



ICC  
Indian Chemical Council

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### Submission by Observer

To

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### **Implementation of Rotterdam Convention in a manner inconsistent with WTO principles. Needed course correction.**

#### **A. Umbilical connection between World Trade Organisation (WTO) principles/rules and Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (RC)**

The WTO is the only global organisation that deals with rules of trade between nations. It operates, *inter-alia*, through a set of agreements (WTO Agreements) which are based on principles of non-discrimination, fairness and multilaterally agreed rules.

The RC is one of the many international agreements that can be said to be linked with WTO in as much as both of them regulate and operate in the field of transnational trade of goods.

Archived records show that during the first meeting of the Intergovernmental Negotiating Committee (INC-1) held from 11<sup>th</sup> to 15<sup>th</sup> March 1996, which drafted the RC text "*several governments pointed to the need to take fully into account the*

*relevant rights and obligation under the GATT/WTO rules*". Therefore, the text of RC was carefully drafted balancing the rights and obligations of the parties to maintain procedural integrity, impartiality, non-arbitrariness, and non-discrimination, mindful of the WTO legal framework that governs international trade. It is important to note that out of 165 countries that are Parties to RC, 146 are also Members at the WTO. In fact, WTO maintains dynamic record that shows WTO members and their current status with selected international conventions (this list includes Rotterdam Convention). The full list can be accessed from [https://www.wto.org/english/res\\_e/booksp\\_e/int\\_exp\\_regs\\_annex\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/int_exp_regs_annex_e.pdf)

In fact, even the recitals to RC recognize the need for consistency between the convention and WTO. Consistency demands avoidance of conflicts on matters of common interest. This is especially clear from the eighth and ninth recitals of the RC, which state 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.*

"[...]"

Not just the Rotterdam Convention, but there are about 20 out of 250 multilateral environmental agreements (MEAs) which include provisions that can affect international trade and are guided by the WTO principles/rules.

Vienna Convention on the Law of Treaties 1969 (VCLT), relating to implementation of international treaties, states in **Article 26** that ***"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."*** The need for States to be guided by the good faith principle cannot be stressed enough. This good faith principle requires that an international treaty must be implemented by States in a manner that ensures honesty of intention and fairness.

Given that the implementation of all MEAs is required to be consistent with WTO principles, Article XXIV of General Agreement on Tariffs and Trade (**GATT**) becomes especially important. It talks of situations where States are permitted to digress and adopt policies which may otherwise be construed as a violation of

GATT/WTO principles. One such situation relates to ***measures necessary to protect human, animal or plant life or health***. However, these measures can only be taken when they are not:

- (a) applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- (b) a disguised restriction on international trade.

Again, the above conditions scream good faith and fairness. In a way, Article XX prescribes a good faith policy that every State must adhere to. Implied in the said Article is also the doctrine of *abus de droit* which requires a State not to exercise its rights and obligations in a way which hampers other States.

## B. The relevance and importance of procedural integrity in the implementation of Rotterdam Convention

RC is Annex driven and it prescribes multilaterally agreed mandatory procedure at every stage. This begins with **submission** of notification of final regulatory actions by the Parties to the Secretariat, **review** of the notifications by the Chemical Review Committee (**CRC**) leading finally to **listing** of the notified chemical by consensus in the trade restrictive Annex III of the Convention. RC establishes a Prior Informed Consent (PIC) procedure to ensure that the chemicals listed in the Convention's Annex III are not exported to the countries that do not wish to receive them. The RC imposes several trade measures concerning PIC listed chemicals and pesticides.

RC obligations are binding on the member countries (Parties) and the organizations tasked with its implementation which in this case are United Nation Environment Programme (**UNEP**) and the Food and Agriculture Organization (**FAO**). The UNEP, jointly with FAO, provides the Secretariat functions for the RC. The functions of the Secretariat include, *inter alia*, verifying information accompanying notifications and proposals submitted by the Parties.

All legally binding obligations in the RC come with mandatory terms such as "**shall**" as opposed to "*should*" or "*may*".

