

Promoting the Effectiveness of the Rotterdam Convention: Ways Forward and Procedural Implications

Introduction

The Rotterdam Convention (the Convention), a legally binding instrument on the Prior Informed Consent (PIC) procedure for international trade in hazardous substances, was adopted in 1998 and entered into force in 2004.¹

According to the Convention, chemicals listed in Annex III to the Convention may only be traded between the Parties in accordance with the PIC procedure established by the Convention. Article 22.5 of the Convention lays out the procedure to list a chemical in the Annex III list. It refers to the procedural steps in Articles 5 to 9 of the Convention and requires a consensus decision.

The Rotterdam Convention is an important mechanism for achieving a number of the Sustainable Development Goals.²

The positive impact of listing substances in Annex III is that it provides countries with the information they need to ensure the safe management of these chemicals. Countries must not only provide explicit consent to receive imports of these chemicals, but they can also use the scientific information provided through the listing process to decide how to manage the chemicals domestically, according to their own political decisions about acceptable levels of risk. Private standards can also rely on Annex III to establish the criteria for compliance with standards and labels.³

¹ UNEP, FAO, Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade, Texts and Annexes (Revised in 2015), Introduction.

² Such as: ensuring healthy lives (SDG 3) - especially through substantially reducing the number of deaths and illnesses from hazardous chemicals (SDG 3.9); ensuring the sustainable management of water (SDG 6) - especially by minimizing the release of hazardous chemicals (SDG 6.3) and protecting water-related ecosystems (SDG 6.6); promoting decent work for all (SDG 8) - especially by providing a safe and secure working environment (SDG 8.8); promoting sustainable industrialization (SDG 9); ensuring sustainable consumption and production (SDG 12) - especially the environmentally sound management of chemicals (SDG 12.4); sustainable use of the oceans (SDG 14) - especially the prevention of marine pollution from land-based activities (SDG 14.1); and the sustainable use of terrestrial ecosystems (SDG 15). UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³ See, e.g., FairTrade International Hazardous Materials List, https://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/Hazardous_Materials_List_EN.pdf (Accessed on 6 Nov. 2017); UTZ Position Paper: Pest and Disease Management and Pesticide Handling, <https://www.utz.org/wp-content/uploads/2016/10/Pesticides-Position-Paper.pdf> (accessed 6 November 2017).

However, many Parties to the Convention are growing frustrated with the difficulty in listing substances under Annex III, which has been unsuccessful even when the Convention's Chemical Review Committee (CRC) has found that the chemicals in question meet the scientific criteria for being listed.⁴ Such substances include chrysotile asbestos, the liquid formulation of Paraquat and Fenthion.

Faced with this ongoing blockade, a round of intersessional work took place between COP 7 and COP 8, focusing on the effectiveness of the Rotterdam Convention and the listing of chemicals. During these intersessional discussions, the Parties attempted to 'take a step back' from the discussions surrounding individual chemicals and consider options to improve the listing procedure as a whole and generally enhance the effectiveness of the Convention.

Despite proposals made by a large group of African countries and discussions in a closed informal group, the paralysis persisted at COP 8. The Parties thus decided to establish another intersessional working group, with the mandate to proceed with the work on the enhancement of the effectiveness of the Convention during the current intersessional period (May 2017 to April 2019).

During a July 2016 intersessional workshop focusing on enhancing the effectiveness of the Convention, in Riga, the Parties discussed a thought-starter document on the issue, drafted by Australia.⁵ The document presented three broad options to enhance the effectiveness of the Rotterdam Convention:

- i. Amending the procedure of Article 22.5 for the listing of a chemical in Annex III;
- ii. Creating a new annex for chemicals for which no consensus can be reached regarding listing in Annex III;
- iii. Increasing information exchange through the Secretariat.

To facilitate the consideration of these options, the paper describes the process for adopting each option, focusing on the changes to the Convention that would be required, the steps that would be necessary to make these changes, and the resulting obligations of the Parties once these changes are made.

Although efforts to promote information exchange through the Secretariat would certainly be welcome and could be helpful in assisting Parties in managing hazardous pesticides and other chemicals, this option would not address the underlying concerns about the efficiency and effectiveness of the Convention.⁶ Therefore, this paper does not consider this option further.

⁴ UNEP/FAO/RC/COP.8/INF/20, p. 3.

⁵ UNEP/FAO, 'Thought-starter paper – Intersessional work on the process of listing chemicals in Annex III to the Rotterdam Convention', 7 March 2016. Retrieved from: <http://www.pic.int/Implementation/ProcessforListingChemicals/IntersessionalWorkingGroup/tabid/5253/language/en-US/Default.aspx>>. Accessed at 18 July 2017. These options were first mentioned in an earlier thought starter paper prepared by the Secretariat are COP 3, UNEP/FAO/RC/COP.4/13, Retrieved from: <http://www.pic.int/Implementation/ProcessforListingChemicals/IntersessionalWorkingGroup/tabid/5253/language/en-US/Default.aspx>>. Accessed at 18 July 2017.

