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**1001 Connecticut Ave NW • Suite 1250 • Washington, DC 20036
202.331.1010 • www.cei.org**

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Ratification without Representation? The Convention on Persistent Organic Pollutants (POPs)

by Angela Logomasini

In 2001, the Bush Administration signed the United Nations Environment Program's Global Convention on Persistent Organic Pollutants, known as the POPs Treaty. It bans twelve chemicals—DDT, aldrin, dieldrin, endrin, chlordane, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls, dioxins, and furans—most of which are already banned in the United States. Congress is currently considering passing legislation to implement the treaty, which members want to pass before Senate ratification. This legislation promises to make a seriously flawed treaty even worse.

Background. The POPs treaty allows for limited, temporary use—until other options come available—of the pesticide DDT, which has important applications for limiting human exposure to malaria-carrying mosquitoes in the developing world. The exemption for DDT came after considerable pressure from public health officials from around the world who signed a petition urging POPs Treaty negotiators to include a public health exemption to the DDT ban.¹

The assumption behind such bans is that there are no valuable uses for the banned products. Were that true, there would be no markets for such products and no need for any bans. In reality, these bans only harm consumers by raising prices and denying access to desired products. The world's poor are often hit the hardest by such policies because they can least afford expensive alternatives, even when they are available.

Treaty regulations on DDT are a case in point. Even with its limited, temporary exemption on the use of the DDT for malaria control, the treaty regulations governing use

¹ DDT-Malaria: "Open Letter To DDT Treaty Negotiators," March 29, 1999. Available online at: http://www.malaria.org/ddtcover_english.html; List of signatures: http://www.malaria.org/DDT_signatures.html.

make access more expensive and difficult at a time when more than a million people—most of them children—die and several hundred million suffer from the disease annually.² Meanwhile, limited use of DDT could save millions of lives and help bring the disease under control, with little environmental impact.³ Rather than advance bans under POPs, policymakers should seek ways to improve DDT access.

Sidestepping the Constitution. Since signing the POPs Treaty, the administration has pushed aggressively for Senate ratification. Yet the Senate has held up ratification as members work to develop and pass implementation legislation. Implementation legislation will amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Toxic Substances Control Act, directing the Environmental Protection Agency (EPA) on how to implement treaty provisions. It is unclear why Congress must first agree on implementation legislation for a treaty it has not yet ratified. Customarily, ratification comes first.

The Bush Administration initially proposed implementation legislation, introduced by Sen. Bob Smith (R-N.H.) in May 2002 (S. 2507), that would allow the EPA to regulate *only* the 12 chemicals listed in the treaty. At the time, others proposed empowering the agency to regulate any additional chemicals for regulation under the POPs Treaty without Senate ratification. Yet each addition essentially constitutes a new treaty agreement via 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 act on treaties until after Senate ratification. There are good reasons for demanding that lawmakers follow the constitutional process. In this case, sidestepping the Constitution would give international negotiators and the EPA authority to deprive Americans of the right to engage in commerce—to distribute, use, and sell certain chemicals.

Unfortunately, instead of holding its ground, the administration abandoned this stand in July 2003 when it endorsed a bill sponsored by Sen. Lincoln Chafee (R-R.I.), S. 1486—the “POPs, LRTAP POPs and PIC Implementation Act of 2003”⁴—which would simply require EPA to consider the bans or other regulations for a year before making them official. With the administration’s support, the Senate Environment and Public Works Committee passed S. 1486 by voice vote.

² World Health Organization, *Malaria: Fact Sheet No. 94: “What is Malaria,”* Geneva: WHO, 2004. Available online: <http://www.who.int/mediacentre/factsheets/fs094/en>.

³ Richard Tren and Roger Bate, *When Politics Kills: Malaria and the DDT Story* (Washington, D.C.: Competitive Enterprise Institute, December 2000).

