



WECF Position on the Commission proposal COM(2011)245 final to recast of PIC Regulation 698/2008/EC

December 2011

Introduction: international trade of hazardous chemicals and pesticides

Three years after its adoption, regulation 689/2008/EC, implementing the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade at EU level is being recast. A major reason behind the recast¹ as described in Commission proposal COM(2011)245 final is that **30%** of the cases of exports of chemicals banned or severely restricted in the EU cannot proceed due to the absence of response by potential importers: accordingly, **70% of EU exports of said chemicals and products can proceed according to the rules of PIC procedure.**

Rotterdam Convention: a right to know and action import of hazardous chemicals

The very aim of the Rotterdam Convention and consequently of the EU regulation implementing the convention, is to guarantee importing countries the right to express their “prior informed consent” before proceeding to imports of certain hazardous chemicals and pesticides listed under the convention: once a country has access to information on certain hazardous chemicals, it can take an informed decision on the import of said chemicals, i.e. information can trigger action. The legal instrument chosen, a convention, is formally *hard law*, but *soft law* in the content. Whereas the Stockholm Convention on POPs (Persistent Organic Pollutants) provides for worldwide prohibition of production, trade and use of chemicals/pesticides falling under its scope, the Rotterdam Convention lets room for interpretation by national countries on action to be taken on said chemicals/pesticides². Thus the Rotterdam Convention chose a less demanding approach³.

Sound chemicals management, human rights and health at global level

Women in Europe for a Common Future (WECF) shares the view of UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights that: “the achievement of sustainable development, environmental protection and effective enjoyment of human rights depends, inter alia, on the sound management of chemicals”. Indeed, every some “47,000 persons die as a result of acute poisoning from hazardous chemicals, but **many more develop serious, life-threatening diseases like various forms of cancer associated with chronic, low-level exposure to hazardous chemicals, particularly pesticides.**”⁴ This statement expressly recognizes the role of exposure to hazardous chemicals in the epidemics of Non

¹ Other reasons for the recast include: alignment with other regulations, involvement of ECHA in certain tasks, technical amendments, Lisbon Treaty consequences on EU external representation.

² Nicolien van der Grijp (2008). *Regulating pesticide risk reduction: the practice and dynamics of legal pluralism*. p. 69-70.

³ At the time of the elaboration of the Rotterdam Convention, in the beginning and mid 90's, several countries, mainly developing countries, including the Group of 77 led by Malaysia, asked for the consideration of the option of a ban of “the export of domestically prohibited chemicals, including pesticides”, showing an early warning that the convention's provisions were considered only a first step by some of the countries most concerned with the use of hazardous chemicals. Source: *Yearbook of International Environmental Law, Vol.6, 1995, p.280.*

⁴Address of UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (Second Session of the International Conference on Chemicals Management, Geneva, May 2009 and 14th session of the Human Rights Council, Geneva, 8 June 2010).

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Communicable Diseases at global level and reminds of chapter 19 of Agenda 21 of Rio Declaration⁵. It calls for a global shift towards effective prevention policies that protect the most vulnerable populations: Rotterdam Convention is one of the existing tools to achieve this.

EU role at UN Chemicals Conventions – experience from WECF as NGO observer

WECF has been observer to United Nations Chemicals Conventions and SAICM process for years and witnessed the following: whereas populations in developing countries and economies in transition are the most exposed to listed chemicals - and accordingly those most in need of proper information, technical and financial assistance to protect themselves from harmful exposures - the information they get on the chemicals/pesticides is relatively poor or inexistent. Effective implementation of the Rotterdam Convention would ensure that ***exposed populations are also informed populations since they are supposed to be the ultimate and primary beneficiaries of the Rotterdam Convention and PIC regulation.***

To our knowledge, the EU has so far chosen to go beyond certain requirements of the convention, granting non Parties the same rights as Parties to the Convention, and including more chemicals within the scope of EU regulation than the Rotterdam Convention, respecting the rules of procedure and the spirit of the convention. We trust that the new PIC recast will be an opportunity to pursue even more demanding health and environment protection objectives. The Commission states in its proposal that it “aims to reduce the administrative burden without compromising the level of protection afforded to human health and the environment”.

