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The Rotterdam Convention on Prior Informed Consent

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ABSTRACT

The Rotterdam Convention on Prior Informed Consent (PIC) has created a PIC procedure which is legally binding for the Convention's Parties. It builds on the experience gathered thanks to a preceding voluntary procedure introduced jointly by UNEP and FAO in 1986. The experience gained over twenty years has been helpful in launching the work under the Convention; the biggest challenge consists arguably in the introduction of new chemicals which are still economically significant, such as chrysotile asbestos and the pesticide endosulfan. UNEP and FAO continue to administer jointly the Convention's Secretariat. The Convention covers certain hazardous chemicals which are listed in Annex III to protect human health and the environment. The emphasis is placed on facilitating information exchange on the characteristics of these substances, on assisting Parties in establishing an effective national decision-making process regarding relevant trade policies, and on sharing the responsibility for trading these chemicals among importers and exporters. The Convention has played an important role far beyond the area of hazardous chemicals in the development of Public International Law thanks to its pioneering introduction of the principle of Mutual Supportiveness. This principle is based on the policy of striving toward sustainable development by attaining a non-hierarchical and complementary relationship between trade and environmental agreements. The principle has subsequently been introduced also in other multilateral environmental agreements and has important legal ramifications for the Parties of both kinds of agreements.

1. The Emergence of the Rotterdam Convention

1. The Antecedents of the Rotterdam Convention

The multilateral regulation of the transport, the environmentally sound management, and the disposal of chemicals and wastes through UN administered instruments consists of three multilateral environmental agreements (MEAs), namely the so-called Basel (BC),[1] the Rotterdam (PIC or RC),[2] and the Stockholm (POPs or SC)[3] Conventions. The Basel Convention is the oldest one among the three, it was adopted 1989, whereas the latter two were adopted in 1998 and 2001 respectively. For completeness' sake, one should also mention as a fourth chemicals convention the 1985 Vienna Convention for the Protection of the Ozone Layer with its 1987 Montreal Protocol.[4]

These conventions were negotiated as a result of the chemicals and waste streams which have enormously increased over the past thirty or forty years, and the concomitant public awareness of the potential health hazards resulting from the accumulation of these chemicals. Reports in the media of serious, sometimes deadly, incidents caused by toxic chemicals repeatedly shook up public opinion. The public started to realize that the increasing trade in food products linked to the mechanization and globalization of agriculture worldwide was only possible thanks to a growing use of pesticides and fertilizers. Industrial chemicals also experienced a huge growth after World War II. There are presently over 70,000 chemicals in use with 1,500 being added every day. A brutal wake-up call occurred in the mid 1950s in Minamata, Japan, with a mercury poisoning disaster in which this metal, originating from a local plastic ingredient factory, permeated the sediments of a bay. Methyl mercury thus entered the food chain via sea food. This catastrophe caused officially over 400 deaths and unofficially over 3000 with thousands more victims suffering from damage especially to the brain, kidney and lungs through a range of diseases.[5] It is a sobering realization to reflect upon the fact that the international community is starting negotiations on a mercury convention only now, half a century later.

The need for regulations covering transports, environmentally sound management and disposal of chemicals and waste was furthermore made more urgent due to the fact that trade in pesticides and other chemicals was booming, with some of them banned in certain countries but not in others. Developing countries often do not have the scientific information and the technical equipment required to handle these pesticides and industrial chemicals with the appropriate care. Thus two historical precursors to the Rotterdam Convention (RC) were established in the

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[1] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
http://www.basel.int/

[2] The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC)
http://www.pic.int

[3] The Stockholm Convention on Persistent Organic Pollutants (POPs)
http://chm.pops.int/

[4] Vienna Convention for the Protection of the Ozone Layer, with its Montreal Protocol
http://ozone.unep.org/

[5] *Protecting human health and the environment : A guide to the Rotterdam Convention on hazardous chemicals and pesticies.* FAO and UNEP, 16 p. (4), 2004

1980s. The UN Environment Programme (UNEP) and the Food and Agriculture Organization of the UN (FAO) developed and promoted voluntary information exchange programs: FAO pioneered an International Code of Conduct on the Distribution and Use of Pesticides in 1985 which includes – among numerous other objectives -- recommendations regarding the management and testing of pesticides. UNEP followed with the London Guidelines for the Exchange of Information on Chemicals in International Trade in 1987. The foundation of these Guidelines consisted in the notion of a shared responsibility between exporting and importing states for the stewardship of industrial chemicals and pesticides. These rules were not primarily intended as a first step for a binding set of legal commitments even though UNEP already at that time aimed for such an agreement as a medium or long term goal. For the time being, they were designed pragmatically to serve as a framework which would be useful for countries in the development of national policies, rules, and decision tools in cases where the import of chemicals was to be banned or restricted. Furthermore, they aimed at promoting transparency and information exchange in activities which later became to be known as the environmentally sound management of chemicals and wastes.[6]

