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Food and Agriculture Organization
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Sent by email to: christine.fuell@fao.org
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13 March 2018

Re: Report on legal and operational implications of priority actions to enhance the effectiveness of the Rotterdam Convention

Dear Ms. Fuell and Ms. Lechner

Thank you for the invitation to parties and others to comment on the subject report. You'll find CropLife International's input in the appendix to this letter.

Sincerely



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Comments on:

Report on legal and operational implications of priority actions to enhance the effectiveness of the Rotterdam Convention,

uploaded on the Rotterdam Convention website in January 2018

CropLife International supports the information exchange procedures and the principles of Prior Informed Consent (PIC) of the Rotterdam Convention. The PIC procedure is an additional safeguard to protect human health and the environment for countries where effective regulatory controls are weak. We consider the Convention, as drafted, appropriate to achieve the objectives of the Convention in the international trade of certain chemicals and pesticides. We see no need to amend the Convention with new procedures and annexes which would require substantial time and effort for drafting and potential ratification and eventually lead to increased complexity and confusion in the implementation.

With respect to the report we have the following comments:

Ref 141

“Increase the number of CRC members”

CropLife International would suggest that rather than increase the number of CRC members, efforts should be made to stimulate the active participation of those CRC members present at the meetings. With this in mind, it may be timely to introduce simultaneous translation in CRC plenary meetings as is done at the Stockholm Convention POPs Review Committee.

Ref 160

“Subject chemicals to a voluntary PIC procedure, where a (qualified) majority of Parties agrees to their listing”

The creation of an additional Annex, listing those substances for which no consensus could be found at COP, would also result in an ungovernable PIC framework, with a patchwork of parties and non-parties for each newly added substance. Determining which party owed obligations to which other party for which substances would create significant confusion, would require a drain of resources better deployed elsewhere, and create additional costs and complexity for the regulated sectors. Similar issues related to acceptance and implementation would arise which we address below on proposal references 154, 161 and 162.

Ref 154, 161, 162

**“Permit a flexible entry into force of the PIC procedure for individual States”,
“Subject chemicals to the PIC procedure, where a (qualified) majority of Parties agrees to their listing”,
“Subject chemicals to the PIC procedure, where a (qualified) majority of Parties agrees to their listing, with the possibility to opt out”**

- All three amendment proposals raise complex issues of international treaty law.
- In practice, the amendment proposals would be unlikely to work, because parties that do not agree to any specific amendment proposal would, we believe, continue to have a legal right to block the listing of substances on Annex III.
- It could also take many years before any amendment ever entered into force, causing significant distraction with no added benefits in the intervening years.
- Any amendment proposal would also result in an ungovernable PIC framework, with a different patchwork of parties and non-parties for each newly added substance in Annex III or any new Annex. Determining which party owed obligations to which other party for which substances would create significant confusion, require a drain of resources better deployed elsewhere, and create additional costs and complexity for the regulated sectors.

Note: Any party can propose an amendment to the Convention text, which will be considered at a COP and adopted by a $\frac{3}{4}$ majority vote. Amendments to the Convention text enter into force only if they are ratified, accepted or approved by at least $\frac{3}{4}$ of the parties. Parties are not automatically bound by such amendments; they have to affirmatively “accept” an amendment of the treaty text before they will become bound by the amended text.

Detailed analysis on potential amendment of article 22 to revise the decision-making procedure by which chemicals are listed in Annex III (the PIC list).

The proposals in Refs 154, 161 and 162 would change the procedure for PIC listing decisions by removing the current requirement for adoption by consensus or by introducing a flexible, party-dependent entry into force.

We focus here on the legal and policy implications of the proposed amendments to article 22.

Firstly, any proposed amendment would almost certainly fail in practice to achieve its own objective of removing the requirement for consensus decision-making. This is because, under the basic rules of treaty law, any party that does not accept the proposed amendment would arguably still be able to prevent the listing of a substance on Annex III.

