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Answers to questions on notice
Environment portfolio

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Senator Singh asked:

Senator SINGH: Where are we at with the Rotterdam Convention? When is the next meeting of the parties?

Mr McNee: The next Conference of the Parties of the Rotterdam Convention will be in May 2017.

Senator SINGH: So that is a while away.

Mr McNee: As you are aware, asbestos was a significant issue at the previous meeting and an intersessional process was established to deal with the fact that the Rotterdam Convention had not been able to successfully conclude with a listing—

Senator SINGH: Which Australia led on.

Mr McNee: Mr Edwards led the last time, and I did the previous time. So the intersessional process has been established. Australia is leading that process. We have recently circulated a thought starter paper about the kinds of issues that arise from the situation that the convention finds itself in ...

...

Senator SINGH: That paper you referred to, that Australia has written to initiate the intersessional process, is that publicly available?

Mr McNee: Yes. It has been circulated by the convention secretariat. I can have a copy of it made available.

Answer:

Please find the paper attached.

Thought-starter paper – Intersessional work on the process of listing chemicals in Annex III to the Rotterdam Convention

March 2016

Executive Summary

At the seventh meeting of the Conference of the Parties (COP) to the Rotterdam Convention in May 2015, decision RC-7/5 on Intersessional work on the process of listing chemicals in Annex III to the Rotterdam Convention was adopted.

A background note was provided to intersessional working group (hereafter the “working group”) members in October 2015, outlining the decision-making process under the Rotterdam Convention and the problems encountered at successive meetings of the COP with achieving consensus to list certain chemicals in Annex III. The background note has set the framework for this thought-starter paper for the use of the working group as a basis for discussion. The intention is to facilitate an analysis of the problems faced by the Convention and then consider options to improve the functioning of the Convention, including the decision-making process.

This paper is divided into six sections:

1. Background and historical context to give perspective on how the Rotterdam Convention currently functions and how this compares with its intended function.
2. Questions for members’ consideration in relation to the function of the Convention.
3. Concerns expressed during COPs with regard to listing.
4. Options set out in Documents UNEP/FAO/RC/COP.4/12 and UNEP/FAO/RC/COP.4/13.
5. Consideration of cases where consensus could not be reached.
6. Conclusion and consolidated questions.

1. Background

The Rotterdam, Basel and Stockholm Conventions

The Basel and Stockholm conventions were developed under the auspices of the United Nations Environment Programme (UNEP) and the Rotterdam Convention was developed under the auspices of UNEP and the Food and Agriculture Organization of the United Nations (FAO). All three conventions provide an international framework governing the environmentally sound management of hazardous chemicals throughout their lifecycles. Together the three conventions cover key elements of “cradle-to-grave” management of hazardous chemicals¹.

The Rotterdam Convention enables countries, as part of their own sovereign decision-making, to determine if they want to import hazardous chemicals and pesticides listed in the Convention. The Stockholm Convention aims to restrict and ultimately eliminate trade, production, use, and environmental release of highly dangerous and long-lasting chemicals. It also aims to prevent the production and use of new chemicals that exhibit the characteristics of Persistent Organic Pollutants (POPs). The Basel Convention deals with hazardous waste, from production and transport, to final use and disposal. It has similarities to the Rotterdam Convention in that it promotes information exchange and has provisions to control trade. The Rotterdam Convention specifically excludes wastes.

What does the Rotterdam Convention contribute to the cluster?

Within the framework for lifecycle management of hazardous chemicals the Rotterdam Convention covers existing chemicals, import/export controls, and hazard communication.² Unlike the Stockholm Convention, there is no element of eliminating or banning the production and use of chemicals, and it specifically excludes wastes, bearing in mind that hazardous wastes are predominantly within the scope of the Basel Convention.

