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

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Item 6 of the provisional agenda*
Other matters

Correspondence with the Indian Chemical Council

Note by the Secretariat

Addendum

Further correspondence with the Indian Chemical Council

The annex to the present note contains a copy of a letter from the Indian Chemical Council regarding the operation of the prior informed consent procedure. It has been reproduced without formal editing.

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

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Annex

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Date: 09.03.2010

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Dear Mr. Cooper and Mr. Kennmore,

Ref: Your letter dated 26th Aug 09 enclosing UNEP's legal opinion dated 21st Aug 09 on application of Article 5(1) of the Rotterdam Convention.

I thank you for your consolidated response to my earlier communications on the application of Article 5(1) of the Convention. Your consolidated response refers to:

- Belated notifications of final regulatory action concerning Endosulfan submitted by Sehalean countries and European Commission.
- Belated notification of final regulatory action concerning Tri-Butyl Tin submitted by Canada.

Your response adduced no evidence showing that the Convention's Secretariat's practice to accept belated notifications was a "conscious act" and that such cases were duly reported to the Conference of Parties (COP) and to the CRC. It seems that the Secretariat woke up to this procedural omission only after receiving letter from Indian Chemical Council. Be that as it may. It is now a matter for the COP to enquire into and address suitably at its next meeting.

ICC

The Annexes (I and II) to this letter carry my detailed reply to your communication. As certain new facts have come to light since our last communication, my reply deals with them too.

I request you to keep this communication in your website for access by all Parties and interested observers and to circulate among members and participants of CRC-6.

Thanking you

Yours faithfully

S.Ganesan
Chairman
International Treaties Expert Committee

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CC : Mr.Achim Steiner, Executive Director, UNEP, Nairobi, Kenya.

Encl: 1. Annex – I
2. Annex - II
3. Copy of Endosulfan retail packing exported by France to Sahelean countries.
4. Copy of commercial invoice

Annex I to ICC's letter dated 9th Mar'10

I Introduction:

The preamble to the Rotterdam Convention states that the Parties recognize that the trade and environmental policies should be mutually supportive. The trade and environmental policies could be mutually supportive only if all decisions are rule based and in accordance with the text of the Convention. Rotterdam Convention is a trade restrictive treaty in the era of the WTO. The Rotterdam Convention (also known as PIC Convention) is a treaty that provides substantive legal regulations concerning world trade of chemicals which currently remains highly skewed and dominated by a few countries in the Europe.

World's exports in chemical and share of Europe:

Particulars	2006	2007	2008
World Exports of Chemicals ($bn)	1248	1483	1705
Exports from Europe	743	883	993
Share of Europe (%)	60	60	58

Source: WTO

Available empirical evidence proves that PIC listing of a chemical under the Convention discriminatively differentiates the chemical concerned from the "like products" in the international trade and negatively impacts its market access. Extreme degree of due diligence must therefore be taken at every level of decision making in the Convention. The procedure followed for decision making and due diligence exercised must be shown to be non discriminatory, flawless and transparent. On matters of international trade, the WTO does not permit any measures/ decisions that are arrived and applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination.

The text of chemical trade related international treaties such as Rotterdam Convention are delicately phrased in such a way to ensure that the basic tenets of GATT/WTO are not infringed. Any failure to respect the rules in trade related treaty could be considered to go against the tenets of the GATT/WTO as well.

II Article 5 (1) of the Rotterdam Convention and UNEP's legal opinion:

Article 5 (1) of the Convention states ***"... 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".***
In response to ICC's letter referring to the Secretariat's failure to follow the Article 5 (1) ,the Secretariat/UNEP has sent a reply interpreting the simple and clear text in the most complex manner unnecessarily using the Vienna Convention on the Law of Treaties (hereafter called "The Vienna Convention).

The lengthy interpretation unfortunately renders a simple sentence unintelligible. The simple sentence in Article 5 (1) of the Rotterdam Convention is:

"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".

Interpretation of a treaty using the Article 31 of the Vienna Convention must be driven by good faith with a genuine need to clarify something that remains obscure or unclear in the text of the Convention.