Subsequently, in 1989, the two organizations jointly introduced a Prior Informed Consent (PIC) Procedure to facilitate governments' access to information on toxic chemicals. National authorities used these in order to facilitate the assessment of the potential for hazardousness of certain substances. This procedure constituted at that time one of the most successful interagency programs.[7] An important step in joining together these early beginnings occurred at the 1992 Rio Conference on Environment and Development which called in its *Agenda 21* for the negotiation of a binding convention on the PIC procedure by 2000.[8] Then in 1994 and 1995 the FAO Council and the UNEP Governing Council mandated their executive heads to initiate negotiations which officially started in 1996. The fact that it took only a little over two years for the completion of a mandate to negotiate a Convention, two years before the deadline stipulated in *Agenda 21,* can to some extent be explained by the level of urgency which the international community attributed to the establishment of an initial framework governing the international regulation of trade in hazardous chemicals.[9] The most arduous task, however, was still ahead: a relatively very high number of preparatory negotiations through the so-called International Negotiations Committees – eleven meetings – were required in order to achieve the adoption of the Convention through this INC procedure which is the normal diplomatic process for the establishment of an MEA.

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[6] Katharina Kummer. 1999. Prior Informed Consent for Chemicals in International Trade: The 1998 Rotterdam Convention. *RECIEL* 8 (3): 323-331 (323-24).

[7] Paarlberg, Robert L. 1993. Managing Pesticide Use in Developing Countries. In *Institutions for the Earth*, edited by Peter M. Haas, Robert O. Keohane, and Marc A. Levy, 309-351. Cambridge, MA: MIT Press.

[8] Chapter 19:
Environmentally Sound Management Of Toxic Chemicals, Including Prevention Of Illegal International Traffic In Toxic And Dangerous Products
http://habitat.igc.org/agenda21/a21-19.htm
Chapter 20:
Environmentally Sound Management Of Hazardous Wastes, Including Prevention Of Illegal International Traffic In Hazardous Wastes
http://habitat.igc.org/agenda21/a21-20.htm

[9] *Rotterdam Convention. Share Responsibility – Overview.* 2005. FAO and UNEP, 6 p.

2. The Adoption of the Rotterdam Convention

These efforts have led to the successful adoption of the Convention – also called the PIC Convention – by a Conference of Plenipotentiaries in September 1998 in Rotterdam, and to its entry into force in February 2004 after the deposition of the 50th instrument of ratification. The original voluntary PIC procedure continued to be used between the adoption and the entry into force of the Convention. The initial list of chemicals covered by the PIC procedure includes five industrial chemicals and 22 pesticides;[10] a number of others have been added since then and further additions will follow undoubtedly. An original feature, explained by the process which led to its finalization as sketched out above, consists in the fact that the PIC Convention's Secretariat functions are carried out jointly by FAO in Rome and by UNEP in Geneva.

Thanks to the initial impetus of the 1992 Rio Conference, further sustained by the successful conclusion of the RC, a new generation of multilateral environmental agreements has emerged as we shall discuss below, such as the Cartagena Protocol on Biosafety (CPB), the Stockholm Convention (SC), or conventions regulating mercury, lead, and cadmium which are presently being negotiated. As Katharina Kummer Peiry, current Executive Secretary of the Basel Convention, has observed after the adoption of the Rotterdam Convention and the initiation of negotiations on the POPs Convention, these two achievements "may well herald the emergence of an international chemicals management regime."[11]

The objectives of the Rotterdam Convention are the following:

- 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;
- to contribute to the environmentally sound use of those hazardous 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 Parties.[12]

The Convention's Annex III[13] contains a list of three kinds of chemicals which are subject to the PIC procedure which is legally binding for the Parties to the Convention:

- pesticides
- severely hazardous pesticide formulations
- industrial chemicals

[10] Catherine Redgwell. 2003. Regulating Trade in Dangerous Substances : Prior Informed Consent under the 1998 Rotterdam Convention. In *Economic Globalization and Compliance with International Environmental Agreements*, edited by Alexandre Kiss, Dinah Shelton and Kanami Ishibashi, 75-88. The Hague: Kluwer Law International (82).

[11] Katharina Kummer. 1999. *Op. cit.* 323.

[12] http://www.pic.int/home.php?type=t&id=5&sid=16

[13] http://www.pic.int/home.php?type=t&id=49&sid=16

The criteria and the process of the inclusion of additional chemicals are politically sensitive due to economic ramifications, therefore they are subject to a rather complex process. The RC's Chemical Review Committee (CRC) is at the core of this process, it makes recommendations to the Conference of the Parties (COP) regarding the inclusion of additional chemicals in Annex III. The CRC as a subsidiary body of the COP is composed of government-appointed experts in chemicals management. The final decision is taken by the COP.

