



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

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Item 6 of the provisional agenda*
Other matters

**Views from Parties and observers on the application of
criterion (d) of Annex II to the Convention**

Note by the Secretariat

The annex to the present note contains a copy of views received from Parties and interested observers on the application of criterion (d) of Annex II to the Convention, as requested by the Conference of the Parties to the Rotterdam Convention in its decision RC-4/6, having considered the inclusion of endosulfan in Annex III to the Convention. These views are referred to in the legal opinion on intentional misuse (UNEP/FAO/RC/CRC.6/10). They have been reproduced as received, without formal editing.

* UNEP/FAO/RC/CRC.6/1.

Annex

**Copy of views received by the Secretariat from Parties and interested observers
on the application of criterion (d) of Annex II to the Convention**



EUROPEAN COMMISSION

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v Radě EU

Czech Presidency
of the Council of the EU

Présidence tchèque
du Conseil de l'UE

30 March 2009

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Submission by the European Community and its Member States

Introduction

The European Community and its Member States are making this submission in response to the request by the fourth Conference of the Parties (COP4) to the Rotterdam Convention¹. In the decision on inclusion of endosulfan in Annex III of the Rotterdam Convention the Conference "requests that Parties provide their considered views on the application of criterion Annex II (d) within a period of 6 months from the date of this decision, to the secretariat".

Background

Questions concerning the application of criterion (d) in Annex II have arisen in the course of considering the inclusion of endosulfan in Annex III of the Rotterdam Convention. Annex III lists those banned or severely restricted chemicals subject to the prior informed consent (PIC) procedure. The listing of chemicals must be based on two Parties' notifications from two different PIC regions that meet the criteria set forth in Annex II.

Following notifications of final regulatory actions for endosulfan by the Netherlands and Thailand, the Chemical Review Committee (CRC) recommended that the COP consider listing endosulfan in Annex III. After a thorough review of the two notifications, the CRC had satisfied itself that the notifications met the Annex II criteria for listing in Annex III.

Thailand's notification concerning its final regulatory action for endosulfan reported that the decision of the Thai government was motivated by the application of endosulfan to kill golden apple snails in paddy fields. This use resulted in environmental harm and, in particular, death of fish and other aquatic life forms.

In reviewing the Thai notification, the CRC took into account criterion (d) of Annex II to the Convention, which lays down that intentional misuse should not be, on its own, an adequate reason for Annex III listing. It concluded that "the Thai regulatory action had been directly linked to the adverse environmental impact on aquatic life forms associated with endosulfan use under the prevailing conditions described".

¹ 38 ILM 1 (1999), Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (concluded 10 September 1998, entered into force 24 February 2004)

However, the validity of the Thai notification has subsequently been questioned and the interpretation of the term 'intentional misuse' has become the main point of contention.

The Annex II criteria and the term "intentional misuse"

"Intentional misuse" appears in clause (d) of Annex II to the Rotterdam Convention, which contains the criteria for listing banned or severely restricted chemicals in Annex III:

"In reviewing the notifications forwarded by the Secretariat pursuant to paragraph 5 of Article 5, the Chemical Review Committee shall:

- (a) Confirm that the final regulatory action has been taken in order to protect human health or the environment;
- (b) Establish that the final regulatory action has been taken as a consequence of a risk evaluation...;
- (c) Consider whether the final regulatory action provides a sufficiently broad basis to merit listing of the chemical in Annex III...;
- (d) Take into account that *intentional misuse* is not in itself an adequate reason to list a chemical in Annex III." (emphasis added)

The meaning of the term 'intentional misuse' contained in criterion (d) of Annex II was already usefully clarified in the legal opinion on intentional misuse attached to the Working paper on the application of criterion (d) of Annex II (UNEP/FAO/RC/CRC.2/20)².

Use versus misuse

The contention with respect to the Thai notification is that, since endosulfan formulations carried a label warning against the use of the pesticide to control snail populations in rice paddies, such applications contrary to label instructions would be an 'intentional misuse'.

The use of a pesticide contrary to label instructions or warnings would in most cases be a non-authorised use, which in some countries is referred to as "off-label use", whereas others would refer to it as 'misuse'. So before qualifying a use as 'misuse', it is critical to examine actual practice on the ground. In certain contexts, off-label use might even be legal, e.g., where a group of pesticide users following a special procedure under national regulation are applying a pesticide to control a particular pest on certain crops, even if such use is not authorised according to the label.

² This opinion rightly explains that "for a person to commit 'intentional misuse' of the chemical, the following conditions should be met:

- The person knows the legitimate use of the chemical, as permitted under the relevant law or regulation, or otherwise as specifies in the label or other means of communication accompanying chemical; and
- The person purposefully uses the chemical in contravention of the legitimate use of the chemical with the knowledge or belief that such illegitimate use of the chemical will cause the result that he/she so desires".

It is worth noting that even in countries with sophisticated systems for labelling pesticides and for educating the end users, mainly farmers, it is difficult to guarantee that labels and similar communications will be abided by to the letter. A 1998 Swedish review of studies considering the handling and use of pesticides indicated that handling or use contrary to label instructions occurred in at least 30% of applications of a plant protection product, even among professional users³.

It is important to bear in mind the greater challenge faced by developing countries where resources may be limited and where a considerable level of illiteracy may be present among the end users of the pesticide. Label instructions and similar communications may have only limited effectiveness in preventing non-authorised uses in the prevailing circumstances.

Indeed, it may be common for farmers in a region to follow certain practices that are not according to label instructions and therefore "off-label". If a government finds that a label instruction has not been adequate to control such "off-label" uses, which lead to adverse effects on human health and the environment, it may indeed find it necessary to take an additional final regulatory action to protect human health and the environment. This might require a severe restriction or a ban of the use of the chemical which is leading to the adverse effects.

This is in fact the case with Thailand's severe restriction of endosulfan. Labelling requirements had failed to prevent the off-label use and the ensuing harm to the environment. Consequently, emulsifiable concentrate and granular formulations were banned, since such formulations had proved to be very toxic to fish and aquatic organisms, while use of capsule formulations remained registered.

Thailand's regulatory action was taken to protect the environment. It was therefore the type of action envisaged by the Parties to the Rotterdam Convention in their common objective of sharing responsibility for preventing unwanted effects from chemicals and pesticide formulations. So, whilst the chemical might have been "misused" in the strict sense, the use does not constitute "intentional misuse" within the proper meaning of that term (see next section). We fully endorse the final paragraph of the legal opinion which explains that widespread use in a country is good evidence that a particular use is *not* an intentional misuse.

Intentional or unintentional

The issue remains as to whether the use of endosulfan in Thailand for golden apple snail control in paddy fields was an "intentional" misuse. The farmers applying the endosulfan intended to kill golden apple snails. The ensuing harm to aquatic life forms was not the intended consequence but rather a non-target effect of the use of the pesticide. This non-target effect can hardly be considered "intentional" since it was neither desired by the users nor was it foreseen by them as virtually certain to occur.

³ "Report on studies covering the use of personal protective equipment in connection with handling and use of pesticides; Results from questionnaires carried out in Norway, Sweden and Europe.", Report by Yvonne Bager, KEMI, March 1998.

The CRC 'Working Paper on the application of criterion (d) of Annex II'⁴ noted that pesticides were frequently used for suicide and for the intentional poisoning of fish and that such a use was to be qualified as an "intentional" misuse. In these cases a specific consequence – the suicide or the poisoning of fish – was intended.

Furthermore, criterion (d) talks about the intentional misuse in itself, which means that the direct consequence (suicide or poisoning of fish) is not an adequate reason to list a chemical on Annex III. But the consequences of the intentional misuse might very well be an adequate reason, e.g. if the poisoning of fish in a river leads to effects downstream or if the groundwater is polluted due to the intentional use of a pesticide in a crop for which the pesticide is not allowed.

In their use of endosulfan to control golden apple snails in paddy fields, the Thai farmers were making a use for which endosulfan was designed, namely, pest control. It is not known whether they knew that this was an off-label use, as they might not have been aware of label instructions and their legal significance. As the use of endosulfan in rice fields was a widespread common practice in Thailand, farmers – who might not always be literate - could well have believed that this use was not prohibited.

For all these reasons, the circumstances in Thailand that led to the regulatory action can therefore be distinguished from the type of "intentional misuse" for which clause (d) was drafted.