The article 31 of the Vienna Convention states:

*"A treaty **shall be** interpreted in **good faith** (emphasis added) in accordance with the **ordinary meaning to be given to the terms** of the treaty in their context and in the light of its object and purpose"*

By expressly stating at the outset that a treaty ***"shall be interpreted in good faith"*** (instead of stating "treaty may be interpreted"), the Vienna Convention clearly signifies that it is an obligation (and not merely a guideline) that the interpretation of a treaty, whenever genuinely required, must be made in "**good faith**". This is the first and foremost requirement.

What is ***good faith?***

Bona fides (Good faith): A person acts in bona fides when he acts honestly, not knowing nor having reason to believe that his claim is unjustified... *Bona fides* ends when the person becomes aware or should have become aware, of facts which indicate the lack of legal justification for his claim" (Ref: *The Oxford Companion to Law*, 1980)

Attempting to interpret the simple sentence in the Article 5 (1) that states ***"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"*** cannot be said to be in good faith. It is both unwarranted and unjustified.

According to the Vienna Convention, the interpretation must be in good faith and in accordance with the ordinary meaning to be given to the terms. The "ordinary meaning" must be taken to mean dictionary meaning.

Surely, a simple sentence does not require any complex interpretation by applying Article 31 of Vienna Convention of Law of Treaties. The attempt by the UNEP/Secretariat to interpret a simple sentence in a complex style [only] to muddy its meaning fails the test of "good faith".

Besides, the interpretation of the UNEP/ Secretariat virtually makes the Article 5 (1) redundant. One of the corollaries of the general rule of interpretation contained in Article 31 of the Convention as noted by the WTO Appellate Body in United States – Standards for Reformulated and Conventional Gasoline is that:

".....an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"

-WTO Doc WT/DS2/AB/R page 23 of 29th April 1996

The UNEP/Secretariat cannot make or attempt to make the Article 5 (1) or for that matter any other Articles of the Rotterdam Convention to be redundant and of inutility in the guise of interpreting them.

It must also be said that while interpreting a treaty, the interpreter cannot depart from the treaty language as held by the WTO Appellate Body in India-Patents case. The Appellate Body said:

"...these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended"

- WTO Doc, WT/DS 50/AB/R adopted 16 Jan 1998, para 45

It also said that it's important not to interpret treaty provision in such a manner as to depart from the treaty language.

The UNEP/ Secretariat cannot depart from the treaty language of the Rotterdam Convention that expressly states that ***"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".*** It cannot impute into the Article 5 (1) words that are not there or the import concepts that were not intended.

Under the Rotterdam Convention, it is an obligation to submit the notification within 90 days after the final regulatory action has taken effect. Nothing can be done by the UNEP/ Secretariat to add or diminish rights and obligations provided in the Convention. Here, reference may be made to what the WTO Appellate Body said in paragraphs 40-47 in the Document WT/DS 50/AB/R (cited above).

The UNEP/ Secretariat takes recourse to the object and purpose of the Rotterdam Convention and tries to explain that Article 5 (1) is no bar to Parties submitting belated notification. This is unnecessary. The (optional) need for interpreting a treaty taking recourse to its object and purpose under the Vienna Convention is that it serves as additional/ secondary means of interpretation where the "ordinary meaning" remains vague or unclear. There is nothing that remains vague or unclear in the sentence in Article 5 (1) that states: ***"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".***

There is no need for the UNEP/ Secretariat to resort to supplementary means of interpretation by selectively describing the object and purpose of the Rotterdam Convention and to justify ignoring the time limit prescribed in Article 5 (1).

The ultimate object and purpose of the Rotterdam Convention as given in Article 1 of the Convention is to "contribute to" environmentally sound use of certain hazardous chemicals by facilitating information exchange. The environmentally sound use of chemicals ensures protection of human health, environment and achieve sustainable development.

The UNEP/ Secretariat should know that the COP was certainly conscious of the object and purpose of the Convention when it included Article 5 (1) in the Convention's text at its first meeting. In other words, it was a considered decision of the COP to keep 90 days limit for notification.

Rotterdam Convention is a trade related multilateral agreement. The Convention's text had been approved by the Conference of Parties at its first meeting. It is settled law that the Convention's text should not be construed as to render any provision of the Convention's text ineffective.

III Secretariat's Responsibility:

Article 5 (1) of the Convention states

"....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".

Further Article 5(3) of the Convention reiterates the significance of the 90 days time limit when it states

"The secretariat shall .....after receipt of the notification under paragraph 1 .....verify whether the notification contains the information required by Annex –I".