The core of the Convention consists of the PIC procedure which is characterized by extensive information exchanges between the Secretariat and the Designated National Authorities (DNAs):

> The PIC procedure is a mechanism for formally obtaining and disseminating the decisions of importing Parties as to whether they wish to receive future shipments of those chemicals listed in Annex III of the Convention and for ensuring compliance with these decisions by exporting Parties.
> For each of the chemicals listed in Annex III and subject to the PIC procedure a decision guidance document (DGD) is prepared and sent to all Parties. The DGD is intended to help governments assess the risks connected with the handling and use of the chemical and make more informed decisions about future import and use of the chemical, taking into account local conditions.
> All Parties are required to take a decision as to whether or not they will allow future import of each of the chemicals in Annex III of the Convention. These decisions, known as import responses, are sent to the Secretariat by the DNA. A listing of the import responses given for each chemical subject to the PIC procedure is circulated by the Secretariat to all DNAs every six months via the PIC Circular. Import decisions taken by Parties must be trade neutral, that is, if the Party decides not to accept imports of a specific chemical, it must also stop domestic production of the chemical for domestic use and refuse imports from any source, including from non-parties.
> All exporting Parties are required to ensure that exports of chemicals subject to the PIC procedure do not occur contrary to the decision of each importing Party. They should ensure that import responses published in the PIC Circular are immediately communicated to their exporters, industry and any other relevant authorities, such as the Department of Customs.[14]

The Rotterdam Convention does not make recommendations to ban international trade or use of the chemicals included in its Annex III. Rather, it provides importing Parties with the necessary decision tools for making informed assessments regarding which of the chemicals included in the list they are able to manage safely, and which ones they chose to exclude. Furthermore, the safe use of chemicals that are traded is supported through requirements for labeling and the provision of information on potential threats to public health and the environment through the bi-annual Circulars.[15]

[14] http://www.pic.int/home.php?type=b&id=24&sid=16&tid=5
[15] http://www.pic.int/home.php?type=t&id=50

2. The Negotiation of the Rotterdam Convention

1. The International Negotiations Committee

The negotiation of the Rotterdam Convention differs from that of most other multilateral environmental agreements (MEA) by the fact that the negotiators were able to build the Convention on the basis of the voluntary PIC procedure, jointly having been implemented by FAO and UNEP, The voluntary PIC procedure had been in existence for nearly ten years when negotiations started officially in 1996 through the formation of an International Negotiation Committee. Another distinctive feature of the PIC Convention consists in the fact that from the beginning FAO and UNEP have been administrating the negotiations jointly, upon a clear mandate from their respective governing bodies which in both cases took its root in *Agenda 21* as mentioned above. We may therefore note that the 1992 Rio Conference not only produced, among other achievements, the Climate and the Biodiversity Conventions as well as the Forest Principles and the call to initiate negotiations on desertification, but it has also generated the political consensus necessary for the commencement of negotiations of the Rotterdam and Stockholm Conventions as well as for the Basel Ban Amendment to the then already existing Basel Convention. The INC held five sessions between 1996 and 1998 which included, in addition to about a hundred national delegations, numerous intergovernmental and non-governmental organizations active in the domain of chemicals management.[16]

In spite of the above-mentioned relatively well-prepared negotiation terrain, there were still major hurdles to be overcome. Thus, at INC-3 in May 1997 brackets in the draft text indicating disagreements proliferated, even on fundamental questions such as the purpose or the scope of these PIC negotiations. In any negotiation, when the participants do not agree on the purpose of a legal instrument, then one may assume that they are still far distanced from a consensual solution. A voluntary agreement is one thing, but converting this status into a legally binding instrument is a very different matter. The EU especially argued that in order to benefit from the experience of the voluntary guidelines it was necessary to aim for a broad scope. Many developing countries argued, however, that for them the administrative and technical requisites even with a limited scope would be a major challenge. These matters were made more complicated by the fact that both industrialized and developing countries are often importers and exporters at the same time, depending on the chemicals under consideration. As always in negotiations involving technical assistance and capacity building there were difficult questions to be resolved over the financing of the Convention's activities, which were made more complicated by the double-headed structure of the Secretariat.[17]

NGOs were particularly concerned over the – unsuccessful – attempts of a group of countries under the leadership of the US which had advocated during INC-5 the introduction of a WTO savings clause, i.e. a provision that the rights and obligations of the Parties under "other agreements" shall not be constrained by the PIC procedure. It means in practice that an exporter's rights to market access under the trade regime normally cannot be limited based on the PIC procedure. This