Elements of the negotiating history and how it was envisaged to function

Growth in internationally traded chemicals during the 1960s and 1970s led to increasing concern over pesticides and industrial chemical use, particularly in developing countries that lacked the expertise or infrastructure to ensure safe use. This led to the development of the International Code of Conduct for the Distribution and Use of Pesticides by the FAO and the London Guidelines for the Exchange of Information on Chemicals in International Trade by UNEP. Both the Code of Conduct and the London Guidelines include procedures aimed at making information about hazardous chemicals more freely available, thereby permitting countries to assess the risks associated with chemical use. In 1989, both instruments were amended to include the Prior Informed Consent (PIC) procedure to help countries make informed decisions on the import of chemicals that have been banned or severely restricted.

The voluntary PIC procedure aimed to:

- help participating countries learn more about the characteristics of potentially hazardous chemicals that may be imported;
- support, but not substitute for, national decision-making regarding the import of certain chemicals; and
- facilitate the dissemination of these decisions to other countries.

¹ <http://www.pops.int/documents/background/hcwc.pdf>

² <http://www.pops.int/documents/background/hcwc.pdf>

At the first session of the intergovernmental negotiating committee (INC) in 1995 of the International Legally Binding Instrument for the Application of the Prior Informed Consent procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the scope of the PIC instrument was discussed including:

- Views on prohibition of use or the phasing out of hazardous chemicals, which had formed part of the elements paper. On this point, countries objecting to the incorporation of this provision in the PIC instrument suggested that it might be simpler and less controversial not to introduce provisions for bans, but to consider this an issue for a possible future protocol (UNEP/FAO/PIC/INC.1/3).
- The functions of the COP, where views were expressed that amendment of the PIC List by the COP seemed inappropriate. Amendment of the PIC List was essentially a product of the PIC process itself. However, for the adoption of new annexes or schedules and an associated broadening of the PIC procedure, a decision by the COP might be appropriate (UNEP/FAO/PIC/INC.1/3).
- The trigger for including chemicals in the PIC procedure and limits on the PIC List. For example, in early comments, a number of governments were of the view that that the PIC procedure should be targeted only at specific chemicals causing health and/or environmental problems, on the basis of the notification of national control actions. If all chemicals that were likely to cause health or environmental problems were to be included in the PIC procedure, then the PIC List would be overwhelmed by sheer numbers. Other early comments from some governments prior to INC 1 had suggested that the PIC List should be constantly updated without having to pass through administrative steps required for ratification of its amendment (UNEP/FAO/PIC/INC.1/3).
- Concepts regarding possible removal of chemicals from the PIC List, as well as the need, wherever possible, for alternatives to be identified in the decision guidance documents (DGDs), were also discussed (UNEP/FAO/PIC/INC.1/6).
- The functions of an “expert group” which would consider information and make a recommendation on whether the chemical is considered a candidate or not, as well as who would take decisions regarding listing: the COP or a subsidiary body such as the expert group. Delegates indicated that the expedience of decisions and resource implications should be a major factor in deciding which body would take these decisions (UNEP/FAO/PIC/INC.1/10).
- It was strongly emphasised that the procedure for the inclusion of chemicals in the PIC List should be transparent, workable and rational. Above all, there had to be well-defined criteria and an agreed process in determining which chemicals to include. Reservations were also expressed concerning the difficulty in identifying internationally acceptable alternatives due to the wide range of conditions between countries (UNEP/FAO/PIC/INC.1/10).

The level and strength of the data requirements and their assessment was an area of much debate during the INC process. Some proposals suggested notifications from five countries, comprising three or more FAO regions, should be required to trigger the PIC procedure. It was argued that the requirement for wide regional consensus would ensure that any chemical listed constituted a legitimate global problem and required action at the international level. This was considered to be too great of an administrative burden. A one-country trigger mechanism was also proposed, noting that history had shown that control actions by one country were sufficient to spur other countries to action on a chemical.

At INC 2, language in Article 1 to accommodate further developments in other forums on the sound management of chemicals and on the adoption of control measures was discussed. There remained differing views on the number of control actions or nominations of hazardous pesticide formulations required to trigger inclusion in the PIC procedure. At this stage there was no differentiation in the procedure for proposing or adopting annexes, and a draft article regarding the adoption of protocols remained under debate (UNEP/FAO/PIC/INC.2/7).

The discussions at INC 3 resolved a number of elements of the framework of the Convention and how it would ultimately operate.