- A multilateral treaty, like the Rotterdam Convention, can be amended in accordance with its terms.
- However, it is well established under treaty law that an amendment to a multilateral treaty is not binding on a party that chooses not to accept or ratify the amendment. See article 40(4) of the Vienna Convention on the Law of Treaties (VCLT).
- Any party to the original Convention that chooses not to accept the amending agreement (i.e., the “originalists”) would still be a party to the original treaty, but

would be considered a non-party with respect to the amended treaty. And as between one state that is a party to the amended treaty, and another state that is party only to the original treaty, the original treaty (and only the original treaty) is the one that “governs their mutual rights and obligations.” See VCLT article 30(4)(b).

- In this case, because the original Rotterdam Convention agreement established a procedure that gave each party the right to block consensus and prevent the listing of a chemical on Annex III – a right that had been important to and exercised by many parties – any originalist party that chooses not to accept the proposed amendment would arguably retain that right, even after the proposed amendment enters into force for other parties.
- Given the centrality of the consensus procedure to the original Rotterdam Convention agreement, there is no reason that such an original party’s rights would be limited to preventing the listing of a chemical in Annex III only with respect to trade with that original party alone. Instead, such an originalist party would also retain the right to prevent the listing on Annex III with respect to all other parties. Put differently, the parties to the original (unamended) Convention would still retain a legal right to consensus decision-making with respect to the Annex III list, and parties that had accepted the amendment would still be obligated to give them that right.
- Moreover, this is not a purely hypothetical issue. Several countries that have blocked consensus in the past have done so not because of the marginal additional administrative burdens that a PIC listing imposes on their own bilateral trade, but because of the much larger impacts a PIC listing has on the global perceptions of listed substances, which potentially can impede global access to listed chemicals and reduce their availability.
- It is a near certainty that a substantial number of parties will either elect not to approve any proposed amendment, or will simply fail to act and therefore never become bound by it.
- As a result, for the reasons described above, it is inevitable that a significant number of parties will retain their legal right to block the addition of substances to Annex III, even where the listing is approved by a super-majority decision of parties to the proposed amendment.

Second, even if it were capable of achieving its stated objectives, any proposed amendment would take years and potentially decades before it took effect.

- Under the Rotterdam Convention, any proposed amendment would only enter into force after acceptance by $\frac{3}{4}$ of the parties (many of which would, as a matter of their domestic procedures, be required to pursue a ratification procedure with their national legislatures).
- This would likely take a period of years. Rotterdam Convention parties need look no further than the Basel Convention for an example of how burdensome and distracting the treaty amendment process can be. The Basel Convention’s “Ban Amendment”, which was similarly controversial, was adopted by a divided COP in 1995. Over 20 years later, it has still not entered into force globally.

- During this period where it awaited entry into force, any proposed amendment would serve no function in improving the operation of the Convention. Indeed, the presence of the pending amendment would serve only to further politicize the Rotterdam Convention processes and distract from meaningful efforts to reform the Convention and improve chemicals management at all levels of governance.

Third, even if one could somehow clear the obstacles discussed above, any proposed amendment would be logistically unworkable and unimplementable in practice, both for governments and the regulated industry.

- Instead of a single global PIC list, which applies to virtually all global trade among parties, governments and trading entities would have to cope with an ever-shifting constellation of PIC lists, the content of which would depend on which two governments were involved in the trade.
 - Some countries would be bound only by PIC listings that took place under the terms of the original Convention; these “originalists” would never be bound by a listing decided in the face of an objection.
 - Other countries that had joined the proposed amendment could nevertheless choose to opt-out of the amendment of Annex III within 1 year.
 - Still other countries would likely either choose to be bound or become bound by default by failing to opt-out within the 1-year period.
- This constellation would be different, moreover, for every newly added chemical. It would pose major challenges to participating stakeholders to try to keep track of and comply with this patchwork of rules regarding export notifications and import consents.
- Clarity on how these obligations would be managed would likely require extensive additional changes to the text of the treaty itself, so that parties understand what obligations they have under which situations, and to which other parties.

Fourth, any proposed amendment undermines the valuable principle of consensus decision making, which has been a core principle that has contributed to the growth, acceptance and effectiveness of multilateral environmental decision-making.