

August 26, 2024

Submission by Observer

To

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Importance and inviolability of Article 5.1 of the Rotterdam Convention

The text of the multilaterally agreed Convention, in this case the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in the International Trade ("**Rotterdam Convention**"), is inviolable.

The Article 5.1 of the Rotterdam Convention lays down the prerequisite for considering any chemical's possible inclusion in the Convention's regime of trade restrictions.

The Article 5.1 that deals with procedures for banned or severely restricted chemicals states:

*"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** [emphasis added] after the date on which the final regulatory action has taken effect, and shall contain the information required by Annex I, where available".*

The drafters of the Convention's final text have deliberately and purposely used the emphatic expression "**shall notify as soon as possible, and in any event no later than ninety days**".

All legally binding obligations in the text of the Rotterdam Convention, including Article 5.1, come with terms such as "**shall**" (as opposed to "*should*" or "*may*"), which signify a binding obligation. Therefore, the requirement of 90 days' time limit for notifying the Final Regulatory Actions (FRAs) must be treated as mandatory and non-negotiable.

In the year 2004, the Secretariat of the Rotterdam Convention published “**Guide on the Development of National Laws to Implement the Rotterdam Convention**”. In this guide, the Secretariat expressly described Article 5.1 to be an “**obligation**” under the Convention. The Black Law Dictionary defines the term “obligation” as “***a legal duty, by which a person is bound to do a certain thing***”. Submitting the FRA to the Convention Secretariat within the 90 days’ time limit is an obligation, a legal duty as held by the Secretariat.

Article 5.1 does not accord discretion to any Party to submit the notifications beyond the ninety days’ time limit, nor does it accord any special powers to the Rotterdam Convention’s Secretariat to accept the belated notifications.

There is nothing in the Rotterdam Convention’s text that permits a departure from this absolute requirement of ninety days’ time limit.

Failure of due process at the pre-review stage

“Article 5: Procedures for banned or severely restricted chemicals.

1. 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....***
(Emphasis added)
2. 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”
3. The Secretariat shall, as soon as possible, and in any event no later than six months after ***receipt of a notification under paragraphs 1 and 2***, verify whether the notification contains the information required by Annex I”
(Emphasis added)

All these 3 steps operate sequentially. The term “**under**” used in Article 5.3 means ***pursuant to or in accordance with***.

This means the Secretariat can verify only those notifications received in accordance with Article 5.1 (that specifies 90 days’ time limit).

Rotterdam Convention Secretariat is duty bound not to accept/process for review any notification of FRA submitted in contravention of Article 5.1.

There is failure on this front which is worrisome.

The 90 days' time limit helps serving an important objective of the Rotterdam Convention which is to share timely information regarding FRAs taken by the member countries in respect of hazardous chemicals. Submitting notifications several years after the FRA had been taken, does not help the objective of the Rotterdam Convention.

The plain meaning of Article 5.1 operates to bar delayed notifications of the FRAs from providing a valid basis for reviewing under the Convention's PIC listing procedures. The questionable practice of the Convention's Secretariat in consciously accepting "time barred" notifications and giving them to the Chemical Review Committee (**CRC**) for Annex II review renders the Article 5.1 inoperative and a nullity. This cannot be allowed to continue. There is nothing on record that shows that this controversial practice has the consent and approval of the Conference of the Parties (**COP**).

All the FRAs scheduled for review before the CRC-20, except one, fail to meet the requirement given in Article 5.1 of the Rotterdam Convention. The age of the notifications listed for review before the CRC-20 ranges from **180 days to as old as >30 years!** For example: The FRA for the pesticide Zineb was taken in the year **1991** and it is listed for review now, in the year **2024**, before the CRC-20! Need we say more?

Conclusion and suggested actions:

In view of all the above, it is pertinent that the impugned notifications are not placed for review at the forthcoming CRC-20 meeting. The Secretariat needs to strengthen the screening process of the notifications received, to assess their conformity to the mandatory requirements in Article 5.1 and 5.3.

It is requested that this submission be made available/accessible to all who attend the CRC-20 meeting.

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