The above is not meant as a comprehensive history, rather, it serves to remind us that the negotiation process involved a series of debates and compromises in order to achieve what was agreed as a workable balance between operational burden and desirable outcomes.

2. The function of the Rotterdam Convention

Having reminded ourselves of the objectives of the Convention, as envisaged at the time it was being developed, it is important to reflect now on how it functions today.

Has the objective of the Convention shifted?

Article 1 states the objective of the Rotterdam Convention:

”to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.”

Does the Convention succeed in achieving its objective of promoting greater chemicals safety?

If Parties remain committed to this objective, as submitted in their instrument of ratification, then it is important to consider what changes could be made to achieve progress towards it.

Is the Convention currently succeeding in promoting greater chemicals safety?

At COP 7, one out of five chemicals was agreed to be listed in Annex III and therefore information helpful for promoting chemicals safety could be disseminated and the PIC procedure implemented. For the remaining 80% of chemicals, the COP did not take a decision. Resources required for chemicals to be considered by the COP are considerable: including for the chemical to be notified, for the Chemical Review Committee (CRC) to meet with Secretariat support and the preparation and hosting of a COP meeting. Considering the multiple competing demands on a very limited pool of resources, it is logical that we should all strive for the Convention to function efficiently and effectively at its task of promoting greater chemicals safety.

One question that could be asked is whether a process whereby 80% of chemicals that the CRC agrees to recommend for listing do not progress is efficient and effective. It is acknowledged that the process consumes resources in the chemicals and wastes cluster that could have otherwise been used for another constructive purpose.

Accordingly, it is timely to better understand and make decisions regarding how the Convention can be more efficient and effective at promoting greater chemicals safety.

Have the actions under the Convention changed since it was agreed?

The Convention envisaged a consent process that was a national decision only, together with exchange of information. In recent years, some Parties have expressed concerns that the actions taken under the Convention restrict the production and use of chemicals. The Convention text has not changed and bans on production and use do not feature in the Convention text. Therefore, one question is whether implementation actions taken in recent years by Parties have led to a significant shift in how the Convention is implemented today? Do Parties enact domestic implementation mechanisms that significantly restrict trade as a result of listing that they would not otherwise have enacted? For example, many countries may decide nationally to take action on a chemical either because of a domestic assessment or through listing under other Conventions (e.g. endosulfan was listed under the Stockholm Convention for elimination in 2011 and under the Rotterdam Convention for information exchange in the same year).

Questions for members for which written information is sought:

- 1. What is the meaning of the Prior Informed Consent Procedure for members?*
- 2. What are the implications of listing a chemical under the Rotterdam Convention for Parties and what has been the effect seen domestically from the listing of chemicals?*
- 3. Do Parties have domestic implementation mechanisms that significantly restrict trade as a result of listing that they would not have otherwise have enacted?*

3. Concerns expressed during COP meetings regarding listing

An initial assessment has been undertaken to identify the broad concerns expressed regarding listing. In addition, a table has been prepared seeking specific inputs from members as requested in Decision RC-7/5 identifying the reasons for and against listing. Decision RC-7/5 further requests that based on that and other information, such as the information set out in documents UNEP/FAO/RC/COP.4/12 and UNEP/FAO/RC/COP.4/13, options are developed for improving the effectiveness of the process.

Accordingly, a discussion of the broad concerns is below together with elements to underpin potential options. Finally, options as set out in documents UNEP/FAO/RC/COP.4/12 and UNEP/FAO/RC/COP.4/13 are also elaborated.

In the broad, there appear to be four main reasons and one fundamental argument raised against listing after the CRC has considered the notification(s) or proposal(s):

- i. Reason: Breach of Article 5(1);
- ii. Reason: CRC has not correctly assessed the notifications or proposals for listing, as the Party/Parties at the COP consider the criteria for listing not to be fulfilled;
- iii. Reason: The socio-economic consequences of listing outweigh the benefits (for that Party);
- iv. Reason: No safer alternatives to the chemical are available;
- v. Argument: If the above reasons cannot be taken into account in rejecting a CRC recommendation, then what function/matters are left for the COP in its decision-making?

i. Breach of Article 5(1)³

This concern usually relates to the timeframe of 90 days. The Secretariat has provided a legal explanation regarding whether exceeding 90 days means the proposal should be set aside.