Application of criterion (d) in Annex II

Decision RC-4/6 requests that Parties provide their views "on the application of criterion Annex II (d)". It means that Parties should not only reflect on the meaning of the term "intentional misuse", but more importantly on the way criterion (d) in Annex II which contains the latter term should be applied by the Chemical Review Committee. In other words – Parties should clarify what the CRC is required to do when properly applying criterion (d). The Vienna Convention on the Law of Treaties (Vienna Convention)⁵ provides rules as to the proper interpretation and application of treaties. Article 26 of the Vienna Convention reflects a fundamental principle governing performance of legal obligations. It states the following: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

Article 31(1) of that Convention deals with interpretation of treaties and states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This basic rule of interpretation requires consideration of all three elements – the text, its context and the object and purpose of the treaty. Therefore the interpretation of the term "intentional misuse" and of the obligations of the CRC to properly apply the criteria contained in Annex II must be done taking due account of the ordinary meaning of the terms in Annex II of the Rotterdam Convention, in light of the Convention's preamble and the entirety of its provisions, in particular its objective as expressed in Article 1.

⁴ UNEP/FAO/RC/CRC.2/20

⁵ 1155 UNTS 331 (concluded 22 May 1969, entered into force 27 January 1980)

The text of Annex II contains 4 criteria for listing of chemicals that must be applied cumulatively by the CRC. It should be noted that whereas clauses (a), (b) and (c) require the CRC to "confirm" or "establish" or "consider" whether the specific criteria have been met, clause (d) is drafted in the style of a safeguard requirement. It only requires the CRC to **take into account** that intentional misuse alone is not a reason to list a chemical. It does not require the CRC to discard a notification of a regulatory action taken to protect human health or the environment in cases where a misuse of a chemical has occurred.

The context as explained by Article 31(2) of the Vienna Convention includes not just the text but also the annexes, protocols and the preamble to the treaty. The preamble to the Rotterdam Convention refers to the determination of the parties "to protect human health, including the health of consumers and workers, and the environment against potentially harmful impacts from certain hazardous chemicals and pesticides in international trade". This determination thus forms part of the context within which the ordinary terms of the convention must be interpreted.

The objective of the Rotterdam Convention is clearly laid down in its Article 1, which states that "the objective of this Convention is to promote shared responsibility and cooperative efforts among Parties in international trade of certain hazardous chemicals in order to protect human health and the environment (...)".

The objective of the Convention is achieved through the application of the prior informed consent procedure to chemicals listed in Annex III to the Convention. Application of the criteria in Annex II is part of the process through which Parties list chemicals in Annex III. The criteria contained in Annex II steer the Chemicals Review Committee in the process of making recommendation to the Parties and make the process of examination by the Committee transparent and scientifically sound.

The European Community and its Member States consider that the CRC correctly applied the criteria in Annex II. Clause (d) is one of the four criteria which must be considered by the CRC together in determining whether a notification meets all of the Annex II criteria.

The Thai notification clearly meets the criteria in clauses (a) to (c) of Annex II. Moreover, the CRC has properly applied criterion (d), which requires the CRC to: "take into account that intentional misuse is not in itself an adequate reason to list a chemicals in Annex III". It does not require the Committee to dismiss a chemical which satisfies criteria (a) to (c) even if it was intentionally misused. Applying clause (d) as meaning that whenever intentional misuse occurs, while at the same time criteria (a) to (c) are satisfied, disqualifies the chemical from listing in Annex III could frustrate the purpose of the Convention.

Interpretation and application of the treaties must be done in good faith and in light of the principle of *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention. Indeed, interpreting clause (d) in Annex II to mean that a chemical used contrary to label instructions may not be placed on Annex III ignores the objective of the convention and contradicts the fundamental obligation of the Parties to apply Rotterdam Convention in good faith.

Conclusion

Parties must interpret and apply the provisions of the Rotterdam Convention, including the annexes, in good faith and in light of its objectives and purpose. All 4 criteria contained in Annex II to the Convention must be applied cumulatively. Criterion (d) in Annex II cannot be interpreted as requiring that a chemical which satisfies criteria (a) to (c) must be excluded from listing in Annex III even if there have been incidents of intentional misuse (which in relation to the situation in Thailand is not accepted). Such an interpretation is not only contrary to the ordinary meaning of the language, but also undermines the objective of the Convention.

Insofar as the Thai notification is concerned, for the reasons set out above, the European Community and its Member States do not believe that the situation in that country can be described as intentional misuse.



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Mr. Peter Kenmore
Secretariat for the Rotterdam
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Plant Production and Protection
Division, FAO
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Submission by the European Community and its Member States

Dear Mr Kenmore,

we are pleased to provide you herewith the enclosed submission on behalf of the European Commission, representing the European Community, and on behalf of the Czech Presidency of the Council of the European Union, representing the Member States of the European Community.

The European Community and its Member States are sending the enclosed submission in response to the request by the fourth Conference of the Parties (COP4) to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade in its decision RC-4/6. In this decision on inclusion of endosulfan in Annex III of the Rotterdam Convention the Conference "requests that Parties provide their considered views on the application of criterion Annex II (d) within a period of 6 months from the date of this decision, to the secretariat".

Yours sincerely,

Paul SPEIGHT
Deputy Head of Unit
European Commission

Karel BLÁHA
Deputy Minister of the Environment
Czech Republic

Enclosures: Submission by the European Community and its Member States

Cc.: UNEP Chemicals

Paper Submitted by Indian Chemical Council in Response to
COP.4 Decision 4/6

The Application of Criterion (d) in Annex II of the Rotterdam Convention:

I. INTRODUCTION AND EXECUTIVE SUMMARY

This paper provides a legal analysis of Criterion (d) of Annex II of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("Rotterdam Convention" or "the Convention"). Criterion (d) states that "intentional misuse is not in itself an adequate reason to list a chemical" in Annex III, which lays out the chemicals subject to the Convention's trade restrictions. Certain parties to the Convention have recently expressed concern that Criterion (d) has not been correctly understood and applied with respect to whether or not certain chemicals should be listed in Annex III of the Convention, and subject to global trade restrictions. Accordingly, the Conference of the Parties ("COP") in its fourth meeting has requested members and observers to present their considered views on the meaning and application of Criterion (d).

In summary, the paper concludes that:

- The Convention's text requires that Criterion (d) be met, independently of, and in addition to, other criteria in Annex II.
- The structure of the Convention requires that Criterion (d) be met with respect to each of the two member country proposals required in order for a chemical to be considered for inclusion in Annex III, and that Criterion (d) be given a recognition independent of other criteria in Annex II.
- Consistent with the Convention's text, "intentional misuse," as used in Criterion (d), must be broadly understood to be referring to willingly/knowingly using a chemical in a manner inconsistent with its approved/authorised use/s.

- The Convention's text, subjected to accepted interpretive methods articulated in the Vienna Convention on the Law of Treaties, requires rejection of other, previously articulated interpretations of Criterion (d).

The remaining sections of this paper provide the legal analysis supporting these conclusions. Section II provides relevant background information on the Convention's listing procedure and the key principles of public international law governing treaty interpretation. Section III applies these principles to interpret Criterion (d), and discusses why interpretations not based on these principles must be rejected.

II. LEGAL BACKGROUND

A. The Convention's Procedure for Listing Chemicals in Annex III

The Rotterdam Convention is a multilateral international agreement relating to international trade in hazardous chemicals and pesticides. It entered into force in 2004. Parties to the Convention may restrict or refuse imports of chemicals listed in the Convention's Annex III. This has the effect of severely limiting global markets for listed chemicals.

In order for a chemical to be listed in Annex III to the Convention, two member countries in different parts of the world must notify the Convention's Secretariat that they have taken a final regulatory action of either banning or severely restricting the notified chemical. Annex II to the Convention specifies that valid notifications must stem from final regulatory actions taken "to protect human health or the environment," that are based on a risk evaluation, and that "provide[] a sufficiently broad basis to merit listing." The Chemical Review Committee (CRC) of the Convention empowered to evaluate the notifications must "take into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III."

If the CRC concludes that the Annex II criteria are met, it may recommend that the chemical be listed in Annex III. That recommendation must then be considered by ~~the~~ full Conference of Parties (COP), which then decides by consensus whether or not to include the chemical in Annex III.

B. The Criteria for PIC Listing -- Text of Criterion (d) of Annex II

Annex II of the Convention establishes the criteria for listing banned or severely restricted chemicals in Annex III popularly called PIC list. The full text of the Annex is as follows:

In reviewing the notifications forwarded by the Secretariat pursuant to paragraph 5 of Article 5, the Chemical Review Committee shall:

(a) Confirm that the final regulatory action has been taken in order to protect human health or the environment;

(b) Establish that the final regulatory action has been taken as a consequence of a risk evaluation. This evaluation shall be based on a review of scientific data in the context of the conditions prevailing in the Party in question. For this purpose, the documentation provided shall demonstrate that:

(i) Data have been generated according to scientifically recognized methods;

(ii) Data reviews have been performed and documented according to generally recognized scientific principles and procedures;

(iii) The final regulatory action was based on a risk evaluation involving prevailing conditions within the Party taking the action;

(c) Consider whether the final regulatory action provides a sufficiently broad basis to merit listing of the chemical in Annex III, by taking into account:

(i) Whether the final regulatory action led, or would be expected to lead, to a significant decrease in the quantity of the chemical used or the number of its uses;

(ii) Whether the final regulatory action led to an actual reduction of risk or would be expected to result in a significant reduction of risk for human health or the environment of the Party that submitted the notification;

(iii) Whether the considerations that led to the final regulatory action being taken are applicable only in a limited geographical area or in other limited circumstances;

(iv) Whether there is evidence of ongoing international trade in the chemical;

(d) Take into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III.¹

C.

