and seepage of liquid wastes: existing cases

16. (1) The [regional authorities] shall ensure that all methods of disposal by discharge and seepage that are liable to cause pollution are adapted so as to comply with the requirements concerning water protection or are discarded within ten years of the entry into force of this Law. They shall establish time-limits on the basis of the urgency of each case and in accordance with the [regional] plan for the enhancement of water quality. Longer time-limits may be granted, as an exceptional measure, in the case of outflows and seepages of minor importance."

The question of conversions is dealt with in two other sections, which prescribe as follows:

"Construction permits: (a) within the area served by the master sewerage plan

19. Permits may not be issued for the construction or conversion of buildings or installations, of any nature whatsoever, in zones designated for construction or, in the absence of such zones, within the area served by the master sewerage plan, unless adequate provision has been made for discharge of waste water into drains. In cases where, for imperative reasons, small buildings or installations cannot yet be connected to the drainage system, the competent authority may as an exceptional measure and subject to the approval of the [regional] technical water protection service, issue a construction permit provided that conditions permitting connexion to the system can be created within the near future and that, until such time, the removal of waste water can be realized by an adequate alternative method ...".

"Construction permits: (b) outside the area served by the master sewerage plan

20. A permit may not be issued for the construction or conversion of buildings and installations outside the area served by the master sewerage plan unless the applicant can produce factual evidence that there is a need therefor. The construction permit may not be issued until a suitable waste water removal and treatment system or alternative suitable method of waste water disposal has been decided upon and the [regional] technical water protection service has given its agreement."

EXAMPLE 4 (cont'd.)

The initial interpretation given to the term "conversion" in the 1972 implementing ordinance was non-quantitative; as a result of the 1974 amendment, the relevant definition now reads as follows:

"For the purposes of Sections 19 and 20 ..., "conversion" means any modification made to buildings with the aim of increasing by more than one-quarter the premises assigned to a particular use (accommodation of persons, agriculture, crafts, etc.), or altering the method of utilization or operation to a corresponding extent."

EXAMPLE 5

In this case (which relates to a Mediterranean State), the basic statute on environmental protection was promulgated in 1976. It provides for the licensing or notification of environmentally harmful installations, the application for a licence or the notification being submitted jointly with the application for a construction permit. Relevant in the present context is the fact that the application for a licence or the notification must be renewed in the event of the installation being transferred, extended, or converted, or the manufacturing processes being altered, in such a way as to entail hazards or adverse effects as referred to in the initial provisions of the law in question. It may be expected that the precise modalities governing the interpretation of the above provisions will be clarified by Ministerial circular or administrative regulations.

EXAMPLE 6

This case likewise relates to a Mediterranean State which enacted a basic law on water pollution in 1976. A complex system of discharge licences is imposed for all new installations, although the actual term "new installations" is not defined. It is prescribed that all existing civil or manufacturing installations whose purpose is modified, or which are extended, converted, or transferred after the commencement of the law, must apply for a new discharge licence. It appears that the interpretation of this provision has given rise to some difficulty, and consequently a draft circular has been prepared by the health ministry explaining the manner in which this particular provision is to be applied, as follows:

"Under [the relevant provisions of the law], a new discharge licence must be applied for from the competent authorities in the case of existing installation ... that are extended, converted, or transferred ...

It has been noted that a rigid application of these rules would subject economic undertakings to certain constraints, particularly those undertakings whose activity is characterized by a continuous evolution of technological processes, in view of the fact that they will be required to submit repeated applications for licences in respect of the same discharges, even in cases where extensions or modifications of existing facilities in a production plant do not modify in any way the qualitative and quantitative characteristics of existing discharges.

It therefore seems necessary to formulate instructions concerning the correct and uniform implementation of these provisions.

In this context, it would appear to be opportune to emphasize, in order to ensure the correct interpretation of the rules, that the legislator's objective has been to protect waters against pollution.

The concepts of extension or conversion of production plants must therefore be viewed from the above-mentioned perspective and, in order to facilitate their interpretation, it would seem to be useful to reinforce these concepts by an objective and readily verifiable criterion, namely the extent of the increase in the total production capacity of the installations concerned. This criterion should be based on valid elements clarifying the effect of the increase in production on the qualitative and quantitative characteristics of existing discharges.