Read together, the Article 5 (1) and 5 (3) clearly establish that the Secretariat can accept the notification and start the process of Annex I review and, subsequently, facilitate Annex II review only if the notification is made and received as per the Article 5 (1) which stipulates 90 days time limit.

Belated notifications can at best be considered as information exchange but cannot be considered for Annex I and Annex II reviews.

By now it is clear that the Secretariat has simply ignored the time limit given in the Article 5 (1) read with 5 (3) while receiving and reviewing the notifications. Although the secretariat has been arranging to review notifications received not in conformity with the Article 5 (1) read with Article 5(3), there's not a single occasion where the Secretariat chose to take into confidence either the CRC or the COP of the delayed submissions. Both these organs of the Convention were kept in the dark when they were reviewing/ deciding on notifications that failed to meet the requirements of Article 5 (1) read with article 5 (3). The secretariat owes an explanation for this.

Despite the clear language of Article 5, paragraph 1, the Secretariat has routinely accepted notifications provided well after the 90-day timeframe. Indeed, the December 2008 PIC Circular reveals that the Secretariat had accepted notifications relating to final regulatory actions that went into effect as much as *sixteen years* previously. Refer to PIC Circular XXVIII – December 2008 at Appendix 1, page 57 (notification of Uruguay relating to Paraquat dichloride) for further details. This practice has not been officially sanctioned or adopted by the Parties to the Convention as a whole, and there are no COP documents discussing the practice. There is no statement of COP guidance or approval with respect to the Secretariat's apparent decision to accept untimely submitted notifications.

COP-4 in 2008 voted to subject Tributyl tin compounds to the Convention's PIC list. One of the supporting notifications was provided over a year after the relevant final regulatory action had entered into force. *See* PIC Circular XXII – December 2005 at Appendix 1, p 42 (notification by Canada). However, there is no mention of this fact in either the report of the CRC regarding such compounds, the comments provided by members of the CRC, or the CRC's draft decision guidance document. *See* UNEP/FAO/RC/COP.4/10 (Oct. 24, 2007) at Annexes IV and V; UNEP/FAO/RC/CRC.2/20 (Feb. 17, 2006). Similarly, the report of the COP on the meeting at which it voted to include Tributyl tin compounds does not mention the timeliness of the notifications. UNEP/FAO/RC/COP.4/24 (Oct. 31, 2008). It's clear that the Secretariat had failed to inform both the CRC as well as the COP that they were deciding on a notification that did not conform to the article 5 (1) of the Convention.

It is now abundantly evident that the Secretariat woke up to its failure to apply the Article 5 (1) read with 5 (3) only after the Indian Chemical Council blew the whistle. In order to bury the questionable past and to remain unaccountable, the Secretariat is now coming with elaborate explanations in vain taking recourse to Vienna Convention. The Secretariat should know that no advisory or decision can have retroactive application. It should also know that it has no rights to give ex *post facto* explanation in order to escape accountability.

Given that the Secretariat's questionable practice not only departs from the plain meaning of the language of Article 5, paragraph 1, but renders it inoperative, only a clear statement of approval from the COP would suffice to ratify such an interpretation of the treaty text. However, the COP has not knowingly or purposefully ratified the Secretariat's practice in accepting untimely notifications (e.g. That of Canada's). The Secretariat had failed to inform the COP about the untimely notification from Canada. As a result, at no time the COP discussed or even acknowledged the untimeliness of the supporting notification.

Accordingly, fundamental principles of treaty interpretation dictate that, in order to be valid, Article 5, paragraph 1 must be interpreted to require notifications to be provided within ninety days after the relevant final regulatory action goes into effect. The contrary practice of the Secretariat to accept late notifications does not trump or modify this basic requirement.

Conclusion

The plain meaning of Article 5, paragraph 1, operates to bar untimely notifications from providing a valid basis for subjecting chemicals to the Convention's PIC listing procedures. Further, the practice of the Secretariat in accepting untimely submissions is insufficient to alter or inform the plain meaning of Article 5, paragraph 1. Only the full COP is competent to ratify such a drastic alteration in the meaning of the treaty text. The COP has not provided any commentary or guidance indicating its approval of the Secretariat's practice. Accordingly, fundamental principles of treaty interpretation require the rejection of untimely notifications.