Fundamental Principles of Treaty Interpretation

¹ This language also appears in another part of the Convention. Article 6, Paragraph 1 of the Rotterdam Convention specifies that any developing country or country with an economy in transition may, if it experiences problems as a result of particular formulations of severely hazardous chemicals in use in that country, propose the formulation for inclusion in Annex III. Such proposals must meet the criteria laid out in Annex IV, including the criterion that "intentional misuse is not in itself an adequate reason to list a formulation in Annex III."

Article 31 of the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention") provides authoritative guidance for interpreting the text of an international agreement such as the Rotterdam Convention. The Vienna Convention offers several ways in which a treaty may be interpreted, which "most observers see ... as establishing a hierarchy." See Detlev F. Vaghts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 EJIL (1993) at 484. This hierarchy requires, above all, that treaties be interpreted in accordance with the "ordinary meaning" of their terms, with the understanding that such meaning may be informed by subsequent agreements and by the practice of the parties. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION ("Y.B.L.I.C."), 1966, Vol. II at 220. "[I]nterpretation must be based above all upon the text of the treaty." See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, I.C.J. 1994 at pp. 21-22, para. 41; see also Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 Rec. des Cours 42-48 (1978-I), reprinted in Henkin, *et al.*, INTERNATIONAL LAW (3d ed. 1993) at 476 ("The process of interpretation must begin with an analysis of the specific provisions of the treaty concerning the question in dispute.").²

An important element of interpreting a treaty in accordance with "ordinary meaning" is the requirement that all portions of the treaty be given the fullest possible meaning, and that treaty terms not be interpreted to be duplicative or to otherwise have no independent meaning. This is termed the principle of "maximum effectiveness." All phrases, terms, and clauses in a treaty are to be construed to make them as maximally effective as possible: "[T]exts are presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it, and so as to have the fullest value and effect consistent with their wording . . . and with the other parts of the text." Henkin, *et al.*, INTERNATIONAL LAW (3d ed. 1993) at 480 (quoting Fitzmaurice, 28 Brit. Y.B.I.L 8 (1951) (emphasis in original)); see also *Corfu Channel Case (Greece v. Great Britain)*, I.C.J. Rep. 1949 at 24 (holding that treaty provisions must not be interpreted so as to be "devoid of purport or effect"). Thus, a valid interpretation of Criterion (d) must be grounded in the actual language of the treaty text, and must give the fullest possible meaning to all of the treaty's language.

Finally, where a given phrase or term occurs repeatedly within a treaty, it should be understood to have the same meaning each time unless the treaty text indicates to the contrary. In this case, the language of Criterion (d) -- "intentional misuse is not in itself an adequate reason to list a chemical in Annex III" -- appears not only in that Annex II but also as the text of Criterion (e) of Annex IV. Annex IV deals with the criteria for listing in Annex III a particular pesticide formulation that has been found to affect human health or the environmental in a developing country. Therefore, unless the treaty text indicates otherwise, the phrase "intentional misuse" must be interpreted to have the same meaning in both Annexes.

² Specifically, Article 31 of the Vienna Convention states that the text of a treaty shall be interpreted to reflect the "ordinary meaning" of its terms "in their context and in light of (the treaty's) object in purpose." Article 31 identifies the proper context for interpretation as the treaty's text, including preamble and annexes, and any agreements made by the parties at the time of the treaty's conclusion, and accepted as an instrument related to the treaty. Article 31 further states that subsequent agreements and subsequent practice of the parties shall be taken into account, along with any relevant rules of international law applicable to the parties' relations. Finally, if it is established that the parties intended a special meaning to be given to a term, the term should be interpreted to have that special meaning.

III. LEGAL ANALYSIS OF CRITERION (D)

Application of the generally accepted interpretive guidance discussed above demonstrates that Criterion (d) is independent from, and on an equal footing with, the other three criteria in Annex II. Fundamental rules of treaty interpretation also reveal that this Criterion must be applied in respect of each individual notification presented to the CRC. Further, there is only one interpretation of the term "intentional misuse" that is consistent with the treaty text and its context. Ad hoc interpretations of Criterion (d) previously offered by the CRC and the UNEP legal office are not all consistent with the treaty text and the COP-4 rightly rejected them.

A. Criterion (d) Must Be Independently Satisfied

As shown above, Annex II lays out four criteria that must be taken into account when considering whether notifications are sufficient to support a listing under Annex III of the Convention. A review of Annex II's language indicates that the four criteria, including Criterion (d), are independent of one another, and that each is on equal footing with the others. The text contains no linguistic markers, such as "but," "and" or "or," that would permit one to rationally conclude that any of the criteria should be considered subsidiary. Rather, the text, when viewed in light of its "ordinary meaning" directs that the CRC "shall" consider each of the criteria in turn, that all criteria must be satisfied and that all must be given equal weight.

B. Criterion (d) Applies to Individual Notifications

The text of the Rotterdam Convention requires that each of the two notifications reviewed in conjunction with a proposal to list a chemical in Annex III must independently meet Annex II's requirements, including Criterion (d).

First, the language and structure of Annex II reflect such individual consideration. Although the Annex lays out criteria to be considered in reviewing "notifications," the criteria are written to reflect the singular phrase "final regulatory action." This indicates that the criteria are to be applied to each, singular notification of a "final regulatory action," rather than to both notifications as a whole.

Further, the practice of the parties in respect of reviewing notifications confirms that each criterion is to be independently applied to each individual notification. For example, the CRC evaluates each notification on the basis of all four criteria, and notes whether or not each of the four criteria are met as to each notification. *See, e.g.,* UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 15,17, 20-23; UNEP/FAO/RC/CRC.2/17/Add.1 (Dec. 1, 2005) at 2; UNEP/FAO/RC/COP.2/8 (April 14, 2005) at Annex 1; UNEP/FAO/PIC/INC.11/3 (May 7, 2004) at 15. This approach is also reflected in the CRC's working procedures, which indicate that each notification must be evaluated for its separate fulfilment of all four subfactors. UNEP/FAO/RC/CRC.4/INF/3 (Jan. 9, 2008) ("Worked Example of Completed Task Group Report"). Consequently, the CRC's decision rationales uniformly address the substance of Criterion (d) by acknowledging

that each final regulatory action, in order to meet the requirements of said Criterion, should not be "based on concerns about intentional misuse." *See, e.g.*, UNEP/FAO/RC/CRC.2/17/Add.1 (Dec. 1, 2005) at 2; UNEP/FAO/RC/COP.2/8 (April 14, 2005) at Annex 1; UNEP/FAO/PIC/INC.11/3 (May 7, 2004) at 15.

C. The Proper Interpretation of "Intentional Misuse"

Having established that each notification must satisfy Criterion (d), application of Article 31 of the Vienna Convention provides a basis for determining the nature of the Criterion's requirements. As discussed above, certain rules of interpretation must be followed to arrive at any legitimate interpretation of the language of Criterion (d).

First, the interpretation must respect the place that Criterion (d) occupies in the larger structure of Annex II, and must grant "maximal effectiveness" to Criterion (d). Accordingly, Criterion (d) as a whole cannot be interpreted as a nullity. Nor may the phrase "intentional misuse" be so narrowly defined as to render the Criterion null in practice.

Further, to the extent practicable given the structure and context of the Treaty, "intentional misuse" should be construed to mean the same thing in respect of both Annex II and Annex IV.

Finally, it is important to consider the established practice of the parties, as memorialized in the CRC's decision rationales regarding chemicals proposed for listing in Annex III. Those practices establish that a final regulatory action, in order to meet the requirements of Criterion (d), should not be "based on concerns about intentional misuse." *See, e.g.*, UNEP/FAO/RC/CRC.2/17/Add.1 (Dec. 1, 2005) at 2; UNEP/FAO/RC/COP.2/8 (April 14, 2005) at Annex 1; UNEP/FAO/PIC/INC.11/3 (May 7, 2004) at 15.

Bearing these factors in mind, there appears to be only one permissible interpretation of "intentional misuse," and thus, only one permissible way in which to apply Criterion (d) to a notification of final regulatory action. This is to determine that all non-inadvertent uses that are in contravention of labelling information and other directives associated with a chemical constitute "intentional misuse."