[16] Katharina Kummer. 1999. *Op. cit*.p. 323-325

[17] Earth Negotiations Bulletin, IISD. 1997. Vol. (15) 2:11-12. http://www.iisd.ca/download/pdf/enb1502e.pdf

perspective was strongly opposed by another group under the leadership of the EU.[18] NGOs furthermore expressed misgivings about the effect of such a precedent on future negotiations on the ban of certain persistent organic pollutants. Any such wording would represent a major weakening of the whole idea of effective environmentally sound management since it would be clear from the beginning that the WTO's and other trade agreements' provisions would prevail over those of the PIC Convention – a phenomenon which obviously would diminish the effectiveness of an MEA and which is often called a 'chilling effect.' [19] [20] After their defeat on the savings clause, the US and its allies were nevertheless successful in narrowing down the scope of the Convention against the resistance of a EU-led group which wanted to include in the Convention's scope a third category of products comprised of consumer chemicals.[21] Furthermore, Article 3 lists a number of important product categories which are exempt from the Convention, such as radioactive materials, narcotic and medical drugs, wastes, or food products.

2. The First Four Conferences of the Parties

The eleventh and last INC was held as a one-day closing session back-to-back with the first Conference of the Parties in September 2004 in order to facilitate the transformation of the voluntary to the binding PIC procedure. Among the chemicals which have been added to Annex III during the interim period there are five kinds of asbestos. It turned out to be impossible, however, to include also the most vigorously contested and defended form of asbestos, chrysotile, which is by far the commercially most important variety. The world's largest asbestos mine is situated in the town of Asbestos in Québec, Canada. The independent Paris-based environmental news agency Cogiterra/Actu-Environnement provides some background on this long-standing situation:

> As reported by the Canadian Member of Parliament Pat Martin,[22] who is known for his opposition to asbestos, Canada, one of the most important exporters of chrysotile asbestos seems to have managed to convince its key clients (India, Pakistan, Philippines and Vietnam) to oppose the inclusion of this product in Annex III. While asbestos is prohibited in the European Union, FAO and UNEP have emphasized that *numerous governments have expressed their strong concerns* (italic in the original) regarding this non-listing (author's translation).[23]

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[18] Katharina Kummer. 1999. *Op. cit.* p. 325-26.

[19] Stilwell, Matthew, and Elizabeth Tuerk. 1999. Trade Measures and MEAs - Resolving WTO Uncertainty. A paper prepared for WWF International (Geneva/Gland) by the Center for International Environmental Law, Geneva, 22 p. www.ecolomics-international.org/tandea_chill_meas_and_wto_stilwell_tuerk_ciel_wwf_int_1999.pdf

[20] Urs P. Thomas, The CBD, the WTO, and the FAO: the Emergence of Phytogenetic Governance. In *Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biological Diversity*, edited by Philippe G. Le Prestre, 177-207 (200-203). Aldershot, Hampshire UK: Ashgate.

[21] Katharina Kummer. 1999. *Op. cit.* 325.

[22] New Democratic Party, elected in Winnipeg Centre 1997, re-elected 2000, 2004 and 2006. http://www.ndp.ca/patmartin

[23] http://www.actu-environnement.com/ae/news/convention_rotterdam_amiante_chrysotile_TBT_endosulfan_liste_PIC_6130.php4

At the time of this writing after RC COP-4, chrysotile asbestos is still not listed in Annex III in spite of the fact that concerns over the use of asbestos fibers are one of the oldest known and scientifically supported threats to public health caused by an industrial chemical:

> … the first medically accurate description of the harm done to the lungs by asbestos was published by a British factory inspector in 1898! By 1918, some insurance companies in the United States and Canada were already refusing to cover asbestos workers because of their occupational health risks. By the 1930s, articles in the medical literature in several countries linked asbestos to lung cancer, … Most of the exposure that caused hundreds of thousands of cancer deaths and massive corporate losses occurred decades after there were credible warnings of the dangers of asbestos.[24]

As we can see, the Convention started its official existence as an MEA in 1998 with an unusual amount of practical experience from its interim period but at the same time with some important unfinished business. Progress is slow whenever environmentally sound management has to be balanced with economic interests.