While implementing the RC, actions that add to or diminish a Party's rights and obligations are impermissible. It is imperative that procedural equality of the Parties is ensured in the implementation of RC if it is to sustain the legitimacy under the international trade law governed by WTO/GATT.

The failure to observe the mandatory procedure set out in RC, adversely affects the perception of the sovereign equality, fairness, WTO conformity and legitimacy of RC's recommendations/decisions.

In fact, the correctness of the substantive decisions at the RC cannot be guaranteed unless there is procedural correctness. Procedural violations/flaws in the implementation of Rotterdam Convention indicate arbitrariness resulting in discrimination between countries and this automatically leads to violation of WTO principles/rules. It weakens the Convention's presumption of conformity to WTO principles/rules.

### C. Lack of procedural integrity in the implementation of Rotterdam Convention

This submission brings out two serious issues which showcase the lack of procedural integrity in the implementation of RC. They are chronic and extend beyond the examples cited below.

#### Issue I

**Notification of Final Regulatory Actions (FRAs) by States in violation of the time limit specified in Article 5.1 of Rotterdam Convention.**

**Article 5.1** of the Rotterdam Convention states that:

*"Each Party that has adopted a final regulatory action shall notify the Secretariat in writing of such action. Such notification **shall be made** as soon as possible, and **in any event no later than ninety days after the date on which the final regulatory action has taken effect**, and shall contain the information required by Annex I, where available". (Emphasis added)*

This means that the notifications of FRA cannot be submitted by the Parties beyond the ninety days' time limit given in the RC text. Such belated FRAs, when notified, must be considered invalid by the Secretariat for review by the Chemical Review Committee (CRC).

## Analysis of FRA notifications listed before CRC-19 that fail to meet the Article 5.1 requirement.

Sr. no	Name of chemical/ Pesticide	Notifying Parties	Date on which Final Regulatory Action had taken effect	Date of notification to the Rotterdam Convention	Delay in submitting notification beyond 90 days
1	Bromacil	Turkey	01/01/2009	-/10/2021	12 years 9 months
		Costa Rica	05/06/2017	21/10/2019	2 years 4 months
2	Carbaryl	Mozambique	15/07/2014	08/04/2020	5 years 9 months
3	Chlorfenvinphos	Mozambique	15/07/2014	08/04/2020	5 years 9 months
4	Chlorpyrifos	Sri Lanka	28/12/2016	27/03/2019	2 years 4 months
		EU	16/01/2020	19/10/2022	2 years 9 months
		Turkey	08/04/2016	-/10/2021	5 years 7 months
5	Diarsenic pentaoxide	EU	21/05/2015	20/12/2021	6 years 8 months
6	Ethion	Mozambique	15/07/2014	20/04/2022	7 years 9 months
		Turkey	01/01/2009	29/04/2021	12 years 3 months
7	Mercury	EU	13/06/2017	29/11/2022	5 years 5 months
		Turkey	23/12/2017	31/03/2021	3 years 3 months
8	Methidathion	Mozambique	15/07/2014	8/04/2020	5 years 10 months
9	Thiodicarb	Mozambique	15/07/2014	8/04/2020	5 years 10 months

Link: <https://www.pic.int/TheConvention/ChemicalReviewCommittee/Meetings/CRC19/Overview/tabid/9480/language/en-US/Default.aspx>

### Remarks:

The time limit given in Article 5.1 is inviolable, unfortunately all these notifications violate the time limit.

The textual phrase *“in any event no later than ninety days after the date on which the final regulatory action has taken effect”* is categorical, emphatic and clear-cut. It does not accord discretion to the Party to submit the notifications beyond the ninety days’ time limit, nor does it accord any special powers to the

Convention's Secretariat to accept the belated notifications. The ninety days' time limit is a mandatory requirement in RC. It should be recalled that the text of RC was finalized after extensive negotiations among the sovereign countries for two years from March 1996 to March 1998 by the Intergovernmental Negotiation Committee (INC). **Annexure-I** (attached hereto) shows the negotiation history behind fixing the ninety days' time limit in Article 5.1.