In particular, modifications introduced to the production processes by means of technological improvements, modernization of equipment, or more rational interrelationships between the diverse sectors of production, which entail an increase in the productivity of the establishment of up to 10 per cent of that reported at the time of the initial application for a discharge licence, are not to be regarded as true extensions or conversions, provided that there have been no changes in the qualitative and quantitative characteristics of the discharges concerned.

In such cases, it is not necessary to apply for a new discharge licence although, if the competent authorities so request, the parties concerned must be in a position to prove that the increased production will entail no augmentation, even temporary, in the polluting load.

EXAMPLE 6 (cont'd)

In the case of conversions and expansions of installations that cause an increase in the productivity of the establishment of between 10 and 50 per cent of that initially reported, new discharge licences must be applied for, and the parties concerned must provide the competent authorities with all relevant particulars enabling a serious evaluation to be carried out aimed at (1) verifying to what extent and in what manner the changes will affect existing discharges, and (2) determining whether one is dealing with an extension as such or a new installation.

In the case of extensions or modifications of installations that will entail an increase in the production capacity of the plant greater than 50 per cent, one is undoubtedly dealing with a new installation, and consequently the new discharges are subject to the measures provided for [elsewhere in the law]."

EXAMPLE 7

In another Mediterranean State, a draft decree has been prepared dealing with the basic technologies required to prevent the discharge of pollutants in liquid effluents originating from industrial processes. Those provisions relevant to this Note demonstrate a concern to forestall pollution from new installations while at the same time assuring the gradual adaptation of existing industrial plants to the requirements to which new installations are subject. The relevant sections read as follows:

"1. (1) ...

(2) Industrial plants engaged in [the activities listed in an Annex] shall require, for their establishment, extension, or transfer, a favourable report by the [competent Ministry] on the processing and treatment methods used so as to ensure compliance with the basic qualitative parameters for liquid wastes, prior to their discharge into the external environment. A favourable report shall likewise be required for the introduction of modifications to the industrial process or to any of the equipment used which, while not causing an augmentation in the production capacity, give rise to a significant increase in the quantity or a significant change in the nature of the pollutants contained in the final effluents from the industrial establishment.

...

11. (1) In general, existing industrial plants must adapt themselves to the basic qualitative parameters for effluents in the manner and within the periods laid down by the [competent Ministry], in accordance with the circumstances in each case ... In particular, at the time of any extension to existing industrial plants, the provisions laid down in [the relevant Section] must be complied with and in each case arrangements must be made to modernize the methods used to deal with water pollution from existing installations, in order to accelerate their gradual adaptation to new exigencies.

..."

One of the transitional provisions in the decree contains the following definition of "existing industrial plants":

"existing industrial plants" shall be interpreted as meaning those that are in operation on the date of entry into force of the [decree] or which applied for provisional registration in the Industrial Register prior to the said date, provided that final registration takes place within 18 months after the date of promulgation of the present provision ...". a/

a/ In the country concerned, provisional registration occurs prior to the commencement of construction work, while final registration (equivalent to an operating licence in other countries) occurs when construction has been completed and the new installation is ready for start-up.

EXAMPLE 8

The term "new installation" is not used in the water pollution law of another country, which has a federal structure. Instead, the term used is "source" (defined as any building, structure, facility, or installation from which there is or may be a discharge of pollutants). The term "new source" is defined to mean "any source, the construction of which is commenced after the publication of proposed regulations prescribing [a standard] which will be applicable to such source, if such standard is thereafter promulgated in accordance with [the relevant provisions of the law]."

The term "construction" is defined as follows:

"any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises."

In order to assist those responsible for the implementation of the above provision, detailed guidance on the modalities for determining whether a source is to be considered as a new source is given in the following terms:

"(1) A source should be considered a new source provided that at the time of proposal of the applicable new source standard of performance, there has not been any:

(a) Significant site preparation work, such as major clearing or excavation, but not including feasibility and design studies, or erection of facilities or structures in connexion with such studies;

(b) Placement, assembly, or installation of unique facilities or equipment at the premises where such facilities or equipment will be used; or

(c) Contractual obligation to purchase such unique facilities or equipment, provided that:

(i) The term 'contractual obligation' shall refer only to binding contracts, and shall not include options to purchase or purported contracts which are terminable at little or no loss; and

(ii) The term 'facilities or equipment' shall mean the following, provided that the value of such items represents a substantial commitment to construct a particular facility:

(a) structures;

(b) structural materials unique to a particular site; or

(c) machinery, process equipment, or construction equipment for use at a particular site. The term 'facilities or equipment' shall not include fuel or other fungible, non-site-specific commodities.