Most importantly, however, in spite of these hurdles, COP-1, in Geneva in 2004, managed to operationalize the legally binding PIC procedures including Annex VI on Settlement of Disputes. A smooth beginning was facilitated thanks to a focus on relatively consensual procedural matters while more contested question such as non-compliance were postponed for another day. Furthermore, it began its activities with the incorporation of fourteen new chemicals into Annex III thanks to the preparations carried out during the interim period. The political will of *a priori* openness toward the addition of new chemicals was expressed in the decision to use seven geographical regions for notification purposes instead of the usual five UN regions, which makes it somewhat easier to obtain the required two regions which must support a chemical's review process in order to trigger the listing process.[25]

In spite of these encouraging signs, it has become clear at COP-2, in Rome in 2005, that the addition of new chemicals to Annex III will be an arduous process requiring intensive negotiations. As far as non-compliance with the PIC procedure is concerned, this was expected to be a difficult issue; the debates therefore were prepared through an Open-ended *ad hoc* Working Group prior to the COP. This group divided this conundrum up into four sub-issues: (I) who will be able to make non-compliance submissions and to trigger this procedure; (II) what are the relevant sources of information to be considered? (III) the composition of the compliance committee; (IV) measures to be taken in case mediation should be unsuccessful. In spite of these preparations, divergent views resulted in a deadlock. Australia was not willing to continue the discussion as long as the question of the trigger was not resolved, whereas many developing countries expressed serious concern about any such provisions as long as financing for the fulfillment of their commitments was not ascertained. These concerns were well founded because the debates on financing the Convention's activities ran into serious problems without a solution in sight at

[24] Frank Ackermann. 2008. *Poisoned for Pennies - The Economics of Toxics and Precaution.* Washington and London: Island Press, 318 p. (86).

[25] Earth Negotiations Bulletin, IISD. 2004. Vol. (15) 105: 9-11. http://www.iisd.ca/process/chemical_management.htm#pic

COP-2.[26] Both the finance and the non-compliance issues will undoubtedly continue to preoccupy future COPs as they do in other MEAs especially in their early stages.

After a relatively smooth and well prepared start, it is nevertheless fair to say that COP-3, in Geneva in 2006, has shown no easy solution should be expected for those issues which could not be resolved earlier, especially non-compliance and chrysotile asbestos. The listing of chrysotile asbestos was adamantly resisted by the major producer countries which are, according to the International Ban Asbestos Secretariat, in decreasing order Russia, Kazakhstan, China, Canada, and Brazil; India as the third biggest user after China and Russia is also among the key asbestos advocates.[27] Many delegates reminded these countries of the fact that listing a chemical in Annex III does not represent a trade ban but only a requirement for enhanced information exchange. Be that as it may, the failure of listing this carcinogenic chemical could undermine the Convention's primary objective of facilitating the information exchange between exporting and importing countries regarding potentially toxic substances. The International Ban Asbestos Secretariat went a step further in dramatizing this point by distributing a brochure entitled "Chrysotile Asbestos – Hazardous to Humans, Deadly to the Rotterdam Convention."[28] As far as the continuing stalemates over a non-compliance procedure, especially over the triggers which may launch such a step, and over reliable funding commitments are concerned it was pointed out that these two issues are connected because without adequate funding the Secretariat cannot effectively administer non-compliance issues.[29]

Given these disappointments and tensions in the preceding meeting, COP-4, in Rome in 2008, started off with real apprehensions over the very effectiveness of the Convention with regard to those chemicals which embody major industrial and economic stakes, so-called *live chemicals* as opposed to obsolete chemicals which can be banned without major ramifications because their use has already been substantially reduced or discontinued as is more or less the case with those twelve persistent organic pollutants which are banned under the Stockholm Convention. Chrysotile asbestos and endosulfan are classical examples of *live chemicals* and this Conference of the Parties again failed to put them onto Annex III, although another chemical, tributyltin compounds (TBT) has been listed. Endosulfan is a pesticide which the PIC negotiators have discussed for a long time.[30] It is banned in the US and the EU and many other countries, but presently still being used extensively in others such as China and India. The NGO Pesticide Action Network expects that it will be banned under the Stockholm Convention by 2011.[31]

The whole debate at least had the benefit of a much needed diplomatic soul searching on the question of *live chemicals* as delegates were forced to squarely face the question of the appropriate balance between short term economic interests and long term environmental and health damages. In this sense these debate

[26] Earth Negotiations Bulletin, IISD. 2005. Vol. (15) 129: 10-11. http://www.iisd.ca/process/chemical_management.htm#pic

[27] International Ban Asbestos Secretariat http://ibasecretariat.org/

[28] http://www.lkaz.demon.co.uk/chrys_hazard_rott_conv_06.pdf

[29] Earth Negotiations Bulletin, IISD. 2006. Vol. (15) 147: 10-12. http://www.iisd.ca/process/chemical_management.htm#pic http://www.iisd.ca/download/pdf/enb15147e.pdf

[30] RC-4/6: Inclusion of endosulfan in Annex III of the Convention http://www.pic.int/RC4_6/Decision%20RC4_6.pdf

[31] http://www.panna.org/resources/panups/panup_20081023

marked an important beginning, it is to be expected that the question of the appropriate balance between the two priorities will continue to preoccupy negotiators for a long time to come. Some delegations such as especially the EU and Switzerland, and also staff from the Secretariat, pointed to the difficulties in listing economically important chemicals as *the most important obstacle* to the Convention's meaningful implementation and ultimate effectiveness. Throughout these debates it was not quite clear whether the obstacles to listing these two chemicals are tantamount to immovable political interests, or whether stricter notification procedures regarding regulatory action would make it more difficult to oppose the listing based on arguments which emphasize scientific uncertainty, and whether therefore such enhanced procedures might in the end facilitate the addition of *live chemicals*.