Way back in 2009, India's CRC Member submitted a Conference Room Paper (CRP) vide no. **UNEP/FAO/RC/CRC.5/CRP.19** protesting against non-observance of the Article 5.1 of RC (same is attached hereto as **Annexure-II**). At that time, it was conveyed by the Secretariat that such issues could only be addressed by the Compliance Committee once formed. Now that the Compliance Committee has been formed and functional since last year (2022). There can be no further excuse to continue to accept and review the belated notifications that breached the provisions given under Article 5.1 of the Rotterdam Convention.

## Issue II

**Delay in notification of the FRAs already in effect in the countries at the date of entry into force of the Rotterdam Convention in such countries.**

**Article 5.2** of the Rotterdam Convention clearly states that *"each Party shall, at the date of entry into force of this Convention for it, notify the Secretariat in writing of its final regulatory actions in effect at that time...."*

Among the notifications listed for review at the forthcoming CRC meeting are two notifications for which the FRA was taken before the RC entered into force for the notifying countries:

Sr. no	Name of chemical/ pesticide	Notifying Party	Date on which Final Regulatory Action had taken effect	Date on which Rotterdam Convention was entered into force in the notifying country	Date of notification of the FRA to the Secretariat, Rotterdam Convention
1	Mercury	Indonesia	26/05/2002	23/12/2013	15/04/2021
2	Diarsenic Pentaoxide	Republic of Korea	13/11/2003	24/02/2004	30/04/2004

Link:

<https://www.pic.int/TheConvention/ChemicalReviewCommittee/Meetings/CRC19/Overview/tabid/9480/language/en-US/Default.aspx>

## Remarks:

Both these notifications are inconsistent with the mandatory requirement specified in the Article 5.2 of the Rotterdam Convention. Apparently, these Parties didn't notify their FRA to the Secretariat when the Convention entered into force in such countries. It is appalling that the Secretariat of Rotterdam Convention chose to accept the heavily delayed notifications for review by the CRC meeting in October 2023. It is incumbent on the Secretariat to have brought the fundamental flaws in the notification to the notifying Parties.

### D. Domino and cascading effects of PIC listing beyond the Rotterdam Convention

- i. Listing of pesticides in Annex III (**PIC list**) of the RC adversely impacts international trade far beyond the impact on just the pesticides concerned. They lead to non-tariff barriers (**NTBs**) that affect the export of agricultural commodities, especially from developing countries.

Once a pesticide is added to the PIC list, many private standard setting bodies (by non-state actors) associated with major retail groups in the western countries issue advisory against their continued use in agriculture. Though termed voluntary and outside the SPS Agreement, they have evolved to be *de-facto* standards. These non-state actors prohibit the use of PIC listed pesticides by enforcing zero tolerance residue levels known as Maximum Residue Limit (MRL) in the agricultural and food commodities exported. At the COP-11 meeting of the Rotterdam Convention (1<sup>st</sup>-12<sup>th</sup> May 2023) many developing countries expressed deep concerns on this.

PIC listed pesticides laterally give rise to certain trade restrictive measure that discriminate against foreign agricultural and food products in the global trade. PIC listing of pesticides aids and incentivizes private entities to act in a particular manner detrimental to the global trade of agricultural commodities. It affects the condition under which "like goods" compete in the market within a WTO Member's territory. All these are violative of WTO principles/rules. Such trade distorting measures are often covertly aimed at protecting domestic markets.

From the year 2011 to September 2023, as many as 11 notifications were sent to the WTO - TBT & SPS Committee by different countries involving PIC listed pesticides.

- ii. There is also a proposal to classify all PIC listed pesticides as highly hazardous pesticides (HHPs) by the international bodies such as UNEP and WHO in other conventions like Strategic Approach to the International Management of Chemicals (SAICM).

As the PIC listing produces significant domino effect and triggers decisions elsewhere, in turn affecting international trade beyond the domain of RC, there must be no deviation from the mandatory procedure set out in text of RC.