Key aspects of the Rotterdam Convention and PIC regulation

The Rotterdam Convention promotes shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment. It contributes to the environmentally sound use of these chemicals 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 Parties⁶. PIC (Prior Informed Consent) obligations attach to imports and exports of substances listed in Annex III. At EU level, similar export notification rules apply to both chemicals listed under the Convention and chemicals banned or severely restricted in the EU, and to all EU exports to third countries, whether Parties or not to the convention.

Transparency: Transparency on the characteristics of hazardous chemicals is an essential component of information exchange, key to the effectiveness of the PIC. The right to information is the prerequisite to the possibility to every single State Party to take action on hazardous chemicals/substances. As such, the right to information is an essential component of human rights policies when it comes to human health protection from exposure to hazardous chemicals⁷.

Towards equality in health and environmental protection at global level: The system of the Convention aims at using national and regional bans/restrictions of certain hazardous chemicals/pesticides to expand information sharing to populations which could be exposed to these compounds without being aware of the risks, due to the fact that the authorities of their countries have so far not implemented a ban/restriction of said chemical/pesticide. This means protecting the most vulnerable populations, from so-called “developing countries” or “economies in transition” or

⁵ Chapter 19 “Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products” of Agenda 21 adopted during the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992

⁶ Rotterdam Convention, Article 1 *Objective*.

⁷ Article 33 of the REACH regulation 1907/2006 provides such a right to know to the general public on the presence of identified substances on the Candidate List of SVHC (substances of very high concern)

vulnerable due to other factors, to avoid a situation where trade is made at the very detriment of public health and environmental protection. The European Commission itself recognizes that “global solidarity”⁸ is one of the aims pursued by the PIC regulation recast. Indeed, vulnerable groups “are most vulnerable to the adverse human rights impacts of poor chemicals governance, because they lack the requisite information about the dangers of the misuse, dumping and improper disposal of chemicals. They also lack the capacity to seek redress when they are victimized by negligent chemicals management”⁹.

Health and environment protection vs. commercial interests: The PIC regulation is at the crossroads of health/environmental law and trade law. The Commission considers PIC regulation part of environmental and commercial policy, but it should be stressed that environmental (and health) concerns are at the origin of the PIC procedure. Most often, the governing principles of trade law and health and environmental law do not pursue the same objectives. As a worldwide leader in chemicals management policies – so far the REACH regulation is the most exhaustive system worldwide on chemicals registration, evaluation, and authorization of chemicals - the EU has to provide a high level of protection of health, first to the populations within its borders, but also to avoid exposing populations beyond its borders to chemicals, banned or severely restricted within the EU, but still exported to other countries, to *avoid double standards, and respect a parallelism between its internal and external commercial policy*: this point is essential to be taken into account, as asserted by regulation 698/2008/EC¹⁰ and Commission’s proposal on PIC recast. And yet, some provisions of the proposed recast may undermine this approach.

EU chemical commercial policy cannot count upon export of hazardous chemicals and pesticides

EU commercial policy, as every EU policy, integrates principles such as a high level of protection of health and the environment, and a precautionary principle approach. Commercial considerations only should not be the basis for a recast. One can question the fact that commercial interests, i.e. exporting hazardous chemicals/pesticides should be the driver of EU considerations for a PIC recast: Rotterdam Convention and allegedly PIC regulation were not developed to facilitate the export of certain chemicals/pesticides but rather to protect exposed populations and guarantee them the basic right to know if they handle hazardous chemicals/substances. Populations inside and outside the EU deserve the same right to protection from exposure to hazardous chemicals/pesticides. The EU should not use its position to increase its commercial balance via exporting banned or severely restricted chemicals within its borders to countries outside the EU. At a time when the EU promotes chemicals safety and green chemistry as a driver for its chemical/industrial policy, and just before Rio+20 Summit, it would be contradictory to this trend.

WECF position and recommendations on proposed PIC recast

WECF would like to ensure that according to the Commission’s assertions: “the proposal will [...] continue to meet the aims of the Rotterdam Convention, namely to promote shared responsibility and co-operative efforts among the Parties in the international trade of dangerous chemicals **in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use**”.

⁸ Commission proposal 2011/0105 (COD)

⁹ Address of UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (Second Session of the International Conference on Chemicals Management, Geneva, May 2009 and 14th session of the Human Rights Council, Geneva, 8 June 2010).