COP-4 was successful in making a contribution toward efforts in improving the synergy among the three chemicals and waste conventions. The mechanism which had been designed for this purpose was the *Ad Hoc Joint Working Group on Enhanced Cooperation and Coordination between the Basel, Rotterdam and Stockholm Conventions* (AHJWG). The AHJWG numbers 45 members in total; each Convention has 15 representatives, three for each of the five regional groups of the United Nations. The representatives were nominated by a process of consultations within the regional groups.[32] Three meetings were held in 2007 and 2008, and the conclusions of this process were to be submitted to the three Conventions. Following the example of the Basel Convention, the oldest and largest of the three, the RC also supported the AHJWG's recommendation.[33] There was in fact a somewhat surprising ease with which the Parties supported the proposals of this Working Group in the hope that it will contribute to achieve enhanced synergies in environmentally sound management.[34]

3. Some Policy and Law Aspects

1. The Principle of Mutual Supportiveness and the PIC Convention

Contrary to the traditional (and oft-criticized) focus of general international law which is based on *ex post* remediation of harm, the Rotterdam Convention represents an *ex ante* preventive mechanism aimed at avoiding, managing and resolving conflict.[35] It can be described as a 'first line of defense' against dangerous chemicals particularly in developing countries. The RC rests on three pillars: (I) prior informed consent: (II) exchange of information; (III) national decision-making processes. It is interesting to note that these elements are present also in the Basel Convention and the Cartagena Protocol on Biosafety. Unlike for instance the Stockholm Convention, the RC does not constitute a ban on the import or export of any chemicals. The rationale for this relatively permissive regime is that factors such as socio-economics and geographic conditions may vary greatly among the Parties, and in any case governments in different countries often have very different perceptions on issues like

[32] http://ahjwg.chem.unep.ch/

[33] The Stockholm Convention will address these recommendations at its forthcoming COP-4 in May 2009.

[34] Earth Negotiations Bulletin, IISD. 2006. Vol. (15) 168: 10-12. http://www.iisd.ca/process/chemical_management.htm#pic

[35] Redgwell *Op. Cit.* 75.

toxicity or threats to human health or the environment. Thus the requirement of the prior informed consent of the importing Party before shipment of listed banned or severely restricted industrial chemicals or pesticides may take place represents this Convention's fundamental regulatory tool. Its definition of banned substances is relatively wide and includes the withdrawal of a chemical by industry where there is clear evidence that the protection of human health or the environment was the reason for the withdrawal.[36] This relatively flexible approach indeed was presumably the only pragmatic and feasible strategy. It is nevertheless regrettable that – contrary to the BC and the CPB -- the Convention does not contain a re-import obligation in cases of non-compliance by the exporter.

The RC represents an interesting case of one of those multilateral environmental agreements which embody important trade ramifications, in other words it is one of those MEAs that the WTO includes in its discussions and negotiations on trade and environment. Ever since its first Ministerial meeting in Singapore in 1996 the WTO Members have *discussed* trade and environment issues informally and on a non-binding basis in the Committee on Trade and Environment (CTE). This situation changed with the fourth Ministerial meeting in Doha in 2001: the *Doha Development Agenda* (DDA) for the first time provides a blueprint for *binding negotiations* which are organized separately in the meetings of the CTE in Special Session (CTESS). The most important negotiating provision of the DDA for the RC is paragraph 31 on trade and environment:

> With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:
>
> **(i)** the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
> **(ii)** procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
> **(iii)** the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

These negotiations are presently, like the rest of the Doha Round, suspended. Nevertheless, it is important to note that intensive negotiations have been carried out in the domain of trade and environment from 2002-2007 which have shown where progress may be expected once negotiations will resume again. Negotiations on the relationship and information exchange between the WTO and MEAs have been mired in political and inter-organizational sensitivities. The most intensive negotiations have been carried out on paragraph 31(iii) to facilitate trade in environmental goods and services including products like laboratory or testing equipment and services which are important for the implementation of the PIC Convention.[37]

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[36] Catherine Redgwell. 2003. *Ibid.* 81-82 ; 84-87.