As noted above, a treaty is to be interpreted in accordance with the ordinary meaning of its terms. The phrase "intentional misuse," as used in Annex II of the Convention, can be broken down into its constituent parts: "misuse" and "intentional." The word "misuse," as it is ordinarily used, indicates "improper, unintended, or unforeseeable" or "improper or incorrect" use. *See, e.g.*, BLACK'S LAW DICTIONARY (7th ed. 1999) at 814; WEBSTER'S II NEW COLLEGE DICTIONARY (3d ed. 2005) at 719. Thus, any use of a chemical that does not agree with the uses for which the chemical is specified or officially approved is "misuse."

The word "intentional," as it is ordinarily used, relates to actions performed "with the aim of carrying out the act." BLACK'S LAW DICTIONARY (7th ed. 1999) at 1018. As such, an action is "intentional" when it is not the result of a mistake or inadvertence, but is rather an action performed knowingly or "deliberately." WEBSTER'S II NEW COLLEGE DICTIONARY (3d ed. 2005) at 591.

Applying the words used in the phrase "intentional misuse" according to their ordinary meaning, "intentional misuse" equates to a use that is not approved or specified, and which is undertaken deliberately, and not as the result of a mistake or other inadvertence. Accordingly, any unapproved or off-label use that is not the result of a mistake or inadvertence is "intentional misuse."

The correctness of this interpretation is underscored by the fact that gives full effect to Criterion (d). An interpretation of "intentional misuse" that equates to any unapproved or "off-label" use that is not the result of mistake or error does not render Criterion (d) subordinate to other criteria. Further, from a practical perspective, it does not result in Criterion (d) having real application only in extremely narrow situations. The interpretation is also consistent with the CRC's working procedures, which indicate that off-label uses may be considered intentional misuse. See UNEP/FAO/RC/CRC.1/9.

This interpretation also has the benefit of being easy to consistently apply. Any use that conflicts with the labelling or other information accompanying a chemical would be deemed intentional. It must be recognised that approved uses of a chemical/pesticide would vary from one country to another. While certain parties have expressed concern over needing to distinguish between developed and undeveloped countries in applying Criterion (d), *Id.*; see also UNEP/FAO/RC/COP.3/26 (Nov. 10, 2006) at 8, this interpretation would, in practice, render Criterion (d) less onerous for all notifying countries, because it would not require any fact-intensive inquiry into actual user knowledge and intent. Because it would not require any such inquiry, this interpretation would not require the COP to develop guidelines regulating inquiries into user intent. Finally, the absence of the inquiry would dispel altogether any concerns that the Criterion (d) might be applied too narrowly, or otherwise in a manner inconsistent with its independent meaning and effect.

D. Other Interpretations of Criterion (d)

In addition to the interpretations described above, which are consistent with the treaty text, the CRC and the UNEP legal office have offered three other interpretations of Criterion (d). First, the CRC implicitly interpreted Criterion (d) in approving a notification from Thailand regarding the pesticide endosulfan. Second, the CRC directed the drafting of a Working Paper on the meaning of Criterion (d), which explicitly interprets the criterion's language. UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 7, 24. Third, UNEP's legal office has provided the COP with an opinion on the meaning of "intentional misuse," which also explicitly interprets Criterion (d). UNEP/FAO/RC/CRC.4/INF/3 (Jan. 9, 2008) at 93.

Neither the CRC's interpretations nor the UNEP interpretation are consistent with the treaty text. The interpretations construe Criterion (d) extremely narrowly, making it

duplicative of other criteria, and leaving it practically meaningless. Accordingly, these interpretations should not be considered when applying Criterion (d) with respect to notifications.

1. **The CRC's Implicit Interpretation with Respect to Endosulfan notification Received from Thailand**

At its second meeting, the CRC voted to accept a notification from Thailand regarding the pesticide endosulfan, and directed the drafting of a decision rationale articulating the reasons for its decision. UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 8, 15-16. The notification itself indicated that "misuse" was the impetus and sole reason behind the final regulatory action. UNEP/FAO/RC/CRC.2/15 (Nov. 8, 2005). In particular, Thai authorities authorized and registered endosulfan for use only in controlling insects in land-based crops; however, the product was used in paddy, water-based crop to control snail, a non-insect pest. According to the notification, this misuse led to the kill of "fish and other aquatic lives too." *Id.* Supporting documents submitted by Thailand showed that paddy farmers who were misusing Endosulfan for killing snails were clearly aware of incidental fish kills.

In its decision rationale, the CRC acknowledged that unapproved use of endosulfan "prompted" the final regulatory action. UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 15. The CRC also acknowledged that Criterion (d) of Annex II holds that "intentional misuse is not in itself an adequate reason to list a chemical." *Id.* However, the CRC noted that the notification indicated a direct link between the misuse and adverse environmental impact. *Id.* at 15-16. Accordingly, the CRC found that Criterion (d) was satisfied. *Id.*

This interpretation violates the interpretative principle of "maximum effectiveness." The CRC found that Clause (d) was satisfied because the Thai notification indicated that misuse of endosulfan resulted in adverse environmental impacts. Put another way, the CRC determined that so long as misuse causes environmental impacts, any resulting regulatory action is not based on "intentional misuse." This interpretation clearly nullifies Criterion (d) by rendering it a mere reiteration of an earlier criterion, without independent meaning.

That earlier criterion is Criterion (a) of Annex II. Criterion (a) requires the CRC to "confirm that the final regulatory action has been taken in order to protect human health or the environment." In holding that Criterion (d) was met with respect to the Thai notification for endosulfan, the CRC stated only that "the Thai regulatory action had been directly linked to the adverse environmental impact on aquatic life forms." This statement goes to the requirements of Clause (a), but not the independent requirements of Criterion (d); it is nothing more than a finding that the regulatory action was taken to protect the environment. Finding that this is sufficient to meet the requirement of Criterion (d) is to deny Criterion (d) any independent meaning. Doing so violates the principle of maximum effectiveness, in that it means that Criterion (d) will always be fulfilled where Criterion (a) is met, and that Criterion (d) will always fail to be met where

Criterion (a) fails to be met. Criterion (d) is accordingly deprived of meaningful purport and effect.

2.

The CRC Working Paper's Explicit Interpretation

In conjunction with its recommendation that endosulfan be listed in Annex III, the CRC directed the drafting of a Working Paper on the meaning of Criterion (d). *Id.* at 7, 24. The Working Paper, however, does not provide a permissible interpretation of Criterion (d) of Annex II. Instead, it interprets the Criterion as a nullity.

The Working Paper does not attempt to define the word "misuse" or the phrase "intentional misuse" outright. Rather, it discusses the way in which the phrase "common or recognized practices" is used in Annex IV, and attempts to use the phrase to shed light on "intentional misuse" as used in Criterion (d) of Annex II. *Id.*

Under Annex IV, the CRC, in evaluating developing country notifications regarding severely hazardous chemical formulations, must take into account "[t]he reliability of the evidence indicating that use of the formulation, in accordance with common or recognized practices within the proposing Party, resulted in the reported incidents." See Rotterdam Convention at Annex III, Part 3. According to the Working Paper, during the CRC's discussion of Thailand's notification, members noted that, "in developed countries, 'common use' might be considered equivalent to the legal use, in other words, those uses listed on the label." UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 24. The parties also noted that, in respect of developing countries, "the difference between what constituted common use or misuse practices could be difficult to define." *Id.*

The Working Paper then goes on to propose that "common use" means anything that is not intentional misuse. Specifically, the Working Paper concluded that the CRC had determined that Thailand's final regulatory action with respect to endosulfan "had been taken to combat an environmental or health risk, as a result of a common and recognized pattern of crop protection use that was described as a misuse," and was thus not actually based on "misuse" at all. *Id.*³

There are two fatal flaws in this interpretation. First, the structure of the treaty does not permit "intentional misuse," as used in Annex II, to be defined in terms of a phrase occurring only in a different Annex which specifically relates to particular formulation of a pesticide and not to a pesticide per se. The term "common or recognized practices" does not appear in Annex II. Rather, that term is used only in Annex IV. Thailand submitted its notification under Annex II of the Convention and not under Annex IV of the Convention. An evaluation of common or recognized practices, accordingly, cannot be used to define "intentional misuse" for a notification made under

³ The CRC Decision Rationale for endosulfan does not actually mention or discuss either "common and recognized patterns of use" or "common and or recognized practices." UNEP/FAO/RC/CRC.2.20 (Feb. 17, 2006) at 15-16. It advocates neither for the relevance of these phrases in interpreting the phrase "intentional misuse," nor defines intentional misuse in terms of the phrase "common or recognized practices." *Id.*

Annex II of the Convention. The treaty text establishes that both Annex II and Annex IV notifications must meet the criterion that “intentional misuse is not in itself an adequate reason to list” a chemical in Annex III, but that “common or recognized practices” are only relevant in respect of Annex IV notifications. Thus, the structure of the treaty text indicates that any attempt to define “intentional misuse” in terms of “common or recognized practices” is flawed.