Finally, the matter must be referred to the next COP i.e. the COP-5 for a thorough probe and remedial measures. There is no other option. Pending this, the Secretariat cannot go ahead in a business as usual fashion to review or arrange to review notifications that were not received in accordance with the Article 5 (1) of the Convention. Such notifications and earlier decisions on them should be considered "*void ab initio*".

S.Ganesan
Chairman
International Treaties Expert Committee
Indian Chemical Council

9th March 2010

Annex II to ICC's Letter dated 9th Mar'10

False/Incorrect/Misleading Notifications

I Notification submitted by Sahlean Countries:

Sahelean Countries (9) have a common and shared authority for registration and de-registration of pesticides administered by the Sahelean Committee of the Pesticides head-quartered in Mali (www.insah.org). The Sahelean Committee of Pesticides took final regulatory action of banning Endosulfan that entered into force on 13th Nov 2007. The import and distribution of Endosulfan was to end by 13th Nov 2007. This was also mentioned in the legal opinion dated 21st August 2009 given by the UNEP's legal office. But latest data reveals that countries governed by Sahelean Committee of Pesticides continued to import formulations containing Endosulfan from the European Union right through 2008.

Import of Endosulfan from the EU in 2008:

Country	Imports (tons)	Exporter
Burkina Faso	16	France (EU)
Mali	7	France (EU)
Senegal	1	France (EU)

Source: http://exporthelp.europa.eu
www.business-explorer.com

Even in the year 2009, one could easily buy in Sahelean countries Endosulfan supplied by France. A representative sample is enclosed showing the date of manufacture as 02/04/2008 and date of expiry as 02/04/2010 .This particular sample (Brand: CAIMAN ROUGE exported by France) was purchased from Mali. The commercial invoice dated 11th May 2009 is also attached as a proof of sale and purchase.

It is apparent that the notifying countries continued to import, distribute and use Endosulfan contrary to what was conveyed by them to the Convention. Clearly, the notification submitted by Sahelean countries is **inadmissible** in view of this fresh evidence.

Evidence shows that the EU has been the sole supplier of Endosulfan formulations to Sahelean countries even after the alleged final regulatory action of banning import of Endosulfan came into effect.

Perhaps, explanation must be sought both from the EU and the Sahelaen Countries on this matter.

The Secretariat would recall that ICC had earlier brought to light a similar false/ incorrect notification submitted by Ivory Coast.

II Notification by European Union/Community

The European Community, in its communication dated 3rd Oct 2006, submitted a notification conveying final regulatory action concerning Endosulfan. It showed the date of entry of its regulatory action as 2nd June 2006. It also indicated that four of its member states (Greece, Spain, Italy and Poland) would use Endosulfan till 30th June 2007.

While deciding on the EC's notification, the Chemical Review Committee observed the following:

"The Committee took into account that the considerations underlying the final regulatory action are not of limited applicability since all uses have been banned"

Ref: UNEP/FAO/RCCRC.3/15
UNEP/FAO/RC/CRC.5/5 Add.1

However, it has now been revealed that Italy, a member state of the EU used Endosulfan both in the year 2008 and in 2009.

A copy of Italian Government order (Dt. 07.04.2008) authorizing use of Endosulfan for the year 2008 is enclosed.

The web link below carries information about similar order issued in the year 2009.

http://www.nocciolare.it/pagine-indipendenti/prodotti-registrati-2009

The European Community had earlier communicated to the Convention that it had banned all uses of Endosulfan by way of final regulatory action.

Under the Convention, Final Regulatory Action means "*an action taken by a Party that does not require subsequent regulatory action by that Party...*"

Banned Chemical means *"a chemical all uses of which within one or more categories have been prohibited by final regulatory action"*

The decision by the European Community/Commission to reintroduce Endosulfan in Italy goes against what it submitted to the Convention.

There is no mention in the CRC reports/ decisions that the European Community continued to use Endosulfan in Italy. It is clear that this important piece of information was not brought to the notice of the CRC.

In view of annual/seasonal use of Endosulfan in Italy (in 2008 and 2009) even after the EC had submitted its notification, the European Commission must rescind its notification. Its notification goes against the basic tenets *final regulatory action* and *banned chemical* as understood in the Rotterdam Convention. The matter must also be reported to the next COP.

S.Ganesan
Chairman
International Treaties Expert Committee
Indian Chemical Council

9th march 2010

Encl: A copy of Italian Government order (Dt. 07.04.2008).