[37] For an up to date detailed account of these Environmental Goods negotiations see: Matthew Stilwell. 2008. Advancing the WTO Environmental Goods Negotiations: Options and Opportunities. *EcoLomics Occasional Paper Series* No. 08-1. http://www.ecolomics-international.org/headg_eops.htm

Whatever happens to the DDA's environmental provisions and to the Round as a whole, the trade-related aspects of the Rotterdam Convention (and also of the Stockholm Convention) are very significant milestones in the evolution of the whole trade and environment issue area. Professor Laurence Boisson de Chazournes and Makane Moïse Mbengue[38] have demonstrated through an innovative and in depth legal analysis that the RC represents the starting point of an ongoing evolution in the relationship between trade-related MEAs and the WTO agreements. It is linked to the above-mentioned attempts during the International Negotiating Committee phase of the negotiations to introduce a WTO savings clause. Such a clause, which has also been attempted elsewhere, e.g. in the negotiations leading to the adoption of the Cartagena Protocol on Biosafety (CPB) to the Convention on Biological Diversity would establish a hierarchy in the legal weight between WTO agreements and a specific MEA, perhaps with the intention of generalizing this lopsided legal relationship for all MEAs in the long term. This state of affairs is what the drafters of the RC have been able to avoid through the introduction of the concept of 'mutual supportiveness' in the preamble. This concept has subsequently been used also in the 2000 CPB and in the 2001 POPs Convention.

As Boisson de Chazournes and Mbengue point out, the fundamental rationality of this approach is the goal of avoiding of legal conflicts between the trade regime and MEAs. In a wider sense it can serve as an interpretative principle capable of guiding the Parties in a conflict-avoiding implementation of their respective rights and obligations under their MEAs and trade agreements. For good order's sake it should be mentioned that the term *mutually supportive* which in the English version of the RC and SC as well as in the CPB is used as such, and which the title of the article translates correctly as *soutien mutuel* is translated in the respective preambles of the French versions three different ways: *devraient être complémentaires* in the RC,[39] *concourent au même objectif* in the SC,[40] and *devraient se soutenir mutuellement* in the CPB.[41] A correct translation of the above article's fine points would represent a real challenge but the original text is a legal as well as a linguistic masterpiece.

As we have seen above, the WTO also uses mutual supportiveness in the DDA's paragraphe 31 in order to explain the purpose of these trade and environment negotiations. The mutually supportive principle has been described as follows:

> Therefore, while each regime should focus on its primary competence, it is not prevented from adopting measures having an effect on the other regime. However, it should take into account the concerns and interests of the other regime, and it should pay deference to the competence of the other regime. This deference requires that each regime does not judge the legitimacy or the necessity of measures adopted by the other regime. Hence, WTO should not try to decide whether an environmental goal pursued by an MEA is legitimate or whether a measure adopted by MEAs for the realization of such goal is necessary.[42]

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[38] Laurence Boisson de Chazournes and Makane Moïse Mbengue. 2007. A Propos du principe du soutien mutuel -- les relations entre le Protocole de Cartagena et les accords de l'OMC. *Revue Générale du Droit International Public.* Numéro 4: 829-863 (832-834).

[39] http://www.pic.int/en/ConventionText/ONU-FR.pdf

[40] http://www.pops.int/documents/convtext/convtext_fr.pdf

[41] http://www.cbd.int/doc/legal/cartagena-protocol-fr.pdf

[42] Franz Xaver Perrez. 2000. The Cartagena Protocol on Biosafety and the Relationship between the Multilateral Trading System and MEAs. In "The Biosafety Protocol: Regulatory Innovation and

The significance of Boisson de Chazournes and Mbengue's analysis lies in the contextualization of the RC within the wider evolution of Public International Law with regards to MEAs and trade law because the drafting of the Convention represents a pioneering step in the arduous process of surmounting the politically very sensitive predicament of the relationship between the rights and obligations which the Parties have acquired under trade agreements and environmental agreements respectively. The binding nature of the RC is strengthened by its call to develop and to implement non-compliance procedures and institutional mechanisms.[43] These highlight the need of finding new ways in bridging the gap between trade-related and environmental perspectives:

> Controversy on this point appears to be inherent in multilateral environmental negotiations addressing transboundary transfer of potentially hazardous substances, since they deal with the interface of environment and trade considerations. The same conflict contributed to the temporary failure of the negotiations on a protocol on the international transfer of GMOs to the UN Convention on Biological Diversity in February 1999.[44]

In the conclusion of their analysis Boisson de Chazournes and Mbengue point out that the principle of mutual supportiveness has two kinds of implications: First of all, it confers the qualities of harmony, coherence and coexistence to the relationship between an MEA containing these clauses in the preamble and other international agreements, especially those of the WTO. Most importantly, the relationship between such MEAs and trade agreements is non-hierarchical and without a legal subordination of either agreement, it is a relationship between agreements of equal weight.[45] Secondly, the relationship between MEAs containing the mutually supportive principle and trade agreements can be considered as legally balanced.[46] This principle therefore, as they point out, is situated at the heart of the sustainable development principle or concept,[47] a connotation which is clearly articulated by the PIC Convention.[48]

Last but not least, the authors see the mutually supportive principle as *the compass* guiding the relationship between trade and environmental agreements.