Second, even if the structure of the treaty permitted consideration of “common” or “recognized” practices in construing Criterion (d) of Annex II, there is no reason to believe that “intentional misuse” is the opposite of “common or recognized practice.”⁴ In fact, it would appear perfectly possible for a use or practice to be both “common or recognized” and “improper or incorrect” and/or “knowingly improper or incorrect.” WEBSTER’S II NEW COLLEGE DICTIONARY (3d ed. 2005) at 719. More importantly, the treaty text itself does not permit such an interpretation. If “intentional misuse” were the opposite of “a common or recognized practice,” then Clause (e), Part 3, Annex IV, would be rendered a nullity. In other words, where Criterion (a) of Part 3, Annex IV was satisfied (*i.e.*, where harm resulted from the common or recognized use of a pesticide formulation in the notifying country), it would be unnecessary to show that the harm did not result from an uncommon or unrecognized use (*i.e.*, an intentional misuse). The duplication that results from the CRC’s interpretation means that the interpretation must be rejected.

3.

The UNEP Legal Office’s Interpretation

Having been notified of the confusion over the proper interpretation of Criterion (d), the COP sought an opinion from UNEP’s legal office regarding the meaning of “intentional misuse.” UNEP/FAO/ RC/COP.3/26 (Nov. 10, 2006). The resulting opinion analyzes how Criterion (d) operates within the larger structure of Annex II, and also offers a definition for “intentional misuse.” UNEP/FAO/ RC/CRC.4/INF/3 (Jan. 9, 2008) at 94. However, the UNEP legal office’s interpretation of Criterion (d) fails to give full effect to the criterion and is thus incorrect.

The opinion begins by analyzing the structure of Annex II. It states that if “intentional misuse is the sole reason for the final regulatory action and criteria (a)-(c) are not satisfied, it might be considered that there is no adequate reason for listing chemical in Annex III.” This statement implies that if intentional misuse is the sole reason for the regulatory action, but Criteria (a)-(c) *are* satisfied, then the notification should be found to have met the requirements of Criterion (d). This interpretation is clearly unsound, as it renders Criterion (d) devoid of any independent effect.

⁴ Indeed, there is no generally accepted definition of “common or recognized practices.” See UNEP/FAO/RC/CRC.1/9 (Dec. 10, 2004) at 3-6 (noting “widely varying views on what constitutes common and recognized patterns of use”; discussing difficulties in understanding what constitutes “common or recognized practices,” and in applying the phrase while in evaluating notifications under Annex IV). Rather, an evaluation of “common or recognized practices” under Annex IV depends on an understanding of how pesticides are regulated on a country-specific and case-by-case basis. *Id.* at 2, 4.

Criterion (d) clearly states that a valid notification cannot be based on intentional misuse. If this criterion is to have any effect, it must be operative even where other criteria are satisfied, and must be interpreted to have the same weight and importance as the other criteria. To interpret Criterion (d) otherwise is to render it a nullity. Accordingly, the UNEP legal office's interpretation as to how Criterion (d) operates within the larger structure of Annex II must be rejected. COP-4 did not accept/adopt the UNEP legal office's legal opinion.

Further, the UNEP legal office's interpretation of the meaning of the phrase "intentional misuse" itself results in a definition that would procedurally and administratively unworkable. The opinion starts by providing definitions of the word "misuse," and the word "intentional." The opinion defines "misuse" as use contrary to law or regulation, or use that is neither intended nor foreseeable by the manufacturer. "Intentional" is defined as having a state of mind so as to consciously desire a certain result. Next, the opinion defines "intentional misuse" as a use occurring when a person knowingly uses the chemical in a manner not consistent with its permitted or intended use.

UNEP's definition superficially appears to be in agreement with the "ordinary meaning" of the phrase "intentional misuse," as described in Section III.C above. However, UNEP goes on to explain that while a chemical may be "misused" in the sense of being not used in the manner described on the label or otherwise foreseen by the manufacturer, the misuse may not be "intentional" if users are unaware that the use is incorrect or improper. For example, the opinion suggests that intent may be affected by questions of whether the "correct" uses of the chemical were communicated to users, by conditions of enforcement in the regulating country, and by other country-specific conditions. Under this interpretation, determining what constitutes "intentional misuse" in a given case is a fact intensive exercise. The interpretation requires an evaluation of the state of mind of those persons whose use of the chemical led to the final regulatory action on which a notification is based. This analysis would require consideration of individual-, country-chemical- user- specific information.

This interpretation has very serious drawbacks. First, both notifying members and the CRC/COP would have to take concrete measures to inquire into end-users' actual knowledge of the correct or permitted uses of a chemical, and thus ensure the consistent and correct application of Criterion (d). Because any thorough inquiry would potentially be onerous for both notifying members and the CRC, the UNEP legal office's interpretation could result in attempts to create practical shortcuts that would permit successful notification without actually engaging in the required inquiry. Such shortcuts could lead Criterion (d) to become nearly meaningless in practice.

For example, notifying countries and the CRC could attempt to circumvent a full-scale intent inquiry by limiting themselves to narrow inquiries aimed at determining whether the final regulatory action was prompted by uses so extreme that any observer would consider them to be knowing misuse, regardless of what any actual user could be expected to know about the actual permitted or expected uses of the chemical. *See, e.g.,* UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 24 (explaining that use of pesticide for suicide or killing fish would likely be "intentional misuse"). Interpreting the intent

inquiry required under UNEP's analysis to cover only such acts as suicide would necessarily place extreme limits the meaning of Criterion (d), rendering it a practical nullity. Such a result would be inconsistent with the treaty, which places Criterion (d) on an equal footing as all other criteria. Accordingly, the UNEP legal office's interpretation would force the COP/CRC to develop strict guidelines for the conduct of user-intent inquiries, so as to forestall the nullification of Criterion (d).

IV. CONCLUSION

Fundamental principles of treaty interpretation indicate that Criterion (d) of Annex II to the Convention must be interpreted so as to give the Criterion full and independent meaning. Criterion (d) may not be interpreted to have the same meaning as other criteria, or to be otherwise superfluous when other criteria are met. Further, the phrase "intentional misuse," as used in Criterion (d), cannot be interpreted in a way that risks rendering the Criterion a practical nullity. Nor should it be interpreted in a way that unnecessarily complicates the application of the Criterion.

Applying these principles, it becomes clear that Criterion (d) cannot be interpreted to be subordinate to other criteria and must be applied with respect to individual notifications. Further, the phrase "intentional misuse" should be interpreted to indicate all "improper" or "unapproved" uses that are not the result of accidents, mistakes, or other inadvertences. This interpretation gives full meaning and effect to Criterion (d). It is not susceptible to any "narrowing" that would threaten Criterion (d)'s practical effect, or otherwise render it duplicative of other criteria. Finally, by designating all such "off-label" use as "intentional misuse," this interpretation promotes the simple and consistent application of Criterion (d) across member countries and notifications.



*Misión Permanente
de la República Argentina*

RCB/Ido

IV/180

Nº 128/09

La Misión Permanente de la República Argentina ante los Organismos Internacionales en Ginebra presenta sus atentos saludos a la Secretaría del Convenio de Rotterdam y con relación a la Decisión RC-4/6, que se adoptó durante la Cuarta Conferencia de las Partes del Convenio sobre el Procedimiento de Consentimiento Fundamentado Previo aplicable a ciertos plaguicidas y productos químicos peligrosos objeto de comercio internacional (Roma, 27-31/10/08), se complace en transmitir los siguientes comentarios y observaciones.

El criterio d) del Anexo II del Convenio de Rotterdam establece que el Comité de Examen de Productos Químicos, al examinar las notificaciones que le haya enviado la Secretaría con arreglo al párrafo 5 del artículo 5: "d) Tendrá en cuenta que el uso indebido intencional no constituye de por sí razón suficiente para incluir un producto químico en el anexo III."

Respecto al criterio d) del Anexo II, en la tercera Conferencia de las Partes se estableció que el Comité de Examen de Productos Químicos continuaría examinando, caso por caso, las notificaciones que involucren el uso indebido intencional. No obstante, se acercaría al Comité la opinión jurídica de la oficina legal del Programa de las Naciones Unidas para el Medio Ambiente (UNEP).

La opinión jurídica del UNEP (UNEP/FAO/RC/RCR.3/INF/7) indica que para que una persona incurra en uso indebido intencional de un químico, se deberán reunir las siguientes condiciones:

- La persona deberá conocer el uso legítimo del químico, según lo estipula la ley o la reglamentación pertinente, o como se especifica en el etiquetado u otros medios de comunicación que acompañan al químico; y
- La persona deberá utilizar a propósito el químico en contravención con el uso legítimo del químico, con el conocimiento o la convicción de que el uso ilegítimo del químico causará el resultado deseado.