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¹⁰ Recital 6, Article 7 and Article 13 of Regulation 689/2008/EC.

WECF questions particularly the drafting of new article 14(7) (former article 13(7)) and the commercial reasons behind PIC recast:

<p>Commission proposal Deletion of Article 5 – paragraph - 1 (new)</p>	<p>proposed amendment Reinstatement of wording of Article 5(1) of the PIC-regulation : 1. The participation of the Community in the Convention shall be a joint responsibility of the Commission and the Member States, in particular as regards technical assistance, the exchange of information and matters relating to dispute settlement, participation in subsidiary bodies and voting.</p>
<p>Justification We support the proposal by rapporteur Dan Jorgensen to reinstate article 5(1) wording: whereas commercial policy is an exclusive EU competence, environment and health are shared competences between the Commission and Member States. Moreover article 15(4) of the Rotterdam Convention provides room for State Parties to interpret the convention in a sense of a better health and environment protection.</p>	
<p>Commission proposal New article 14(7) 7. In the case of chemicals listed in Parts 2 or 3 of Annex I, the designated national authority of the exporter may, in consultation with the Commission assisted by the Agency and on a case-by-case basis, decide that the export may proceed if, after all reasonable efforts, no response to a request for explicit consent pursuant to paragraph 6(a) has been received within 60 days and there is evidence from official sources in the importing Party or other country that the chemical has been licensed, registered or authorised or that it has in the last 5 years been used in, or imported into the importing Party or importing other country and no regulatory action has been taken to prohibit its use.</p>	<p>Proposed amendment Partial reinstatement of wording of former article 13(7) 7. In the case of chemicals listed in Parts 2 or 3 of Annex I, the designated national authority of the exporter may, in consultation with the Commission assisted by the Agency and on a case-by-case basis, decide that the export may proceed if, after all reasonable efforts, no response to a request for explicit consent pursuant to paragraph 6(a) has been received within 60 days and there is evidence from official sources in the importing Party that the chemical has been licensed, registered or authorized. or that it has in the last 5 years been used in, or imported into the importing Party or importing other country and no regulatory action has been taken to prohibit its use.</p>
<p><u>Justification:</u> Consideration of a 5-year period of import or use is too long and risks opening the door to unwanted imports. This interpretation is not valid, since Article 11.2 of the Rotterdam Convention is precise enough to be considered directly applicable: the EU cannot apply to chemicals covered by parts I and II of Annex I of PIC regulation weaker provisions than the ones applying to Annex III Chemicals of the Rotterdam Convention. How will DNAs/EU authorities get evidence on the use or import of a chemical/pesticide by countries which do not provide responses to export notifications, i.e. if a Party cannot provide a consent, it is very likely to be unable to show evidence of import.</p>	

<p>Justifications for PIC recast as expressed in Commission proposal 2011/0105 (COD)</p> <p><u>In around 30% of the cases to date</u>, despite the efforts made by the DNAs of the exporting Member States and the Commission to obtain explicit consent, no response is forthcoming from the importing country, in some cases for many months or even years. <u>As a result, exports cannot proceed</u>, despite the fact that the substances are often not banned or severely restricted in the importing countries.</p>	<p>30% of exports cannot be considered as reflecting Rotterdam Convention’s provisions of “exceptional circumstances”. This aim conflicts directly with the text of the convention.</p> <p>The motivation of the recast is clearly expressed: commercial concerns rather than health and environmental concerns are at the origin of the recast.</p>
<p>The current system thus causes difficulties for exporters and the DNAs of exporting Member States without necessarily affording greater protection to importing countries. The situation as regards chemicals listed in part 2 of Annex I (chemicals banned or severely restricted in the Union within a Convention use category and thus qualifying for PIC notification but that are not yet PIC chemicals) is particularly problematic because <u>authorities in importing countries are not always aware of EU procedures or do not always have the mandate or the means to respond.</u>”</p>	<p>Absence of export from the EU should be seen as a <i>de facto</i> reduction of risk of exposure of the populations: indeed if the products are not exported, they are accordingly not placed on the market of the (importing) countries. The fact that exports from non-EU countries of same products/chemicals take place is an unacceptable argument and does not serve health and environment protection.</p> <p>The absence of answer can be linked to a competence issue (no mandate) or a lack of means of the authorities of importing countries which also do not have the means to protect final users of hazardous substances/pesticides: this implies a strong need of technical and financial assistance.</p> <p>Countries outside the EU do not have to be aware of EU procedures.</p>
<p>Against this background, <u>certain limited possibilities</u> for exports to proceed on a temporary basis, while further efforts are being made to obtain explicit consent, seem appropriate.</p> <p>It is proposed to allow the export to proceed if there is documentary evidence from</p>	<p>PIC recast intends to use the exceptional circumstances provisions allowing exports without explicit consent (article 11 of the Rotterdam Convention¹¹). Interpret the silence of an importing country as acceptance to import hazardous chemicals/pesticides is contrary to the spirit of the Rotterdam Convention and to the PIC principle. There is a risk that the export of</p>