## Conclusion and course correction

The language in the **Articles 5.1** and **5.2** does not permit any degree of discretion and flexibility while submitting the notifications of the FRA beyond the timeline stipulated. Accepting such belated notifications results in reducing the whole clauses of Article 5.1 and 5.2 to redundancy or inutility. Remember, these Articles do not suffer from any “constructive ambiguity”.

The existence of procedural violations/flaws in the implementation of the RC indicates arbitrariness which is unacceptable under GATT/WTO principles and rules.

The Articles 5.1 and 5.2 must be interpreted using the maxim “*Expressio unius est exclusio alterius*” which means express mention of one thing excludes all other things.

The mention of ninety days’ time limit in Article 5.1 excludes any day/time beyond that. The Article 5.2 must also be construed similarly.

The RC comes with several trade measures that regulate or restrict the global trade in certain chemicals. Therefore, it can neither be considered nor implemented in clinical isolation of the global trade rules governed by the WTO.

It is common knowledge that in the past, several belated notifications were prepared, accepted, reviewed, and even sent for final decisions by the Conference of Parties (**COP**). Regrettably, there is nothing on record that shows the COP was put to notice of the Secretariat’s practice of accepting for review notifications that breach the mandatory requirements in Article 5.1 and 5.2 of the RC.

It is true, past wrongs cannot be corrected, but they should also not set precedents for future actions. Repeating the past wrongs would weaken the credibility and sustainability of the RC in the era of the WTO.

With the Compliance Committee in place now, the Parties have the opportunity to take measures leading to course correction. The Compliance Committee has a crucial role to play in addressing the issues brought out in this submission and restore the much-needed procedural integrity in the RC.

In view of all the above, it is pertinent that the impugned notifications are not placed for review at the forthcoming CRC-19 meeting.

It is requested that this submission be made available/accessible to all who attend the CRC-19 meeting on the first day itself.

Parallely, this is being shared with select Parties to the RC who are also Members at the WTO for possible action.

Thanking you,



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**Encl:** Annexure I & II

**Negotiation history behind fixing the ninety days' time limit in Article 5.1 of the Rotterdam Convention.**

**INC 2** (16<sup>th</sup> - 20<sup>th</sup> Sept 1996) - *“A notification pursuant to paragraph 1 of this article shall be made as soon as possible, but not later than **90 days** after the date on which the regulatory measure has taken effect.”*



**INC 3** (26<sup>th</sup> - 30<sup>th</sup> May 1997) - *“A notification pursuant to paragraph 1 of this article shall be made as soon as possible, but not later than **[ninety] days** after the date on which the final regulatory action has taken effect.*



**INC 4** (20<sup>th</sup> - 24<sup>th</sup> October 1997) - *“Each Party that has adopted a final regulatory action to ban or severely restrict a chemical shall notify the Secretariat in writing of such action through its designated national authority. Such notification shall be made as soon as possible, but not later than **[ninety] days** after the date on which the final regulatory action has taken effect and shall include the information required by Annex X, [where available]”.*



**INC 5** (9<sup>th</sup> -14<sup>th</sup> March 1998) - *“Each Party that has adopted a final regulatory action shall notify the Secretariat in writing of such action. Such notification shall be made as soon as possible, but not later than **ninety days** after the date on which the final regulatory action has taken effect, and shall include the information required by Annex I, where available”.*

The last text (that of **INC 5**) was adopted on 10<sup>th</sup> Sept 1998 by the Conference of Plenipotentiaries of the Rotterdam Convention.

**United Nations  
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**UNEP/FAO/RC/CRC.5/CRP.19**

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English only

**Food and Agriculture Organization,  
of the United Nations**

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

**Fifth meeting**

Rome, 23–27 March 2009

Agenda item 4 (b) (ii)

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

### **Submission by the member from India**

The annex to the present note contains a submission on endosulfan by the member from India. It has not been formally edited.

