



**Rotterdam Convention on the Prior  
Informed Consent Procedure for  
Certain Hazardous Chemicals and  
Pesticides in International Trade**

Distr.: General  
14 March 2010

English only

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**Chemical Review Committee**

**Sixth meeting**

Geneva, 15–19 March 2010

Item 5 (b) (iv) of the provisional agenda\*

**Listing of chemicals in Annex III to the Rotterdam Convention:  
review of notifications of final regulatory actions to ban  
or severely restrict a chemical: methyl bromide**

**Letter received regarding methyl bromide**

**Note by the Secretariat**

**Addendum**

**Letter containing comments on the notification of final regulatory action**

The annex to the present note contains a copy of a letter received from Mebrom NV providing comments on the notification of final regulatory action for methyl bromide by Malawi contained in document UNEP/FAO/RC/CRC.6/8. The letter has been reproduced as received, without formal editing.

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\* UNEP/FAO/RC/CRC.6/1.

**Annex**

**Copy of a letter received from Mebrom NV**

**Marc De Hondt**  
Advocaat\*

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MIJN REF : 6803  
UW REF :

Ms. Darina Liptakova  
Vice Chair of the CRC to the Rotterdam Convention  
UNEP  
11-13 Chemin des Anémones  
1219 Chatelaine GE

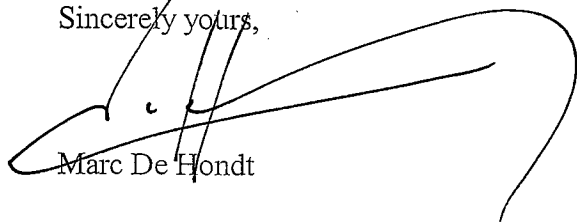
Hemiksem, 8 maart 2010

Dear Madam,

**Mebrom NV**

Please find hereby a copy of the letter that I sent to the Secretariat.

Sincerely yours,



Marc De Hondt

**UNEP Rotterdam Convention**

Date Received : 11 MAR 2010

File no / name : #1A

For action : AM / SJ

Cc : .....

\* by bvba M. De Hondt

**Marc De Hondt**  
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Secretariat for the Rotterdam Convention  
UNEP  
11-13 Chemin des Anémones  
1219 Chatelaine GE  
Switzerland

Hemiksem, March 5<sup>th</sup> 2010

Dear Mr Executive Secretary,

**Re: Notification regarding methyl bromide submitted by Malawi**

As the legal counsel to Mebrom NV, the sole European importer/formulator/exporter/worldwide distributor of methyl bromide, it is my task to verify that all regulatory decisions regarding methyl bromide are both procedurally and substantively correct.

At its first meeting in 2005, the CRC (Chemical Review Committee) of the Rotterdam Convention considered the notification of final regulatory action for methyl bromide from the Netherlands and agreed that it met with the requirements of the Convention. The provisional agenda for the 6th meeting of the CRC mentions the review of a notification of final regulatory action submitted by Malawi in order to determine that the criteria of Annex II have been met.

All countries in the world, including Malawi, joined the Montreal Protocol, an international treaty that regulates and controls the production and consumption of ozone-depleting substances.

As such they are obliged to implement the Montreal Protocol decisions under their national legislations.

Methyl bromide was added to Annex E of the Montreal Protocol in 1992.

Malawi was the second largest user of methyl bromide for tobacco cultivation in Africa. As a member to the Montreal Protocol having access to UNDP funding aimed at an "early phase out", it had to put in place legislation restricting the import and use of methyl bromide.

Following the conclusion of an ad hoc CRC Working Group, we at Mebrom hold the opinion that Malawi's notification does not comply with the requirements of Annex II to the Convention.

1.

### **The final regulatory action is not based on an independent risk evaluation**

According to the criteria set out in Annex II to the Convention, the final regulatory action has to be based on a risk evaluation, based itself on a review of scientific data that reflect the conditions prevailing in that country – consequently, an independent review.