At heart is the question of whether exceeding the timeframe makes the action taken domestically invalid or makes the content of the notification inaccurate.

<i>4. Members are invited to comment on the breach of Article 5(1).</i>

ii. CRC has not correctly assessed the notifications or proposals for listing, as the Party/Parties at the COP consider the criteria for listing not to be fulfilled. In particular, the scientific information on adverse effects to human health or the environment for a chemical is not strong enough to warrant listing; and the risk evaluation was not of sufficient quality.

Under the Stockholm Convention, a risk profile is generated by experts, the POPs Review Committee (POPRC), against specific criteria and is considered necessary to underpin decisions that strong global action to ban or significantly reduce use, as well as manage waste, are warranted.

By contrast under the Rotterdam Convention, the DGD is a collation of information on risk evaluations of the notifying Parties and hazard information gathered from internationally

³ Article 5(1) states that each Party that has adopted a final regulatory action shall notify the Secretariat in writing of such action. Such notification shall be made as soon as possible, and in any event no later than ninety days after the date on which the final regulatory action has taken effect, and shall contain the information required by Annex I, where available.

recognized sources. It is not an expert assessment to support a regulatory action in the same way that the Stockholm Convention risk profile is.

In understanding whether the DGD process is 'fit for purpose', an important consideration is what evidence is required to support what types of action. Where strong actions like a global ban or regulatory intervention are sought, then the supporting evidence may need to be stronger. Where the action does not require such an intervention, the level of evidence is proportionally less stringent. The final composition that we now see in operation was considered a reasonable compromise when Parties decided to ratify the Convention.

The aim should be for a transparent, efficient and effective process for listing a chemical that is fit for purpose given the resource constraints facing all countries.

There are a number of potential options available that may influence the listing process including: modification of the criteria, changing the composition of the CRC or changing the numbers of notifications to ensure that technical concerns can be resolved at an earlier stage. Any changes would need to reflect the appropriate roles of the CRC and the COP, particularly in the context of technical matters.

In contemplating re-opening a discussion about operation of the Convention today, it is important to consider that the negotiation process involved a series of debates and compromises in order to achieve what all ratified Parties agreed as a workable balance between operational burden and outcomes towards chemical safety. If Parties decide today that greater operational requirements are needed, this may need to be balanced with improved chemical safety outcomes.

5. Members are invited to submit examples that support the contention around the problem, and/or options to consider.

iii. The socio-economic consequences of listing outweigh the benefits (for that Party). In particular, listing of chemicals in the Convention represents a ban on the chemical and listing will lead to major impacts in trade.

The Convention is concerned with facilitation of information exchange on the safe handling and management of listed chemicals. A plain reading of the Convention text indicates socio-economic considerations are not relevant to whether the notification of final regulatory action or the proposal for severely hazardous pesticide formulation meets the criteria for listing of chemicals under the Rotterdam Convention as per Annex II and Annex IV, respectively. Therefore, it is appropriate to consider whether this issue should be addressed and if so, in what form.

Since socio-economic aspects are not relevant to the criteria as currently written, an amendment would presumably need to be made to the logic of the Convention to enable them to be included. That is, an assessment of the impacts of restriction is undertaken when there is an expectation that users must move away from using a chemical. Therefore, assessment of socio-economic implications across a range of countries as part of the decision-making criteria would presumably go hand-in-hand with expectations and requirements to discontinue use across a range of countries.

Assuming this is the case, operational requirements would also need to be resolved, such as setting defined criteria and requirements for clear information in order to inform decision-making. Presumably, Parties would need to produce evidence of socio-economic consequences. Parties could for example then have a factual basis to assess if the negative impact outweighs the benefits of listing.

6. Members are invited to submit examples that support the contention around the problem, and/or options to consider.

iv. No safer alternatives to the chemical are available.

