



International POPs Elimination Network

Legal Analysis of Request by India for an Extension of Its Specific Exemption to Produce and Use DDT as an Intermediate in the Production of Dicofol

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QUESTION PRESENTED

Has India justified its continuing need for the registration of its specific exemptions allowing for the production and use of DDT as an intermediate in the production of dicofol, such that the Stockholm Convention Conference of the Parties should grant its request for an extension to its specific exemptions?

BRIEF ANSWER

India has not justified its continuing need for the registration of its specific exemptions that allow for the production and use of DDT as an intermediate in the production of dicofol. India's extension request report provided very limited relevant information and failed to address most of the criteria set forth by the Conference of the Parties. With such scant information, the Conference of the Parties cannot know if India met the criteria. Therefore, because of the dearth of relevant information provided by India, the Conference of the Parties should not grant India's request for an extension to its specific exemptions for the production or use of DDT as an intermediate in the production of dicofol.

STATEMENT OF FACTS AND APPLICABLE PROVISIONS

The Stockholm Convention on Persistent Organic Pollutants (POPs) is intended "to protect human health and the environment from persistent organic pollutants."¹ A fundamental way in which the Convention achieves its objective is by preventing releases of POPs chemicals into the environment. Parties to the Convention are thus obligated either to eliminate or to restrict their production and use of POPs. The Convention contains limited exceptions to that obligation; for example, DDT is among the chemicals that can still be used or produced, but only for an "acceptable purpose" or by a "specific exemption."² Acceptable purposes for DDT production and use are limited to disease vector control, while specific exemptions are for the use and production of DDT as an intermediate in the production of dicofol. In the latter case, a Party can register for a specific exemption for the production or use of DDT as an intermediate in the production of dicofol by notifying the Convention Secretariat.³

¹ See generally STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (POPs) (2001), http://chm.pops.int/Portals/0/Repository/convention_text/UNEP-POPS-COP-CONVTEXT-FULL.English.PDF.

² See Stockholm Convention, Annex B.

³ *Id.*, art. 4, para. 3.

Under Article 4 of the Convention, “all registrations of specific exemptions shall expire five years after the date of entry into force of this Convention with respect to a particular chemical.”⁴ However, Article 4 gives the COP the discretion to extend a Party’s specific exemption for up to five years.⁵ To request an extension, a Party “shall submit a report to the Secretariat justifying its continuing need for registration of that exemption. The report shall be circulated by the Secretariat to all Parties. The review of a registration shall be carried out on the basis of all available information. The Conference of the Parties may make such recommendations to the Party concerned as it deems appropriate.”⁶

Although the Convention provided for the possibility of extensions of specific exemptions, it did not specify the requirements that a Party must comply with in requesting an extension. Moreover, the Convention did not establish a process for reviewing a Party’s request, nor did it provide the criteria that the COP should use to evaluate an exemption request report. The COP at its first meeting therefore adopted a review process (which it subsequently revised at its third meeting) for deciding whether or not to grant a request for an extension to a specific exemption.⁷ At its second meeting, the COP specified the criteria that “shall be taken into account” when it reviews a Party’s request for an extension of a specific exemption.⁸ Under the Convention, a Party must register separate specific exemptions to *produce* and *use* DDT as an intermediate in the production of dicofol. The COP consequently enumerated specific criteria that it will apply when reviewing a request report for an extension of a specific exemption to *produce* DDT, and separate criteria that it will use to review extension request reports for a specific exemption for the *use* of DDT.⁹

The criteria for reviewing an extension request report for a specific exemption for the *production* of DDT as an intermediate in the production of dicofol are:

- (a) The Party has submitted a justification for the continuing need for the exemption pursuant to paragraph 6 of Article 4 of the Convention that establishes that the extension is necessary for health or safety or is critical for the functioning of society;
- (b) The national implementation plan required by Article 7 of the Convention (as originally submitted or as updated in accordance with Article 7) contains a strategy aimed at phasing out the production for which the extension is requested as soon as is feasible;
- (c) In accordance with the strategy in subparagraph (b) above, all feasible measures have been taken by the Party to minimize the production of the chemical for which the extension is requested, including legal or administrative measures, as well as to prevent illegal production and human exposure and release into the environment;
- (d) The chemical for which the extension is requested is not available in sufficient quantity and quality from existing stockpiles, bearing in mind the need for the chemical by developing countries or countries with economies in transition; and

⁴ *Id.*, para. 4.

⁵ *Id.*, para. 7.

⁶ *Id.*, art. 4, para. 6.

⁷ See Conference of the Parties, Decision SC-1/24, annex 1, *Review process for entries in the Register of Specific Exemptions* (May 2005), <http://chm.pops.int/Portals/0/Repository/COP1/UNEP-POPS-COP.1-SC-1-24.English.PDF>, revised in Decision SC-3/3, annex, *Revised process for the review of entries in the Register of Specific Exemptions* (May 2007), <http://chm.pops.int/Portals/0/Repository/COP3/UNEP-POPS-COP.3-SC-3-3.English.PDF>.