2) For the purposes of determining applicability of these regulations to new construction involving direct discharge into the [country's waters], three categories of new construction are described: a totally new source, a modification, and a major alteration to an existing source. A totally new source is subject to its under [the new source requirements relevant provisions]. Such facilities include both what are traditionally known as green field operations and total reconstruction.

Modifications to an existing source holding a... discharge permit are intended by [the relevant law] and its legislative history to be subject only to permit modification procedures... and are not considered to be new sources. Modifications include changes in production capacity by modification to or addition of process units in a manufacturing process. It may also involve the addition of related but new product lines.

The category of new construction called "major alteration" is established by these guidelines to accommodate situations which do not naturally fall into either of the above new construction categories. The purpose is to distinguish plant and process modifications which should not be considered to be new sources from those major alterations which effectively create a new source, but which by circumstances are located at the same site or are associated with existing sources... the A major alteration is construction of an additional industrial facility or facilities on the existing site which functions independently of the existing

EXAMPLE 9

In one of the States of which the federal nation referred to in Example 8 is constituted, the air pollution regulations include the following definition of "new source":

"New source is any air contaminant source constructed after April 3, 1972, and any air contaminant source constructed prior to that date to which any modification is made after that date."

The term "modification" is defined as follows:

"Modification is any physical change in, or change in the method of operation of an air contaminant source which increases the amount of any air contaminant emitted by such source or which results in the emission of any air contaminant not previously emitted, except that:

1. routine maintenance, repair, and replacement shall not be considered physical changes, and
2. the following shall not be considered a change in the method of operation:
 - (i) an increase in the production rate, if such increase does not exceed the operating design capacity of the affected source;
 - (ii) an increase in the hours of operation; and
 - (iii) the use of an alternate fuel if the source is designed to accommodate such alternate fuel:

provided, however, that the [competent authority] is notified within thirty (30) days of such changes."

EXAMPLE 10

The regulations on waterworks, sewerage, and refuse disposal in another of the States of which the federal nation referred to in Example 8 is constituted include the following provisions relating to the approval of plans and specifications:

"(2) PLANS AND SPECIFICATIONS TO BE SUBMITTED. Plans and specifications shall be submitted to and approved by [the competent authority] before commencing construction for:

- (a) New water supplies, also for extensions and alterations in the source, pumping equipment, purification, storage or any other part of existing waterworks which may affect the quality or quantity of the water.
- (b) New sewerage systems and alterations or extensions of existing systems which may materially affect the quality or quantity of the effluent, or location of the outlet.
- (c) New refuse disposal plants and material modifications in existing plants.
- (d) All plans and specifications shall be accompanied by an application for approval."

EXAMPLE 11

In another country having a federal structure, a series of regulations have been issued to implement the country's Fisheries Act. Definitions are given in certain of these regulations of the terms "existing plant" and "new plant" (or of corresponding terms). Thus, a text dealing with liquid effluents from meat and poultry plant contains the following definitions:

"existing plant" means a plant that commenced commercial production before the date of the coming into force of [the text];

'new plant' means a plant that did not commence commercial production before the date of coming into force of [the text] and that commences commercial production on or after that date."

A corresponding text dealing with pulp and paper effluents contains the following definitions:

"'altered mill' means any mill the processes of which are, after the coming into force of [this text], altered, thereby resulting in a change in the quality of the effluent from the mill but does not include any mill the processes of which are altered solely for the purpose of pollution abatement;

'expanded mill' means any existing mill in which, after the coming into force of [this text], equipment has been installed that increases the production of the mill by ten per cent or more;

'existing mill' means any mill other than a new mill, expanded mill, or altered mill;

'new mill' means any mill that commences operations after the coming into force of [this text]."