The Convention on Persistent Organic Pollutants

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In 2001, the Bush administration signed the United Nations Environment Program's Stockholm Convention on Persistent Organic Pollutants, known as the *POPs treaty*. The treaty bans 12 chemicals—DDT (dichloro-diphenyl-trichloroethane), aldrin, dieldrin, endrin, chlordane, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls (PCBs), dioxins, and furans—most of which are already banned in the United States. Several bills in Congress have focused on implementing the treaty, which members wanted to to pass before the Senate ratification. The legislation promised to make a seriously flawed treaty even worse by allowing the U.S. Environmental Protection Agency (EPA) to ban and regulate additional substances unilaterally after unelected bureaucrats add chemicals to the treaty list. Legislation has stalled, but is likely to reemerge in a future congress.

Current POPs Bans

The assumption behind the POPs treaty is that regulators—and, in this case, international negotiators—are well positioned to decide which products are valuable and which are too dangerous for public use. Although eliminating dangerous chemicals might sound reasonable, such decisions rarely are cut and dry—they often carry serious tradeoffs.

History shows that regulators are inferior to the marketplace in managing such risks. Market selection of products is driven by such concerns as price, utility, and quality. Those parties affected—manufacturers, buyers, sellers, and downstream

consumers—make decisions at the appropriate points in the process where they have access to information about the implications of their decisions. Markets manage risk in this fashion by allowing individuals to decide what level of risk is worth taking to gain the benefits of many products and activities. Although people do not always make perfect decisions, individuals in the marketplace are better positioned to make such decisions than are regulators.

Government bans, in contrast, are the result of a political process and focus instead on political payback rather than product price, utility, or quality. Decision makers often are distant and lack adequate information to make informed decisions about acceptable levels of risk and the appropriateness of certain products. As a result, political bans more often serve the politically organized at the expense of others—and too often they increase risk and reduce quality of life. In the end, the bans often harm consumers by increasing prices and denying access to desired products, and sometimes the bans have devastating consequences. The world's poor are often hit the hardest by such policies because they can least afford expensive alternatives, even when such alternatives are available.

Treaty regulations on the pesticide DDT demonstrate why we should not trust international—or any other—bureaucrats with such decisions. DDT is the most affordable and effective tool in fighting malaria around the world, and adverse human health impacts from DDT have never been demonstrated. In addition, limited use for malaria control has little impact on wildlife.[1] Yet misinformation about the public health impacts of DDT, which was advanced by environmental activists, prompted public officials to ban the use of the substance around the world at the domestic level starting in the 1970s. In large part because of DDT use, malaria rates reached historic lows in the 1960s, but after nations banned the pesticide, cases skyrocketed. Currently, malaria kills more than 1 million people a year—mostly children—and makes 500 million more seriously ill.[2]

Such realities should have led officials to resume use of DDT. Indeed, public health officials from around the world signed a petition urging POPs treaty negotiators to include a public health exemption to the DDT ban. Instead POPs treaty negotiators worked to ban DDT globally—preventing a return to DDT use even though it could save millions of lives. Only under considerable pressure did negotiators agree to allow a temporary, limited exemption for DDT use for malaria control.[3] But even with this temporary, limited exemption, the treaty regulations governing use make access more expensive. Rather than advance bans under the POPs treaty, policymakers should seek ways to improve DDT access.

Other examples exist, as well. The POPs treaty also bans the use of PCBs, even though PCBs could have beneficial applications in industrial processes in developing nations. Yet the only health impacts that have been demonstrated scientifically are skin and eye irritations, which can be avoided with proper management of the substance.[4] Such unwarranted bans

1. Richard Tren and Roger Bate, *When Politics Kills: Malaria and the DDT Story* (Washington, DC: Competitive Enterprise Institute, December 2000). See also the policy brief titled "Pesticides and Public Health."

2. World Health Organization, "Malaria," Fact Sheet 94, May 2007, Geneva, World Health Organization, http://www.who.int/mediacentre/factsheets/fs094/en.

3. Malaria Foundation International, "DDT-Malaria: Open Letter," Malaria Foundation International, Stone Mountain, GA, March 29, 1999, http://www.malaria.org/ddtcover_english.html. The list of signatures is available online at http://www.malaria.org/DDT_signatures.html.