⁶ Thought Starter Document' p. 13.

1. Under the Rotterdam Convention, a new annex would enter into force more easily than a change to the voting procedure for listing substances under Annex III

The process is the same whether Parties choose to create a new Annex or to amend the Convention to change the decision-making procedure for listing substances in Annex III. This process is described in the provisions of Article 21.1 to 21.3 of the Convention: Any Party to the Convention may propose amendments to the articles of the Convention (including the creation of a new annex), at least six months before the meeting at which it will be proposed for adoption. A three-fourths majority vote of the Parties present and voting at the COP is required to adopt any amendment to the Convention, including the creation of a new annex.⁷

However, the process for entry into force following adoption differs for the two options, and this difference may have consequences for the effectiveness of each approach.

After the adoption of an amendment to the procedure for listing a chemical under Annex III, the amendment will enter into force on the ninetieth day after the date of deposit of instruments of ratification and acceptance or approval by at least three-fourths of the Parties.⁸ Until the amendment enters into force, the inclusion of any new substance to the Annex III list would continue to require a consensus.

The requirement for three-fourths of the Parties to ratify an amendment before it goes into force could be a challenge. At the time of writing, there are 157 Parties to the Convention. 118 Parties would have to adopt and ratify the Amendment before it entered into force. As the Secretariat has observed, ratification by this number of Parties could take several years or might never occur.⁹

Unlike the requirement for amending the procedure for Annex III listings, the creation of a new annex does not need to be ratified after adoption to enter into force. After one year has passed from the date of adoption of an additional annex, the annex enters into force for all Parties that have not explicitly notified their non-acceptance of it.¹⁰ Thus, a new annex will enter into force just one year after it has been adopted.

2. Options for amending the procedure for listing chemicals under Annex III

2.1. Amending procedure of Article 22.5

There are two main ways to amend the procedure for listing chemicals under Annex III: First, it could be modified to align with the procedure for amending all other annexes to the Convention. Alternatively, the consensus requirement of Article 22.5(b) could be removed.

⁷ Rotterdam Convention, Article 21.1, 21.2 and 21.3.

⁸ Rotterdam Convention, Article 21.b.

⁹ UNEP/FAO/RC/COP.4/13, para. 10(a).

¹⁰ Rotterdam Convention, Article 22.3.b.

2.1.1. Aligning annex amendment procedures

The process to amend the Annex III list differs significantly from the amendment processes of other annexes to the Convention. In particular, amending the list of Annex III to the Convention requires a consensus, while amending the other annexes does not.

Aligning both procedures could be achieved by deleting the words “Except in the case of Annex III” from the text of Article 22.4 and deleting Article 22.5, which currently describes the procedure to amend the list of Annex III.

Deleting Article 22.5 of the Convention would erase all references to the procedural steps prescribed in Articles 5 to 9 of the Convention, relating to the review of the Chemical Review Committee (CRC) of substances proposed for listing under Annex III.

Following such an approach, any party to the Convention could propose the listing of a new chemical in the Annex III list. The proposal would have to be communicated to the Parties at least six months before the COP and could be adopted with a three-fourths majority vote of the Parties present and voting at the meeting.

Once adopted by the COP, the listing of this new chemical in the Annex III list would not be subject to a ratification process. Any Party unable to accept such a new listing in Annex III would have one year to notify the Depositary in writing. A year after the COP decision, the amendment listing the new chemical in Annex III would enter into force for all Parties that had not submitted such a notification.¹¹

As a consequence, Parties could decide to not be subject to the PIC procedure with regards to one or several chemical substances, after the substance in question has been listed in Annex III.

The CRC currently serves as a scientific expert committee to the Convention and plays a critical role its effectiveness. The CRC’s role has never been questioned at any stage of the discussions on enhancing the effectiveness of the Convention, and it does not appear that parties to the Convention wish to eliminate it from the Annex III listing procedure. It therefore seems unadvisable to align the procedure to list chemicals on the Annex III list with the procedure to modify other annexes to the Convention.

2.1.2. Removing the consensus requirement

Another way to amend the decision-making procedure for listing in Annex III would be to delete paragraph 5.b of Article 22, which poses the requirement for consensus, or to modify this paragraph to require a specific majority.

However, Article 22.5.c provides that the listing in Annex III shall enter into force for all parties on a date to be specified in the decision, and it does not provide for the possibility for any party to opt out of the Annex III listing decision. Amending this procedure to allow such a listing decision to be adopted without consensus while simultaneously subjecting all parties to that same

¹¹ Rotterdam Convention (amended version), Articles 22.4, 22.3.b and 22.3.c., UNEP/FAO/RC/COP.8/16/Add.1.

decision could prove a sticking point for a number of countries, which could slow or hinder ratification of the amendment and thus its entry into force.