¹¹ Rotterdam Convention, Article 11 [...] 2. Each Party shall ensure that a chemical listed in Annex III is not exported from its territory to any importing Party that, *in exceptional circumstances*, has failed to transmit a response or has transmitted an interim response that does not contain an interim decision, unless:

- (a) It is a chemical that, at the time of import, is registered as a chemical in the importing Party; or
- (b) It is a chemical for which evidence exists that it has previously been used in, or imported into, the importing Party and in relation to which no regulatory action to prohibit its use has been taken; or
- (c) Explicit consent to the import has been sought and received by the exporter through a designated national authority of the importing Party. The importing Party shall respond to such a request within sixty days and shall promptly notify the Secretariat of its decision.

<p>official sources showing that the chemical has been imported or used in the last 5 years and no regulatory action has been taken, if, despite all reasonable efforts by the exporter's DNA, the Agency and the Commission, there is no response from the importing country within 2 months. The evidence showing that the chemical is imported in the country can be regarded as sufficient indication of consent for exports to proceed ad interim for a period of 12 months pending a response. This would be compatible with the so-called "status quo" provisions of Article 11(2) of the Convention, but would be more restrictive. Moreover import licenses are frequently specific to a given product or supplier or importer so that the possibility for exports to proceed would be limited accordingly."</p>	<p>hazardous chemicals without their consent becomes the rule. An import or use in the 5 years preceding the request for export should not be considered expressing the consent of the importing country. It is a too long period in the matter of hazardous chemicals/pesticides and human health and environment protection.</p> <p>A temporary import period of one year is foreseen. A one year period is a too long to be considered temporary. Imports also means uses (and potential misuses) in importing country: the population on the field would be at risk from being exposed to hazardous chemicals consequently to the proposed PIC revision by the EU.</p>
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Conclusions

PIC recast implies that imports would result both of the absence of explicit consent and of explicit consent itself. This is unacceptable and contradictory to the spirit of the Rotterdam Convention: **the proposed addition under new article 14(7) regarding the possibility of temporary import without explicit consent from the importing country.**

Setting double standards disadvantaging populations outside the EU would send a very bad signal to developing countries in need of *bona fides* (good faith) from "developed" countries exporting hazardous chemicals. The EU should **devote efforts to increase its technical and financial assistance¹² to countries prevented by technical/financial obstacles to fulfill their obligations under the Rotterdam Convention.** Efforts to obtain explicit consent are not enough: during the 5th Conference of the Parties of the Rotterdam Convention, several developing countries made clear that technical/financial assistance was a major obstacle to the implementation of the Rotterdam Convention. The EU should **make chemicals safety an issue of development aid programs.**

The EU should **ensure that substances banned or severely restricted of the following categories are effectively covered by PIC regulation: Substances of very high concern (SVHC) listed under Annex XIV of REACH regulation, active substances withdrawn from the market or banned under Biocidal Products regulation.** In addition, the European Chemicals Agency (ECHA) should be given the means to fulfill properly its tasks under new PIC regulation and ensure proper information of the general public.

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¹² Back in 1995, during the first steps that would finally lead to the elaboration of the Rotterdam Convention, several countries expressed their concern that information exchange and PIC procedures were not in themselves sufficient to ensure chemicals safety in developing countries. *Source: Yearbook of International Environmental Law, Vol.6, 1995, p.280.*