Emerging Trends," edited by Laurence Boisson de Chazournes and Urs P. Thomas, *Swiss Review of International and European Law* 10 (4): 518-528. http://www.ecolomics-international.org/biosa_lbc_upt_etal_bp_regulatory_innov_emerging_trends_rsdie_00_4.pdf

[43] Article 17 - Non-Compliance: The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Convention and for treatment of Parties found to be in non-compliance.

[44] Katharina Kummer. 1999. *Op. cit.* p. 326.

[45] Boisson de Chazournes et Mbengue. 2007. *Op.cit.* 853-857.

[46] Boisson de Chazournes et Mbengue. 2007. *Op.cit.* 857-859.

[47] Boisson de Chazournes et Mbengue. 2007. *Op.cit.* 859.

[48] The Preamble of the PIC Convention expresses the principle of mutual supportiveness as follows:

> Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,
>
> Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,
>
> Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements, …

Based on this function they call for new legal strategies in the international legal order, especially an *ex ante* and an *ex post* coordination. The former requires that the coherence and the coexistence between an MEA being negotiated and relevant trade agreements be taken into consideration from the very beginning, especially if there is a possibility that the rights and obligations between the two kinds of agreements might stumble over each other ("peuvent achopper avec"). The *ex post* coordination strategy in the development of Public International Law also refers to efforts of making trade and environment agreements coherent among each other, but instead of being aimed at the elaboration of rules in the relevant agreements it is concerned with the establishment of inter-institutional conduits and cooperation as well as inter-institutional norms and standards with the intention of facilitating the coherent implementation of both categories of agreements. Thus Boisson de Chazournes and Mbengue summarize and wrap up their extensive legal analysis by noting that the negotiation of multilateral agreements which has been mushrooming lately needs to apply a new approach based on the mutually supportive relationship between different systems of legal instruments.[49]

2. Conclusion

In this context the situation of the US is a particular case thanks to its economic, not to mention political, importance. The United States has used the same stratagem in several MEA negotiations: it participates very actively in the initial negotiations, often diluting the thrust of the treaty, but in the end it refuses to ratify it, as happened in the RC. It is then up to the other key delegations to decide which concessions are worth or not worth the signature of the US. The price to pay at the end of the day may be a WTO ruling like the one in the case *EC-Biotech* where the Panel ruled that since the US is not a Party to the Biosafety Protocol the latter is not relevant in interpreting the WTO rules at issue in this dispute.[50] It remains to be seen if under President Obama the US negotiators will effectuate what he promised to do in general terms: to change… Be that as it may, the WTO itself is undoubtedly also in the process of undergoing change due to the pressures arising from the global financial crisis – be it for better or worse with regard to its position on environmental questions. Steve Charnovitz, a long time and insightful observer of trade and environment related issues summarizes the WTO's first ten years by noting "many positive (and a few negative) features of the key Appellate Body decisions," especially by reversing some of the GATT and early WTO panel holdings that "threatened to render the environmental exceptions unusable." [51] On the whole Charnovitz expects an increase in environmental disputes over the next ten years.

To conclude, we note that this Convention is not only located at the center of the tensions between the opposite priorities and stakes which apply to all trade-related MEAs to some extent, but that it has indeed been pioneering a new era of MEAs emphasizing mutual supportiveness and the absence of a hierarchical relationship with trade agreements. The PIC Convention, even though it is "a modest treaty," and limited in scope, is nevertheless "procedurally complicated" with regard to

[49] Boisson de Chazournes et Mbengue. 2007. *Op.cit.* 859-60.

[50] Andrew Green and Tracey Epps. 2007. The WTO, Science, and the Environment: Moving towards Consistency. *Journal of International Economic Law.* 10 (2):285-317 (299).

[51] Charnovitz, Steve. 2007. The WTO's Environmental Progress. *Journal of International Economic Law.* 10 (3): 685-707. (685; 695).

its operation; furthermore it is "filled with vague language, susceptible to divergent interpretation."[52]

That vagueness of course is not the prerogative of the RC, one may say it is the prerogative of diplomacy and very often it represents the diplomatic strategy to overcome a deadlock in a way which does not frustrate any of the key negotiators to the point that they prevent the adoption of a negotiating text or refuse to sign on to it. This incidentally is an observation that is made frequently also with regard to the WTO which then leaves the challenge of making sense out of a cryptic paragraph to its Dispute Settlement Body.

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[52] Ted L. McDorman. 2004. The Rotterdam Convention on Prior Consent: Some Legal Notes. *RECIEL* 13 (2): 187-200 (199-200, also footnote 154).