4. William P. Kucewicz, *The Public Health Implications of Polychlorinated Biphenyls (PCBs) in the Envi-*

make development more expensive for people in developing nations—and make the transition from poverty less attainable for many people around the world.

Additional Bans Ahead

Now that the POPs treaty has been ratified by enough nations to make it binding on the signatories, negotiators are meeting to discuss adding additional chemicals to the POPs list of banned and regulated substances. In the United States, ratification has been held up because members of Congress first want to pass legislation determining how the United States would implement the treaty and how it would address POPs listings. Implementation legislation would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA), directing EPA on how to implement treaty provisions.

In 2002, the Bush administration initially proposed implementation legislation, introduced by Sen. Bob Smith (R-NH) in May 2002 (S. 2507), that would allow EPA to regulate *only* the 12 chemicals listed in the treaty. At the time, others proposed empowering the agency to regulate any additional chemicals added to the POPs treaty without Senate ratification.

Each addition essentially constitutes a new treaty agreement by amendment, and each amendment demands Senate ratification according to the U.S. Constitution. Just as Congress cannot expect EPA to implement amendments to existing laws until after both Congress and the executive branch have approved them according to constitutional standards, EPA is not supposed to act on treaties until after Senate ratification. Lawmakers must follow the constitutional process for good reason. In this case, sidestepping the Constitution would give international negotiators and EPA authority to deprive Americans of the right to engage in commerce—to distribute, use, and sell certain chemicals.

During the 109th Congress, several members offered bills that would amend FIFRA and TSCA to allow EPA to implement the POPs treaty. Rep. Paul Gillmor (R-OH) offered H.R. 4591, and Rep. Hilda S. Solis (D-CA) introduced a competing bill, H.R. 4800; both would amend TSCA. Rep. Frank Lucas (R-OK.) introduced H.R. 3849 to amend FIFRA, and Sen. Saxby Chambliss (R-GA) introduced a companion bill (S. 2042). Both the Gillmor and Lucas bills were reported out of committee, and there was discussion that they might be combined and passed as one bill, but that did not happen before the end of the Congress.

Rather than requiring Senate ratification, all bills set up a process for EPA to consider whether to issue rules regulating chemicals that negotiators add to the POPs list in the future. All bills set up notice and comment provisions for any regulations that EPA might issue under the POPs treaty, and the Gillmor, Lucas, and Chambliss bills mention some form of cost-benefit considerations when EPA considers whether to regulate newly listed POPs.

Of the bills, the Gillmor bill contains the strongest language. Specifically, it states that the EPA can issue regulations of POPs listed chemicals to "the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits."[5] In addition,

ronment (New York: American Council on Science and Health, 2005), http://www.acsh.org/docLib/20050103_PCBs2005.pdf.

5. U.S. Congress, H.R. 4591, 109th Congress, section 503(e)(1)(A)(ii).

when assessing the risks of a substance, the Gillmor bill would require EPA to use "sound and objective scientific practices" and to "determine the weight of the scientific evidence concerning such risks or effects based on the best available scientific information, including peer-reviewed studies, in the rulemaking record."[6]

Some environmental activists have complained that the Gillmor bill would apply "onerous cost-benefit requirements that will make future U.S. action on these substances very unlikely."[7] Yet following sound science and consideration of costs and benefits is critical given that POPs regulations could have serious adverse public health and economic impacts. However, those mandates alone do not make the Gillmor bill acceptable, because they do not guarantee that the agency will follow them sufficiently. Agencies often have incentives to regulate, and such incentives can undermine scientific objectivity. Elected officials in the Senate should ratify treaty changes and additions as the Constitution outlines.

All bills fall short when it comes to requiring Senate ratification or even presidential signature for any new agreement. The Gillmor bill comes closest to suggesting that ratification by the Senate might be applied, but it does not require such ratification. In several sections of the bill, it suggests that someone else in the federal government should consent before EPA regulations take effect, but the specifics of such approval are unclear. Under those vague provisions, unelected public officials from EPA or the State Department might be sufficient to bind the United States to new international agreements related to POPs.