The Convention is concerned with facilitation of information exchange on the safe handling and management of listed chemicals. A plain reading of the Convention text indicates that alternatives are not relevant to whether the notification of final regulatory action or the proposal for severely hazardous pesticide formulation meets the criteria for listing of chemicals under the Rotterdam Convention as per Annex II and Annex IV, respectively. Nevertheless, transition to safer alternatives is always of value to countries and safer alternatives should be an aim for all countries regardless of whether a chemical is listed under a Convention or not. Therefore, it is appropriate to consider whether this issue should be addressed under the Convention and if so, in what form.

As above, one option may be to make assessment of alternatives a formal part of the criteria in Annex II and IV, rather than part of other relevant information in Annex I paragraph 2 (d). This presumably would also necessitate a change in logic for the Convention, i.e. assessment of alternatives in a country is generally undertaken when there is an expectation that users must move away from using a chemical. Therefore, assessment of alternatives and their applicability to other countries as part of the decision-making criteria would presumably go hand-in-hand with expectations and requirements to discontinue use more broadly than in the country that undertook the final regulatory action.

Assuming this is the case, operational requirements such as setting transparent and clear criteria for alternatives assessment remain to be resolved.

7. Members are invited to submit examples that support the contention around the problem, and/or options to consider

4. Options set out in Documents UNEP/FAO/RC/COP.4/12 and UNEP/FAO/RC/COP.4/13

Document UNEP/FAO/RC/COP.4/13 on ensuring continued effectiveness described two possible approaches within the framework of the Convention. The first approach involved amending the decision-making process for the addition of chemicals to Annex III of the Convention, while the second proposed the possible creation of a new annex for those chemicals on which the COP could not reach consensus on listing in Annex III. Document UNEP/FAO/RC/COP.4/12 described opportunities for information exchange on chemicals recommended for listing in Annex III by the Chemical Review Committee. These three broad options are itemised and further elaborated below.

- i. Creation of a new annex for chemicals on which consensus is not reached regarding listing in Annex III;
- ii. Amending the procedure for the adoption and entry into force of an amendment to Annex III;
- iii. Option for increased information exchange through the Secretariat.

i. Creation of a new annex for chemicals on which consensus is not reached regarding listing in Annex III

Adoption of another annex giving Parties the option to opt out would enable promotion of greater chemicals safety for those chemicals passed by the CRC.

It would lead to a dual track system for a proportion of Parties. It is noted, however, that the existing system already has differences in that each export and import situation is tailored to which country is a Party and what each importing Party has decided regarding imports for each chemical.

This option would require an amendment to the Convention text to create the new annex and the procedure around it, but should not require broad changes to other elements of the Convention so as to balance the operational requirements with outcomes of chemical safety.

Procedurally, paragraph 3 of Article 22 sets out the procedures for the proposal, adoption and entry into force of additional annexes to the Convention. In line with paragraphs 1–3 of Article 21, a new annex to the Convention may be adopted by a three-fourths majority vote. As stated in subparagraph 3 (b) of Article 22, Parties that cannot accept a new annex may so notify the Depositary within one year of the date on which the annex is adopted. Annexes enter into force one year after adoption for all other Parties.

ii. Amending the procedure for the adoption and entry into force of an amendment to Annex III

Procedurally, paragraph 5 (b) of Article 22 provides that a decision to amend Annex III shall be adopted by consensus. Paragraph 5 (c) of Article 22 provides that an amendment to Annex III enters into force for all Parties on the date specified in the decision adopted by the COP. A change to the existing procedure for adopting and, possibly for the entry into force, of an amendment to Annex III would require an amendment to paragraph 5 (a) and possibly 5 (b) of Article 22 of the Convention.

Article 21 sets out the procedures for amendments to the Convention. Any Party may propose amendments to the Convention, which are to be communicated to all Parties at least six

months before the meeting at which they are proposed for adoption. Paragraph 3 states that an amendment can be adopted by a three-fourths majority vote of the Parties present and voting at that meeting. Paragraph 5 further states that such amendments will enter into force for the Parties having accepted it on the ninetieth day after the date of deposit of instruments of ratification, acceptance or approval by at least three-fourths of the Parties.