⁴ In addition to the POPs Treaty, this legislation would implement two other treaties related to international regulation of chemical substances. These are: The Protocol on Persistent Organic Pollutants to the Convention on Long-Range Trans-boundary Air Pollution (LRTAP) and the Rotterdam Convention of Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC).

This bill is very problematic for many reasons. It not only eliminates Senate ratification; it gives international negotiators the upper hand over domestic regulators. In theory, it would allow the EPA to decide against bans and regulations. However, the legislation makes it difficult for the agency to prevail in any denial to regulate. First, EPA would be forced to give “substantial weight” to POPs listing decisions—placing the burden on EPA to prove them wrong. In addition, environmental pressure groups would be able to sue EPA for failing to impose bans or regulations. The courts would then be able to order EPA to issue bans or regulate unless the agency could prove that such action is unnecessary. If that weren’t bad enough, taxpayers would pay not only for EPA’s litigation costs, but courts could also award attorneys and witness costs to litigants—which would come from taxpayer dollars as well.

Gillmor Alternative. In June, Rep. Paul Gillmor (R-OH) circulated a new proposal.⁵ The Gillmor bill offers a far better alternative than S. 1486 in many respects. Rather than requiring EPA to disprove the need for new POPs regulation, it requires the agency to consider whether the regulations or bans are necessary, and it gives the EPA some room to reject them. To that end, it requires some cost-benefit considerations and includes language that is designed to promote science-based considerations.

Unfortunately, the Gillmor bill is also seriously flawed because it fails to demand that the Senate employ its constitutional responsibility to ratify new treaties. It notes that the EPA may issue POPs-related rules “upon ratification, acceptance, approval *or* [emphasis added] accession of the United States.” The use of the word “or” suggests that ratification is only one of several possible means for making the treaty amendments legal. It doesn’t even require that “approval,” “acceptance,” or “accession” of the United States involve signing of the treaty changes by the executive branch.

U.S. Freedoms and Competitiveness at Risk. If any of these implementation bills pass, they will likely make the POPs Treaty a vehicle for many more international bans of valuable chemical products. Treaty signatories and anti-chemical activists are already discussing the possibility of banning lindane, a pesticide banned in some European nations,⁶ but which is used in the United States to control head lice and scabies and in products to protect pets, livestock, and various plants from pests. When used properly, the benefits of lindane outweigh its risks,⁷ yet such realities may not matter to international negotiators.

Our treaty partners might even use the treaty to reduce U.S. competitiveness. As with lindane, their proposed bans are likely to focus on products they no longer use but that still have value in the United States. Such bans will cost our competitors little, while imposing costs in America. Legitimate public health concerns are likely to take a back

⁵ Available online at: <http://gillmor.house.gov/pdf/pops.PDF>.

⁶ Arthur Rogers, “European Parliament Approves Measure to Transpose POPs Treaty into EU Law,” *Daily Environment Report*. February 27, 2004, A-6.

⁷ U.S. Food and Drug Administration, “FDA Public Health Advisory: Safety of Topical Lindane Products for the Treatment of Scabies and Lice,” March 28, 2003. Available online: <http://www.fda.gov/cder/drug/infopage/lindane/lindanePHA.htm>.

seat to such political interests. After all, this is the body that was 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.

To ensure that America's sovereignty does not become subject to the whims of international negotiators and unelected domestic officials, policymakers should reject efforts to sidestep congressional ratification of treaties and treaty amendments. Ideally, policymakers should oppose ratification and implementation of the POPs Treaty altogether. This treaty is seriously flawed. Its provision impeding access to the chemical DDT—currently through costly and bureaucratic regulations and eventually through an all-out ban—is particularly egregious. 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.

Angela Logomasini is director of Risk and Environmental policy at the Competitive Enterprise Institute (www.cei.org). This article is adapted from a section of the Report Card on Bush's Environmental Policy, forthcoming from PERC, the Property and Environment Center.