⁸ Conference of the Parties, Decision SC-2/3, para. 3, *Review process for entries in the Register of Specific Exemptions* (May 2006), <http://chm.pops.int/Portals/0/Repository/COP2/UNEP-POPS-COP.2-SC-2-3.English.PDF>.

⁹ The criteria relating to production are found in Part A of the annex to Decision SC-2/3, and the criteria relating to use are found in Part B of that annex.

(e) In the case of a developing country Party or a Party with an economy in transition, the Party has requested technical assistance pursuant to Article 12 or financial assistance pursuant to Article 13 of the Convention in order to phase out as soon as is feasible the production for which the extension is requested.¹⁰

The criteria that the COP shall apply when reviewing a request for an extension to a specific exemption for the *use* of dicofol are:

- (a) The Party has submitted a justification for the continuing need for the exemption pursuant to paragraph 6 of Article 4 of the Convention that establishes that the extension is necessary for health or safety or is critical for the functioning of society;
- (b) The national implementation plan required by Article 7 of the Convention (as originally submitted or as updated in accordance with Article 7) contains a strategy aimed at phasing out the use for which the extension is requested as soon as is feasible;
- (c) There are no technically and economically feasible alternatives that are available and acceptable to the Party from the standpoint of environment and health and that can entirely replace the use in the Party as from the expiry date of the specific exemption;
- (d) In accordance with the strategy in subparagraph (b) above, all feasible measures have been taken by the Party to minimize the use, including legal or administrative measures, and to prevent illegal use of the chemical for which the extension is requested;
- (e) In accordance with the strategy in paragraph (b) above, the Party has adopted measures to prevent or minimize human exposure to and release into the environment of the chemical for which the extension is requested and to ensure availability of public information regarding release prevention controls; and
- (f) In the case of a developing country Party or a Party with an economy in transition, the Party has requested technical assistance pursuant to Article 12 of the Convention in order to phase out as soon as is feasible the use for which the extension is requested.¹¹

India submitted to the Secretariat an extension request report for its specific exemptions to *produce* and *use* DDT as an intermediate in the production of dicofol. The report consisted of five pages and focused primarily on the types of mites that plague India, India's widespread use of dicofol, the advantages of dicofol as a miticide, and the higher costs of two alternative miticides. Thus far, no other Party to the Convention, aside from India, has requested an extension for any specific exemption.¹² The COP's review of India's request at COP-4 will, accordingly, be the first such review and will establish the precedents that will likely guide any subsequent reviews of requests that may be made for exemption extensions under the Convention.

The fourth Stockholm Conference of the Parties will meet 4-8 May 2009. The COP "shall decide" whether to grant a Party's request for an extension to its specific exemption "prior to the expiry date of the exemption."¹³ India's specific exemptions for the production and use of DDT as an intermediate in the production of dicofol expire in May 2009.¹⁴ Because COP-4 will be the last time the COP will meet before

¹⁰ Conference of the Parties, Decision SC-2/3, annex, paras. (A)(1)(a)-(e).

¹¹ *Id.* annex, paras. (B)(2)(a)-(f).

¹² Email from Paul Whyllie, Programme Officer, Office of the Secretariat of the Stockholm Convention, to Jennifer Round, (Feb. 19, 2009) (on file with CIEL).

¹³ Conference of the Parties, Decision SC-3/3, annex, para. 5.

¹⁴ Paragraph 4 of Article 4 states that "all registrations of specific exemptions shall expire five years after the date of entry into force of this Convention with respect to a particular chemical." DDT was among the original "dirty dozen" POPs listed in the Convention, and thus the five-year expiration period started to toll when the Convention entered into

the expiration of India's specific exemptions, the COP must review India's report requesting extensions to its specific exemptions before the conclusion of COP-4. Similarly, the review process for evaluating India's request for an extension will "expire at the end of" COP-4.¹⁵ However, if the COP cannot make a decision during the meeting, the COP can extend the review process and consider the request further.¹⁶

ANALYSIS

I. The Conference of the Parties Should Not Grant India's Request for an Extension of Its Specific Exemption to *Produce* or *Use* DDT.

The COP should not grant India's request for an extension to its specific exemption for the production or use of DDT as an intermediate in the production of dicofol. The COP, in Decision SC-2/3, enumerated multiple conditions¹⁷ to be applied when reviewing a Party's request for an extension to a specific exemption for the production or use of DDT as an intermediate in the production of dicofol. Although the language of the body of Decision SC-2/3 is somewhat ambiguous as to whether all of the conditions must be satisfied before the COP may grant an extension,¹⁸ the annex of the decision is more explicit, stating that the COP "may" grant an extension "if the . . . conditions have been met."¹⁹ This plain text logically suggests that the COP may *not* grant a Party's request for an extension if the Party has *not* met the conditions.