The simplest approach may be to bring the procedures for amending Annex III to the Convention in line with that for amending other annexes as set out in paragraphs 3 of Article 22, i.e. to allow, should consensus not be possible, for a three-fourths majority vote. This may need to be balanced with an opt-out provision.

iii. Option for increased information exchange through the Secretariat

Under paragraph 1 (c) of Article 14, a Party may request the Secretariat to circulate information concerning regulatory actions taken by it to restrict substantially one or more uses of a chemical to other Parties. The COP in decisions RC-3/3 and RC-4/4 on chrysotile asbestos, and decision RC-6/8 on certain formulations of paraquat dichloride, encouraged Parties to make use of all information available on these chemicals, including the draft DGDs, to assist others to make informed decisions regarding their import and management and to inform other Parties of those decisions.

This option, while positive, does not appear to be able to address the underlying concerns about the efficiency and effectiveness of the Convention.

5. Consideration of cases where consensus could not be reached

Decision RC-7/5 requested an intersessional working group to review the cases in which the COP was unable to reach consensus on the listing of a chemical by identifying the reasons for and against listing.

8. Accordingly, Members are invited to fill out column 4 in Table 1 below presenting reasons for and against listing.

Table 1 The process of listing chemicals, the role of each entity and chemicals considered at COP 7 where consensus was not reached

Process	Chemical notification	Chemical Review Committee – recommendation to list in Annex III	COP decision
Role of each entity/step in process to list chemicals	Countries identify and provide information on hazardous chemicals domestically	Review the information in notifications against Annex II or IV criteria which includes scientific evaluation of notified chemicals	To decide on listing in Annex III based on the recommendations from the CRC
Decision Base of entity	Science/policy	Science	Policy
Chrysotile Asbestos	Two notifications of final regulatory action	<ul style="list-style-type: none"> • Recommendation to list in Annex III since Annex II fulfilled • Draft DGD 	For: Against:
Trichlorfon	Two notifications of final regulatory action	<ul style="list-style-type: none"> • Recommendation to list in Annex III since Annex II fulfilled • Draft DGD 	For: Against:
Fenthion (ultra-low-volume (ULV) formulations at or above 640 g active ingredient/L)	Two notifications of final regulatory action	<ul style="list-style-type: none"> • Recommendation to list in Annex III since Annex IV fulfilled • Draft DGD 	For: Against:
Liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L		<ul style="list-style-type: none"> • Recommendation to list in Annex III since Annex IV fulfilled • Draft DGD 	For: Against:

6. Conclusion

In conclusion, the purpose of this paper is to support a dialogue around the operation of the Convention, elicit views about its effectiveness and consider the pros and cons of options should concern over effectiveness require action.

To that end, any supporting evidence that members can provide will promote dialogue and resolution at the planned workshop⁴. Questions that have been raised throughout this paper are consolidated below for ease of reference.

- 1) *What is the meaning of the Prior Informed Consent Procedure for members?*
- 2) *What are the implications of listing a chemical under the Rotterdam Convention for Parties and what has been the effect seen domestically from listing of chemicals?*
- 3) *Do Parties have domestic implementation mechanisms that significantly restrict trade as a result of listing that they would not have otherwise have enacted?*
- 4) *Breach of Article 5(1): Members are invited to comment.*
- 5) *CRC has not correctly assessed the notifications or proposal for listing, as the Party/Parties at the COP consider the criteria not fulfilled: Members are invited to submit examples that support the contention around the problem, and/or options to consider.*
- 6) *The socio-economic consequences of listing outweigh the benefits (for that Party): Members are invited to submit examples that support the contention around the problem, and/or options to consider.*
- 7) *No safer alternatives to the chemical are available: Members are invited to submit examples that support the contention around the problem, and/or options to consider*
- 8) *Identifying the reasons for and against listing: Members are invited to fill out column 4 in Table 1 presenting reasons for and against listing.*

In addition, views regarding the options elaborated in documents UNEP/FAO/RC/COP.4/12 and UNEP/FAO/RC/COP.4/13 are welcomed, as are additional views on the current operation of the Convention and other relevant issues that members believe should be considered in future discussions.

⁴ Subject to the availability of funding.