26-03-09

From

Dr.G.K Pandey

CRC Member

To

The Secretariat

Rotterdam Convention

Rome

**Conference Room Paper on Report of Task Group on Endosulfan (UNEP/FAO/RC/CRC.5/CRP.6 and subsequent discussions.**

The report of task group on Endosulfan notifications and subsequent discussions have left out several key issues raised and debated at the pre session meeting held on last Sunday, 22<sup>nd</sup>, March 09. The key issues raised/debated include the following:

**I Belated submission of notifications from Sahelian countries:**

Article 5 of the Convention describes the obligations of Parties in notifying final regulatory actions and also the role of Convention's Secretariat.

Article 5, paragraph 1 of the Convention states:

*"Each party that has adopted a final regulatory action shall notify the secretariat in writing of such notifications. Such notifications shall be made as soon as possible, and in any event no later than ninety days after the date on which the final regulatory action has taken effect, and shall contain the information required by annex I, where available".*

Article 5, paragraph 3 of the Convention states:

*" The secretariat shall, as soon as possible, and in any event no later than six months after receipt of a notification under paragraph 1 and 2 shall verify whether the notification contains the information...."*

Repeated use of the term "shall" in these two important provisions of the Convention make it compulsory for Parties to submit the notifications within ninety days after the date which the final regulatory action has taken effect. Also, it is expected that the Secretariat to begin the process of verifying the notifications

only if notification received is within the specified time period in conformity with paragraph 1 of Article 5 (which stipulates 90 days time limit).

In case of Sahelian notifications, the final regulatory action entered into force on 13<sup>th</sup> Nov 2007 (Ref: PIC Circular XXVIII- Dec 2008), but the notifications were sent to the secretariat only in July 2008 i.e. after a lapse of about eight months and as such the notifications from Sahelian countries do not qualify for considerations under Rotterdam Convention as they were not notified to the Convention within ninety days and are in contravention of Article 5

## **II About the term final regulatory action:**

The Convention defines final regulatory action as “*an action taken by a party that does not require subsequent regulatory action by that Party, the purpose of which is to ban or severely restrict a chemical*”.

Final regulatory action cannot have a subsequent or secondary regulatory action.

This, when read with Article 5 (1) of the Convention do not allow multiple dates of entry into force for a single final regulatory action. In the report prepared by task group, two different dates are shown as date of entry for a single final regulatory action. This is not maintainable under the Convention. It must be mentioned here that in all earlier notifications considered by CRC, only one date would be shown as date of entry into force of final regulatory action.

As such, it is evident that Sahelian notifications do not meet Annex I (2)(a)iii of the Convention.

## **III Inadequate adoption of bridging information and noncompliance of Annex II(b)(iii) of the Convention:**

Sahelian notifications did not conform to guidelines given in policy guidelines (UNEP/FAO/RC/CRC.3/INF/3) for bridging information.

Paragraph 4 of this document expressly states “*It is important to note that when a Party submits a notification of final regulatory action, the risk evaluation and the bridging information must be sufficient to fulfill the criteria in Annex II b (iii) for the notification to be a trigger for further consideration under the Convention.*”

Under no circumstances, there shall be failure to meet Annex II b(iii) which states “*The final regulatory action was based on a risk evaluation involving prevailing conditions within the Party taking the action*”.

Supporting documents submitted by Sahel seek to selectively use information from risk evaluation carried out in alien environment in other countries where application methods, frequency of applications,

formulations used , soil and whether conditions, size of land holdings etc are significantly different from Sahelian conditions.

Risk evaluations should be based on actual exposure in prevailing conditions of the notifying party. Computer simulated model submitted by Sahel (not subjected to peer review and validation) cannot be a substitute for real & actual field measurements. The computer simulated model can only give approximate estimates as there are several variables used in the model. Unless the method and model used are validated, they would not reflect the realistic estimates. In supporting documents submitted by Burkina Faso, there is no mention of actual measurements of Endosulfan in surface waters that could cause potential adverse effects in aquatic environment.

In view of above facts, I am of the firm opinion that **CRC cannot conclude that Sahelian notifications merit consideration under Rotterdam Convention.**

Dr. G. K .Pandey

CRC member.

26-03-09