SECRETARIA DEL CONVENIO DE ROTTERDAM
(Fax: 022.917.80.82)
Ginebra

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UNEP Stockholm Convention	
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A su vez, respecto al criterio d) del Anexo II, dicha opinión aclara que:

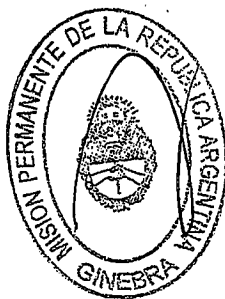
- Cuando un químico prohibido haya satisfecho los requisitos a) a c) del Anexo II, el hecho de que haya incidentes de uso indebido intencional de un químico no deberá ser interpretado en el sentido de descalificar la inclusión del químico en cuestión en la lista del Anexo III.
- Cuando el hecho del uso indebido intencional es la única razón que motivó la medida reglamentaria firme respecto al químico y no se han satisfecho los criterios a) a c) se podría considerar que no existe razón suficiente para incluir el químico en el Anexo III.

La República Argentina coincide con el criterio jurídico de la oficina legal de la UNEP supra expresado. En efecto, en virtud de la Convención de Viena sobre el Derecho de los Tratados de 1969, la regla general de interpretación de los tratados, según lo estipulado en el artículo 31.1 es la siguiente: "Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de éstos y teniendo en cuenta su objeto y fin".

Por lo expuesto, el término "uso indebido intencional" presente en el criterio d) del Anexo II del Convenio deberá ser interpretado, en primera instancia, conforme al sentido corriente de los términos del tratado. Así, se podría inferir que uso indebido intencional se refiere, en forma corriente, a la voluntad deliberada de utilizar el producto químico de una forma contraria a la estipulada para su uso. En otras palabras, la utilización del químico difiere o se aparta de la finalidad a la que éste está destinado.

La Misión Permanente de la República Argentina ante los Organismos Internacionales en Ginebra reitera a la Secretaría del Convenio de Rotterdam las seguridades de su consideración más distinguida.

Ginebra, 30 de abril de 2009.



Conditions of 'ordinary' use versus intentional misuse in the Rotterdam Convention

Submission to the PIC Secretariat on behalf of PAN International.

The PIC CoP4 (Rome, Oct 08): RC-4/6 "Requests that Parties and interested observers provide to the Secretariat within six months of the date of the present decision [Oct 31] their considered views on the application of criterion (d) in Annex II of the Convention". Pesticide Action Network is presenting its case as follows:

We feel that "intentional misuse" should not be so broadly interpreted that it comes to mean any illegal use, off-label use, or use not intended by the manufacturer. Such an interpretation would fly in the face of the whole point of the Convention. The Convention is meant to protect the most vulnerable people and countries, including those without the capacity to enforce their regulations and where limited resources lead to less than ideal conditions of use of hazardous pesticides. It is recognized by the parties to the Rotterdam Convention that the ordinary "conditions of use", that would not be considered as misuse, lead to many problems in developing countries and countries with economies in transition.

The onus should be on regulators and manufacturers to assess prevailing conditions under which a chemical is realistically likely to be used when making or registering products, and recognise the full risks under the particular conditions in a given country. If unrealistic instructions relating to protective equipment or other conditions of use are set by the manufacturer and/or regulators when registering pesticides, it is unfair to put the blame on pesticide users for any incidents that may occur.

Deviation from label instructions or recognised practice is not necessarily misuse. Such deviation can arise from a number of factors, including:

- the label being in an unfamiliar language
- label pictograms being culturally inappropriate and incomprehensible to farmers
- personal protective equipment not being available or affordable to users
- Personal protective equipment being impossible or impractical to use correctly due to climatic or other reasons
- Provision of inappropriate and incorrect advice and guidance to the user. This would apply to using a pesticide intended for use on one crop on another (cotton pesticides on cowpea), or mixing pesticides together that are not intended to be mixed - a very widespread practice. We do not see this as intentional misuse.

If a farmer uses a pesticide in contravention to its label or local law, it should not be considered "intentional misuse" unless the farmer could reasonably have been expected to know what the intended conditions of use were, and deliberately not respected them. If, for example,

- s/he cannot read the label (either through illiteracy or because the label is in a language he cannot read), or
- if s/he does not know that the label is the law and not simply a recommendation, or
- if s/he cannot reasonably be assumed to know the law, or
- if local custom is such that it is commonly used this way,

then it would be unreasonable to assume s/he would question a use that did not conform with the intended conditions of use; and therefore it would be unreasonable to define such as use as 'intentional misuse'.

In the case of endosulfan, Thailand seems to have banned it precisely because it was commonly used in paddy fields for the control of snails—an off-label use—and this caused fish, reptile, amphibian, and bird deaths. The CRC's decision to include endosulfan states that "8. The Committee noted that the Thai notification on the severe restriction of endosulfan had been based on the decision of the Thai authority which had been prompted by the fact that farmers "misused" endosulfan through unapproved use in paddy fields against golden apple snails. 9. While the Committee took into account that, under criteria (d) of Annex II, intentional misuse was not in itself an adequate reason to list a chemical in Annex III, the Committee concluded that the Thai regulatory action had been directly linked to the adverse environmental impact on aquatic life forms associated with endosulfan use under the prevailing conditions described." We believe the Thai situation could have been described as 'off-label' use, and according to local custom.

In short: any use of a pesticide other than to control pests could reasonably be called intentional misuse. On the other hand, in general, use of a pesticide to control a pest (including diseases, weeds, vertebrate pests, etc) should not be considered intentional misuse even if the actual use was not intended by the manufacturer, or provided for by the regulator.

Submitted by PAN UK on behalf of PAN International, 30 April 2009-05-01

Submission from the United States of America
Application of Criterion in Annex II(d) of the Rotterdam Convention

I. Introduction

In decision RC-4/6: Inclusion of endosulfan in Annex III of the Convention, the Conference of the Parties requested that "Parties and interested observers provide to the Secretariat within six months of the date of the present decision their considered views on the application of criterion (d) in Annex II of the Convention." The present submission provides an analysis describing the U.S. views on the meaning and application of paragraph (d) of Annex II, including the meaning of "intentional misuse", under the Convention.

II. Analysis

The text of paragraph (d) of Annex II provides that the Chemical Review Committee (CRC) "shall... [t]ake into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III." Over the past few years, the CRC at times has addressed how to interpret the text and has developed guidance that has been approved by the COP. In our view, however, it is necessary to go beyond this guidance to ensure a consistent application of the text for relevant notifications. The United States has given the relevant text considerable attention, and found that both policy and legal considerations were important components of our analysis.

To determine what the application of this paragraph requires, we considered three rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. First, international agreements are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See Art. 31(1). For purposes of this analysis, the context in which interpretation is to occur includes both the preamble and annexes. See Art. 31(2). Second, in addition to the terms and context of the particular language, it is necessary to take into account any subsequent agreement between the Parties regarding interpretation, or any relevant rules of international law applicable to the Parties. See Art. 31(3). A third, supplementary source for interpretation is the preparatory work of the agreement and the circumstances of its conclusion, but only when necessary to confirm the meaning established through application of the first two rules or to determine the meaning when application of the other rules still "leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable." See Art. 32.

Two elements of paragraph (d) are clear: (1) the CRC has an obligation to apply this paragraph in its evaluation ("shall" in the chapeau), and (2) there is a factual statement about the impact of intentional misuse in the listing process (a regulatory measure based solely on intentional misuse does not support a listing in Annex III). In order to determine what paragraph (d) requires outside of these elements, there are four interpretive issues that require special attention: (1) whether paragraph (d) should be applied to each notification; (2) what "take into account" means, (3) what "in itself" means, and (4) "what intentional misuse" means.

A. Applying paragraph (d) to each notification

We believe that the CRC is to apply paragraph (d) with regard to each notification. That is, as the CRC reviews each notification, the CRC must apply paragraph (d) just as it would apply paragraphs (a), (b), or (c). We have arrived at this conclusion based on an analysis of the text and the context of Article 5 and Annex II, and the practice of the Parties. Article 5 (6) of the Convention requires the CRC to review at least one notification regarding a particular chemical from each of two Prior Informed Consent (PIC) regions and “in accordance with the criteria set out in Annex II,” recommend listing on the basis of that review.

Paragraphs (a)-(c) of Annex II clarify that the CRC is to check the Annex II criteria against “the final regulatory action” (emphasis added). While paragraph (d) does not include a similar reference to “final regulatory action,” we believe that the intent of (d) is similar to that of (a)-(c). To the extent ambiguity persists, moreover, the practice of the parties, through the CRC, appears to support the conclusion that paragraph (d), along with the other paragraphs, are to be applied to each notification. See, e.g., UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006) at 15, 17, 20-23; UNEP/FAO/RC/CRC.2/17/Add.1 (Dec. 1, 2005) at 2. Taking these factors into consideration, we believe that the application of paragraph (d) is specific to each notification that is under review by the CRC.