For example, section 503(e)(1)(C) of the Gillmor bill states that the rules do not take effect "until the United States has consented to be bound" by the POPs listing decision, but the bill never defines what body of the United States government would consent or how it would indicate consent.[8] Again in section 504 (a), the bill states that it is "the sense of the Congress that the United States shall consent to be bound … only after … the United States has declared that such amendment shall enter into force upon ratification, acceptance, approval, or accession of the United States to such amendment."[9] This time, the bill offers a menu of means for binding the United States to the POPs treaty amendments. Ratification is only one option and, hence, is not considered necessary under the bill. The section notes that the president must consult with congressional committees in both houses and they will conduct oversight. It does not say that the Senate should ratify any agreement or that the president should sign any agreement. Section 506 makes a similar pronouncement: "Any provision of this Act that establishes a requirement to comply with, or that is based on, a provision of the POPs Convention … shall be effective only to the extent that the United States has consented to be bound by that provision."[10]

Whether the Gillmor bill would pass constitutional muster in the Supreme Court is unclear, but there are good reasons it should not. If any of the implementation bills pass in the future, they likely would make the POPs treaty a vehicle for many more international bans of valuable chemical products. Our treaty partners might even use the treaty to reduce U.S. competitiveness. Their

6. Ibid., section 503(e)(4).

7. Lauren Morello, "POPs Bills Still on Target for House Vote, Sponsors Say," *Environment and Energy Daily*, September 20, 2006.

8. U.S. Congress, H.R. 4591, 109th Congress, section 503(e)(1)(C).

9. Ibid., section 504(a).

10. Ibid., section 506.

proposed bans likely would focus on products the treaty partners no longer use but that still would have value in the United States. Such bans would cost our competitors little, while imposing costs in the United States. Legitimate public health concerns likely would take a back seat to such political interests. After all, international negotiators were willing to impose a worldwide ban on DDT even though developing nations could use the product to save millions of people from malaria illness and death.

Getting a Seat at the Table

Some have suggested that the United States needs to ratify the POPs treaty in order to "get a seat at the table" among POPs negotiators to ensure that U.S. interests are met. For example, while urging Congress to pass a POPs bill and ratify the treaty, EPA Administrator Steve Johnson lamented, "As a consequence of [the current U.S.] non-party status, we are limited to being observers.… Our absence from these treaties diminishes the voices of some of the best scientific and policy experts in the world."[11] However, such arguments are based on the assumption that the POPs treaty is good public policy and hence will be valuable if implemented in the United States. This assumption is wrong. Rather than trying to get a seat at the table, the United States should oppose the growth of global controls that threaten human freedom and well-being.

State Preemption

Environmentalists also criticize the Gillmor bill because it contains a provision that effectively demands that states gain EPA approval to issue regulations on substances listed in the POPs treaty that are more stringent than EPA regulations. Allegedly, such regulations prevent states from protecting public health. In reality, such bans and regulations make as much sense at the state level as they do at the global or international level—which is very little. If anything, preemption of additional, more onerous regulations at the state level could mitigate some of the adverse effects of domestic bans and regulation. However, the benefits are not substantial enough to warrant the passage of any of the misguided POPs bills or ratification of the treaty.

Conclusion

Ideally, policymakers should oppose ratification and implementation of the POPs treaty. The treaty represents a seriously flawed approach to managing chemical risks, as is clearly demonstrated by its provisions impeding access to the chemical DDT. By hindering malaria control efforts, such policies contribute to the misery and deaths of millions of people every year. American policymakers must provide the strong moral leadership necessary to fight the world malaria crisis. In addition to reversing the POPs treaty, they should pursue policies to allow greater freedom to access DDT for malaria control. In addition, imposing global regulations on other chemicals that may have public value and whose risks can be managed makes little sense. Finally, at a bare minimum, POPs implementation legislation should not allow international negotiators and unelected domestic officials to determine U.S. policy without complying with the constitutional mandate for a presidential signature and Senate ratification.

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11. Lauren Morello, "EPA Chief Urges House Panel to Approve POPs Bill," *Energy and Environment Daily*, July 21, 2006.