As Malawi indicated that the reason for the final regulatory action is relevant to the environment, not to human health, the final regulatory action should have been taken pursuant to a risk evaluation, based on scientific data regarding the environmental impact, more specifically the impact on the ozone layer of methyl bromide in Malawi.

No such a risk evaluation is presented however.

Instead, Malawi merely refers to the brochure "*Methyl bromide, getting ready for the phase-out*", issued under the Montreal Protocol in 1998 (!), which provides general data and information in a popular way.

Moreover, if it were possible to vest the final regulatory action on a risk evaluation or a similar document issued under the Montreal Protocol, every Party that is a member to both treaties could file such a notification, based on the same documents and information. That way an automatism would be created, leading to getting whatever ozone-depleting substance on Annex III to the Rotterdam Convention, thus bypassing the *ratio legis* of the Rotterdam Convention and annihilating the criteria and procedures that it is providing for and that must be respected in order to create rights and obligations for the Member States.

2.

### **The final regulatory action cannot be based on an obligation under the Montreal Protocol**

Malawi's Form for Notification mentions under "Summary of the final regulatory action": "*Malawi decided through its Regulatory Authority to restrict the use of this chemical*".

Regarding the "Regulatory document" Malawi mentions: "*The Pesticides Act 2000 was used to enforce the law on the restricted use of methyl bromide*" whereby the date of entry into force is described as "28<sup>th</sup> May 2009". Unfortunately the law itself is not indicated.

Under "Summary of the hazard or risk evaluation related to the environment" Malawi reports: "*With the existence of the Montreal Protocol on Ozone depleting substances, Methyl Bromide use in Malawi has to be restricted to protect the environment*"

Thus Malawi indicates that the regulatory action resulted from Malawi's obligations under the Montreal Protocol.

If the CRC arrives at the conclusion that the final regulatory action has been taken as a consequence of the obligations Malawi entered into under the Montreal Protocol and its Multi Lateral Fund, and not as a consequence of findings uncovered in a specific scientific study, the regulatory action in question cannot be taken into account.

If the putting in place of national legislations as an obligation under the Montreal Protocol is to be considered as a final regulatory action allowing a valid notification under the Rotterdam Convention, every Party that is a member to both treaties could file such a notification. That way an automatism would be created, leading to getting whatever ozone-depleting substance on Annex III to the Rotterdam Convention, thus bypassing the *ratio legis* of the Rotterdam Convention and annihilating the criteria and procedures that it is providing for and that must be respected in order to create rights and obligations for the Member States.

3.

If the final regulatory action and the required study would be allowed to be the same under both treaties, one would have to apply the Latin maxim "Specialia generalibus derogant": wherever something is mentioned in both special and global provisions, the special provision shall apply to it. A matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of a general provision dealing with the category of subject to which that matter belongs, and which therefore might otherwise govern it as part of a category (*Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-4*). In that case, the Montreal Protocol would prevail over the Rotterdam Convention with regard to the chemicals listed under the Montreal Protocol.

The Montreal Protocol is specifically created and aimed at substances that deplete the ozone layer, while the Rotterdam Convention concerns "chemicals" in general.

While the Rotterdam Convention gives the parties the possibility to make informed decisions as to whether they will allow future import of the chemical, the Montreal Protocol dictates binding rules regarding the use, production quota, consumption and, finally, phase-out, hence trade, of the chemical under regulation.

The effects of ozone depleting substances require a global approach and a specific regulation, while the Rotterdam Convention is aimed at the spreading of specific information, gathered by one or more individual parties.

The Montreal Protocol provides the latest scientific, technological and economic information. It has installed detailed and effective rules, mechanisms, tools, institutions, etc. All members are well informed about the effects of the ozone-depleting substances and the use of possible alternatives.

Under the Montreal Protocol most developing countries ( such as Malawi ) can benefit from considerable financial and technical support .

For these reasons we urge the CRC to adopt the Working Group's conclusion that the Malawi notification does not comply with the requirements of Annex II and that methyl bromide cannot be proposed for inclusion in Annex III of the Convention.

May we also ask you that this letter be circulated to the members of the CRC in advance of the coming meeting?

Sincerely yours,



Marc De Hondt