B. “Take into Account”

The phrase “take into account” often is used in provisions in international agreements requiring a decision to be made after certain factors are considered in the deliberative process. Here, what follows “take into account” is the declaration of a specific limitation on the CRC’s discretion when developing its recommendation for listing. Thus, “take into account” requires the CRC to consider information regarding a particular factor as it conducts its evaluation. This contrasts with other possible language, such as “confirm” or “establish,” that would require the CRC to confirm affirmatively whether every notification was based on intentional misuse.

If the CRC has reason to believe that intentional misuse is an issue in the notification, the CRC should consider, on the basis of the notification and the supporting information provided by the notifying country, whether intentional misuse was, in fact, the sole basis for the notification. If the CRC is unable to determine whether intentional misuse was the sole basis for the final regulatory action that has been notified, then the CRC takes that into account by setting that notification aside until the ambiguity is addressed, and a recommendation to list based on that notification should not go forward until clarifying information can be provided. To assist the CRC in making its determination, we would suggest that the CRC draft guidance, to be approved by the COP prior to application, on what the CRC could ask for from the notifying party in the event that it has a reasonable basis to believe that misuse might have been the sole purpose behind the final regulatory action.

C. *"In Itself"*

What the CRC must "take into account" is that intentional misuse is not "in itself" an adequate reason to list a chemical. The statement without this phrase – intentional misuse is not an adequate reason to list the chemical – suggests that if addressing intentional misuse is the only purpose for the regulatory action, that purpose is not enough to justify listing. However, if there are multiple reasons for a regulatory action, one of which is to address intentional misuse, such other reasons would justify listing (assuming all of the other criteria of Annex II have been met). The phrase "in itself" therefore emphasizes the basic meaning of this statement, i.e. that intentional misuse "in itself" or "by itself" cannot be an adequate reason to list the chemical. As such, the phrase strengthens the negative implication that regulatory actions promulgated for multiple reasons, one of which may be to address intentional misuse, would not falter under paragraph (d).

D. *"Intentional Misuse"*

The most scrutinized part of this paragraph thus far among Parties and observers has been the term "intentional misuse." While the CRC may not be required to affirmatively explore whether intentional misuse is relevant for every notification, if its evaluation suggests that a notifying state's only basis for regulating was to address intentional misuse – e.g. the state explicitly states that its final regulatory action was intended only to address a misuse or there is otherwise a reasonable basis for such an assumption – it is incumbent upon the CRC to explore the issue further.

In our view, in order to give meaning to both words in this term, it is important to examine each term separately: Namely, the CRC should determine whether the state only intended to address a misuse with its regulation and, if so, whether the misuse being regulated was intentional on the part of the users.

i. Misuse

A primary tool for determining whether the final regulatory action targeted misuse should be to determine whether, based on domestic regulatory regime of the notifying Party, the regulated use was not permitted even prior to the regulatory action. The CRC process recognizes that countries consider and set their own levels of protection in undertaking regulatory activities. The CRC might consider the following questions when determining whether a state's final regulatory action is directed at a misuse.

- What was the state's previous legal/regulatory posture toward the use? Had the state already banned/restricted it? Was the state silent? Had it expressly permitted the use?
- How does the state's domestic regulatory regime incorporate manufacturer's intent? Is any use not expressly permitted by the government a misuse under domestic law?
- How does the state's final regulatory action change the status of the chemical under the law with regard to the use?

ii. Intentionality

If the CRC decides that the notifying state's final regulatory action was directed only at a misuse, it next should evaluate whether the misuse was intentional. To determine whether a misuse is intentional, the CRC will need to assess whether the users in the subject country purposefully used the chemical in a manner that they knew constituted a misuse. Some have argued that a user who knows he/she is using a chemical for a particular purpose, which happens to constitute a misuse, comprises "intentional misuse". However, this interpretation fails to establish a nexus between what the user intends and the characterization of the use. Such uses are more likely examples of intentional *use*, where the user may or may not know how that use is characterized by others. For a user to intentionally misuse a chemical, rather than intentionally use it in a way that unknowingly constitutes a misuse, there must be an element establishing a certain degree of knowledge possessed by the user that his/her use is in fact a misuse.

While there may be many ways to impute knowledge to the chemical users, we believe that the approach most likely to give meaning to paragraph (d) without being either over- or under-inclusive is to have the CRC examine a number of factors to assess the existence of "intentionality." In our view, examining a variety of circumstantial factors that, when taken together, could establish a reasonable basis for imputing knowledge to users is a practical approach in this context, because the issue of intentionality in Annex II tends to concern the knowledge of many users (i.e. enough to justify national regulatory action and subsequent listing), rather than isolated individuals. Possible factors include the following:

- Evidence of specific knowledge by users;
- Existence and clarity of a label;
- Effectiveness of government-led public outreach to clarify uses and training in application methods;
- Effectiveness of manufacturer-led public outreach to clarify uses and training in application methods;
- Enforcement efforts to crack down on misuse;
- Illiteracy levels;
- Conditions of use.

E. Effect on the CRC's Recommendation

Finally, in the event the CRC believes that a notifying state did promulgate a final action for the sole purpose of regulating intentional misuse, it is still necessary to determine what impact such a finding should have on the CRC's evaluation and recommendation. Article 5(6) provides little guidance on this point as it only directs the CRC to review "in accordance with the criteria set out in Annex II [and] recommend...whether the chemical [should be listed]". The plain language of paragraph (d), however, seems to set forth a clear understanding of the drafters that when the CRC believes that a final regulatory action is promulgated only to address intentional misuse, a recommendation of a listing cannot go forward on the basis of that notification. To conclude otherwise – that a finding of intentional misuse as the only reason for regulating does not prevent the CRC from recommending a chemical for listing – is contrary to the plain text of

Annex II(d). In the event that there exists at least one notification from each of two PIC Regions in which misuse was not the sole basis for the notification, the presence of an additional notification based solely on misuse would not preclude a recommendation by the CRC to list.

III. Conclusion

The United States believes that, taken in the context of the rest of the Annex, paragraph (d) requires the CRC to keep in mind the issue of intentional misuse as it evaluates a particular final regulatory action. On the basis of the information before it, if the CRC suspects that intentional misuse may have been the sole basis for the final regulatory action and associated notification, it should evaluate whether the notifying state was regulating a misuse and, if so, whether knowledge of the misuse may be reasonably imputed to users. If, on the basis of further evaluation, the CRC continues to believe that the notifying state was regulating intentional misuse, and that such intentional misuse was the sole purpose of the final regulatory action, paragraph (d) makes clear that such action is not enough of a basis for that notification to contribute to the listing of the chemical.



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28 April 2009

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Re: Rotterdam Convention on Prior Informed Consent: Intentional Misuse

Dear Mr. Kenmore and Mr. Cooper:

Pursuant to paragraph 1 of Decision RC-4/6, which "[r]equests that ... interested observers provide to the Secretariat within six months of the date of the present decision their considered views on the application of criterion (d) in Annex II of the Convention," CropLife International is pleased to provide the attached paper setting forth our views on the appropriate interpretation of the "intentional misuse" criterion.

We understand that the Secretariat will convey our views to the UNEP legal office in keeping with paragraph 2 of the Decision. We would welcome any follow-up questions or comments in response to the attached paper.

We look forward to our continued work together on the implementation of the Rotterdam Convention.

Yours Sincerely,

A handwritten signature in cursive script that reads "Michael A. Morelli".

Michael A. Morelli, Ph.D.
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28 April 2009

**Intentional Misuse
April 2009
Submitted to the Rotterdam Convention Secretariat
Pursuant to RC-4/6**

Introduction

- CropLife International welcomes the opportunity to share its views on the appropriate interpretation and application of the term "intentional misuse" in Annex II(d) of the Rotterdam Convention.
- As the discussion among the Parties at COP-4 made clear, the proper interpretation of this term raises important legal and policy issues that merit careful attention. CropLife International concurs with the Conference of the Parties that more focused guidance from the Parties is required in order to assist the Chemical Review Committee (CRC) in fulfilling its duties under the Convention.
- We believe that the UNEP legal office can play a constructive role in facilitating that guidance by providing a compilation or overview of the various submissions from Parties and stakeholders pursuant to Decision RC-4/6.
 - Recognizing, however, that the interpretation and application of the Convention is a function that lies within the province of the individual parties and collectively by the Conference of the Parties, we do not believe that the legal office should attempt to prescribe a legal opinion that would prejudge the Parties' discussion of this issue.
 - Instead, the legal office could usefully contribute to the discussion by summarizing the key issues and perspectives in order to inform a future discussion of the issue at COP-5.
 - In any event, it would be helpful for the legal office to note in its report that UNEP has no formal authority to interpret the terms of the Convention and that the legal office's views have no legal status in that regard and are purely advisory in nature.