It would be possible to address that difficulty by modifying Article 22.5.c to provide a possibility for parties to opt out of the listing of specific substances. Such a change would further complicate the Convention and potentially weaken it, by creating a multi-tier convention where parties could unilaterally decide to not be subject to the PIC procedure with regards to the trade of certain substances. However, it would address one of the issues identified as an obstacle to the Convention's efficiency and would most likely improve the chances of entry into force of an amendment modifying the procedure to list a substance on the Annex III list.

2.2. Period between entry into force and full ratification by all parties

Once three-fourths of the Parties have ratified an amendment to the Convention, the amendment goes into force for those parties who have ratified the amendment. Therefore, it is possible for an amendment to be in force for some of the parties and not others. In this case, there would be two parallel Conventions: the amended Convention that would govern the relations between two parties having ratified the amendment, and the unamended Convention that would govern relations between a party that has not ratified and any other party (whether that second party has ratified the amendment or not).

This would effectively lead to the creation of two alternative Annex III lists. On the one hand, there would be the 'original' Annex III list that binds all Parties to the Convention. Listing on this 'original' Annex III would require compliance with the provisions of the original Article 22.5 (i.e., a decision adopted by consensus). On the other hand, substances could be added to the "alternative" Annex III following the procedure of the amended Article 22.5 (which would likely provide for the possibility of a vote).

However, the 'alternative' Annex III list would only apply to the Parties that have ratified the amendment, whereas the 'original' Annex III list would continue to govern obligations for all Parties to the Convention.

For example, if a substance could not be listed on the 'original' Annex III list due to lack of consensus, but was added to the alternative Annex III pursuant to the revised version of Article 22.5, the PIC procedure would only apply to trade between parties that have both ratified the amendment modifying the listing procedure. Conversely, the PIC procedure would not apply to trade either between parties that have not ratified the amendment, or between a party that has ratified the amendment and one that has not.

2.3 After ratification of the amendment by all Parties

Should all parties eventually ratify the amendment, it would be necessary to determine the fate of the two alternative Annex III lists. This issue could be addressed in the original proposal for an amendment. One option could be to include a decision to automatically add to the alternative Annex III list those substances that would be added to the original Annex III list during this period. Alternatively, the two annex III lists could be merged.

This system of parallel conventions and annexes may complicate the decision-making process for the listing of substances in Annex III and could possibly make the implementation of the Convention more complex. It might further provide the Parties to the original Convention with little incentive to reach consensus on future listings under Annex III before the amendment enters into force, effectively freezing the Annex III list until the entry into force of the amendment. Conversely, the revision of the listing procedure could enhance the effectiveness of the Convention by making it easier to list chemicals in Annex III, expanding the use of the PIC procedure, and facilitating the use of the Rotterdam Convention Annex III for national regulation.

In case the revision includes the possibility to opt out of specific Annex III listings as described in section 2.1.2 of this document, a difference in how the PIC procedure applies to the trade of certain substances between parties could remain even in the case of ratification of the amendment by all parties.

3. The creation of a new annex for chemicals that cannot be listed with consensus in Annex III

3.1 Options for the creation of a new Annex

The other option proposed by the thought-starter document is the creation of a new annex, where chemicals on which no consensus is reached can be listed. There is currently no specific proposal for creating such an annex. The usefulness of such a new annex to the effectiveness of the Convention would largely depend on the obligations attached to the substance listed in this new annex. Requirements could range from imposing a strict PIC procedure for the trade of such substances between parties (similar to existing Annex III), to creating specific information sharing requirements, to mandating technical and financial assistance to developing countries to manage such chemicals adequately.

The procedure to list substances in this new annex should similarly be specified and could range from a consensus COP decision, to a voting option, to automatic listing by the CRC. The decision to create a new annex could also include a provision related to the future listing of chemicals from the new annex to the original Annex III. It is not the object of this paper to go into the details of all possible options for such a new annex.

3.2 Procedural implications of the adoption of a new annex

Whatever the obligations attached to the listing in a new annex, the creation of such an annex would likely impact the existing dynamics of the Convention.

As mentioned above, if a new annex is adopted through a COP decision, any Party may notify the Secretariat of its non-acceptance of the new annex. These Parties would not be bound by any of the obligations attached to the listing of a substance in the new annex.

Similar to the situation discussed above where two Annex IIIs would remain unless or until an amendment to the voting procedures for listing substances was ratified by all Parties, the creation of a new annex would also lead to a two-tier system for the convention, unless the new annex is unanimously agreed to and no Party decides to notify its non-acceptance. Trade between parties that have not notified their non-acceptance of the new annex of substances listed on this new annex, would be subject to the specific obligations of that new annex. Conversely, trade between a party that has accepted the new annex and one that has notified its non-acceptance would be governed by the original convention (and would therefore not be subject to any specific obligations).

Despite the two-tier system, this would allow the Parties who want to move forward to do so, regardless of the opposite stance of a few Parties to the Convention. There is a risk, however, that the Parties currently opposing consensus will never ratify the new list nor consent to any listing of new chemicals in the original Annex III, as the progressive parties now have their 'own' list to place these new substances on.¹²

¹² *Id.* para 13.