Background

- Paragraph (d) of Annex II requires that the CRC "take into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III."
- The CRC first addressed the interpretation and application of the exclusion in Annex II in the context of Thailand's notification of endosulfan. That notification expressly characterized Thailand's regulatory action as a response to the "misuse" of endosulfan for non-target species.
 - The underlying facts were well-established. Thailand's regulatory decision on endosulfan was directly and exclusively a response to the use of endosulfan by rice farmers in some regions of Thailand to respond to a golden apple snail infestation in rice paddies. That use resulted in adverse environmental impacts on fish. This use was unapproved, unregistered, and inconsistent with the product's label. (Endosulfan was approved in Thailand only for use as an insecticide, and only for use in controlling pests in cotton, sesame and coffee production.)
 - CRC-2 reviewed this history and nevertheless concluded that the Thai notification met the Annex II criteria. The report from CRC-2 asserted that the CRC "took account" of the criterion in subparagraph (d), that the CRC concluded that the notification met the other criteria, and that "intentional misuse was not the only reason proposed for listing the chemical in Annex III." This language implies that there were other reasons for the Thai action apart from the misuse that led to the final regulatory action on endosulfan. But the Thai notification makes it clear that there was *no other basis* for the control measure. The CRC seemed to rely on the

fact that the Thai notification was a response to the environmental impact of the misuse, but that circular reading of the term would completely empty the criterion in Annex II(d) of meaning and therefore cannot be a valid treaty interpretation. See, e.g., WTO Appellate Body Report, *United States -- Standards for Reformulated Gasoline*, WT/DS2/AB/R at 23 (April 29, 1996) ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.") (citing numerous authorities).

- COP-3 subsequently addressed the interpretation of "intentional misuse." Although COP-3 noted with approval the CRC's adoption of a case-by-case approach to this issue, it also requested a legal analysis by UNEP to help inform the Parties and CRC.
- The UNEP legal analysis was prepared and submitted to the CRC shortly before the CRC-3 meeting. See UNEP/FAO/RC/CRC.3/INF/7. CRC-3 agreed that, if notifications received in the future raised a query on possible intentional misuse, they would be examined on a case-by-case basis and that the paper from the UNEP legal office would be used to inform the discussions of the Committee. (The issue was not addressed in substance at CRC-4.)
- Against that backdrop, COP-4 took up the endosulfan decision guidance document, which relied in part on the notification from Thailand as one of the two notifications to trigger the CRC's review. The Parties were unable to reach consensus regarding that nomination due primarily to the view expressed by some Parties that the CRC misapplied the criterion in Annex II(d).

Discussion

- It is a widely agreed premise of treaty interpretation that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See Vienna Convention on the Law of Treaties, art. 31.
- Following this fundamental principle, the COP and CRC should give effect to the ordinary meaning of Annex II(d). The ordinary meaning of this term is relatively straightforward to evaluate:
 - First, where a use is either unapproved or illegal, it is a *misuse*. In this sense, a misuse is any application that is either legally prohibited or outside the scope of the government's registered, approved or authorized uses. For pesticides, the approved or authorized uses are typically reflected on a label or in related documentation (either in text or in pictograms, or both).
 - Second, where the specific application of the substance was deliberate (*i.e.*, where the application was not accidental or inadvertent), it is *intentional*.
 - Third, as a result, where a use is unapproved or illegal, and where the use or application of the substance was deliberate rather than accidental, it constitutes an *intentional misuse*.
 - Fourth, where that intentional misuse is the *sole* reason for a regulatory action that gives rise to a notification under the Rotterdam Convention (*i.e.*, where a regulatory authority took action solely in response to the environmental, health or other adverse impacts of an intentional misuse), that action is not "in itself an adequate reason to list a chemical in Annex III" and the resulting notification cannot form the predicate for a PIC listing decision.
- The reading above, moreover, is fully consistent with both the context of the treaty and its object and purpose. The listing process under the Convention was expressly designed to identify substances that pose concerns that are widely shared -- *i.e.*, concerns that are present in at least two PIC regions -- and thus may merit global attention. By contrast, Annex II(d) excludes regulatory decisions based on intentional misuse because such misuses typically present a *localized* problem.

- Others have suggested, based on remarks of one or two countries during early stages of the Convention's negotiation, that this term was intended to be limited to poisoning, suicide, or the intentional killing of fish. These observers seem to be importing a distinction into the text between use of a pesticide against "pests" and use for other purposes (e.g. suicide or fishing). In doing so, however, they are attempting to inject a meaning into the provision that was not included in the text of Annex II but easily could have been if the negotiating states intended that result. For example, the exclusion could have been drafted to apply narrowly to intentional use of a pesticide in non-pesticide applications. The fact that Annex II was not so written strongly suggests that those who rely on oral discussion during the Convention's negotiation are placing far too much weight on offhand examples given during negotiations. Annex II(d) was instead worded more broadly, and it must be given effect more broadly as well in light of its ordinary meaning.
- The original UNEP legal analysis unfortunately did not significantly clarify the interpretive issues surrounding the application of this term to date.
 - For example, the opinion's proposed definition of "misuse" is so narrow as to exclude any misuse that was "reasonably foreseeable by the manufacturer." This definition would exclude nearly all potential instances of misuse, including such obvious examples as use for suicide. It would also create a perverse disincentive for manufacturers, who would be penalized for taking affirmative stewardship measures to bar certain misuses in the registration and labeling of substances, because such steps might constitute evidence that the manufacturer had foreseen a particular misuse.
 - The opinion's proposed definition of "intentional misuse" is equally problematic. The opinion turns on the specific intent, knowledge and beliefs of individual users to evaluate whether their use constituted a knowing misuse of the substance. As a result, it is incapable of being universally and objectively applied in a policy context. To the extent that the term is susceptible to more than one interpretation, the Parties should not adopt an interpretation that requires the CRC to perform a fact-intensive investigation into the specific knowledge of individual users, because the CRC is singularly ill-suited to perform that function. Instead, the Parties must adopt an objective standard that can provide guidance that the CRC is capable of applying with the tools and information that are available to it. The ordinary meaning of the terms described above satisfies that requirement, but the original UNEP legal opinion's interpretation did not.
 - In addition, the opinion suggests that an application could not constitute misuse if there were inadequate enforcement measures taken against users. That standard would exclude many obviously "intentional misuses" in jurisdictions that lack resources to enforce such requirements. Government decisions about how to allocate scarce environmental or public health enforcement resources cannot determine whether a use that is otherwise unapproved does not constitute an "intentional misuse."
- In addition to the core considerations above, we believe the Parties should bear in mind several other issues associated with the application of this term:
 - First, the treaty requires that the CRC take account of whether international misuse formed the basis for a notification. Some participants have characterized Annex II(d) as somehow optional or hortatory. (For example, the UNEP legal opinion implies that if the criteria in Annex II(a)-(c) were satisfied, then even a notification based clearly upon an intentional misuse would nevertheless satisfy Annex II.) That reading is inconsistent with the text of the Convention, however, which explicitly requires that the CRC "shall ... take into account" the intentional misuse issue. It is also flawed for the reasons given above regarding the CRC's application of the term to the Thailand notification for endosulfan: it fails to give operative effect to a key term of the treaty.
 - Second, for the same reasons that a notification of regulatory action based solely on intentional misuse cannot form the basis for a PIC listing, where a regulatory

action is based on both an intentional misuse and another factor, the CRC should be careful not to rely on the consequences of the intentional misuse in evaluating the other criteria in Annex II. For example, if the underlying risk evaluation related to the intentional misuse, the CRC should not rely on that risk evaluation to establish that the requirements of Annex II(b) have been satisfied. Similarly, when considering whether the final regulatory action would lead to a significant reduction in the quantity of chemical used under Annex II(c), the CRC should not consider the reductions in use associated with the controls on the intentional misuse. Otherwise, the CRC's failure to screen out these intentional misuse-related considerations could lead to a result where the CRC determined that the Annex II criteria were satisfied because of the impacts of the intentional misuse-related action, which would violate the requirement of Annex II(d) even if there were more than one reason for the notifying Party to take the regulatory action.

Recommendation

- With respect to the general question of how to interpret "intentional misuse," the Secretariat should provide a summary or discussion of the various Party, observer and stakeholder inputs regarding the term.
- COP-5 should review the input from the parties and establish more comprehensive guidance about the proper scope of the criterion to assist the CRC in reviewing future notifications.
- In the meantime, pending further guidance from the COP, the CRC should not proceed further with notifications where the sole reason for regulatory action appears to be a desire to address an intentional misuse.

For further information, please contact Dr. Michael Morelli, michael_morelli@fmc.com, or Dr. Bernhard Johnen, bernhard.johnen@croplife.org.