Moreover, the most reasonable interpretation of this language is that a Party must satisfy *all* of the enumerated conditions before the COP may grant an extension. The COP may, in its discretion, decide that developing country Parties should receive some leeway in the requirement to fulfill every condition. The COP may thus wish to take into account a developing country Party's efforts to meet each condition to the best of its ability. Regardless, the COP, by including the conditions enumerated in Decision SC-2/3, asserted that *all* of the conditions are important and that each condition should be given significant weight when reviewing a Party's request for an extension. A Party to the Convention that has requested an extension to a specific exemption should, therefore, provide in its report sufficient information about how it has met each condition, or, at a minimum, the steps it has taken in its attempt to satisfy each of the conditions listed in Decision SC-2/3.

force in May 2004. Therefore, the specific exemptions of all Parties for the production and/or use of DDT as an intermediate in the production of dicofol expire in May 2009. However, India recorded in the Register of Specific Exemptions that its specific exemptions to produce and use DDT do not expire until April 2011, which would be five years from the date that India ratified the Convention. See <http://chm.pops.int/Programmes/Exemptions/RegisterofSpecificExemptions/tabid/171/language/en-US/Default.aspx>. India's claim that its specific exemptions do not expire until April 2011 plainly contradicts Art. 4, Para. 4 of the Convention and is unfounded.

¹⁵ Conference of the Parties, Decision SC-3/3, annex, para. 6.

¹⁶ *Id.*

¹⁷ The words "conditions" and "criteria" are used interchangeably in this memo because they were used as such in Decision SC-2/3.

¹⁸ Paragraph 1 of Decision SC-2/3 "Adopts . . . the criteria to be applied in the review process... [which] is set out in the annex to the present decision." Thus Paragraph 1 seemingly mandates that the COP apply all of the criteria when reviewing a Party's request. However, the language of Paragraph 3 of Decision SC-2/3 is more ambivalent, requiring merely that "the criteria set out in the annex to the present decision shall be *taken into account* by the Conference when it considers the review process. . . ." The phrase "take into account" seems to imply that the COP has the discretion to deny or grant a request for an extension if it is satisfied that enough of the conditions have been met. This discrepancy in the wording of these two paragraphs could be explained by the COP's concern with demanding unrealistic obligations of developing countries. Thus in an attempt to avoid overburdening a Party that does not have the capacity to satisfy all of the conditions completely, the COP used the phrase "take into account" to give itself the ability to grant an extension to a developing state that has proved that it has fulfilled the criteria to its utmost capabilities.

¹⁹ Decision SC-2/3, annex, paras. (A)(1) and (B)(2).

India's superficial treatment of the report makes it impossible for the COP to apply the criteria set out in Decision SC-2/3. India's report addressed only one of the five criteria to be considered in the review of an extension for the *production* of DDT as an intermediate in the production of dicofol. Additionally, India addressed only two of the six criteria to be considered in the review of an extension for the *use* of DDT as an intermediate in the production of dicofol. SC-2/3 requires that the COP apply the criteria enumerated in that decision; by failing to provide any information about how it has satisfied—or even taken steps to attempt to satisfy—the majority of the conditions, India has made it impossible for the COP to adhere to the terms of its Decision SC-2/3. Moreover, the information that India did provide does not demonstrate that India has satisfied the relevant conditions. Thus, without more substantial information addressing India's progress in fulfilling every condition enumerated in Decision SC-2/3, the COP has no basis upon which it can conclude that India has met the required conditions, and it should not grant India's request for an extension of these specific exemptions.

This section deals first with each of the five criteria relevant to India's request for an extended *production* exemption and, second, with each of the six criteria relevant to India's request for an extended *use* exemption.

A. India's Production Exemption Request

India's extension request report did not provide sufficient information for the COP to grant India's request for its continued specific exemption to produce DDT as an intermediate in the production of dicofol. Decision SC-2/3 enumerated five criteria that India should show it has satisfied in its extension request report. While India has arguably addressed one of the five criteria, it failed to provide any information at all that addresses the other four criteria. Hence, India did not provide adequate information for the COP to grant India's exemption extension request, because the COP cannot apply the criteria as required by SC-2/3 if it does not have information about each condition. Additionally, although India could argue that it *addressed* the first condition, India did not demonstrate that it had *met* the condition. Because India has not met any of the required conditions, the COP should not grant India's request for an extension to its specific exemption to produce DDT as an intermediate in the production of dicofol.

1. Condition One

The first condition requires that a Convention Party must “establish[] that the extension. . . is critical for the functioning of society.”²⁰ India's report requesting an extension focused almost exclusively on establishing that major food and cash crops were “severely infested every year by various types of mites.”²¹ India further claimed that dicofol is the “most important and major tool for protection of agricultural field crops from mite infestation” and that it is “highly effective in controlling all types of mites.”²² India also asserted that the alternative miticides propergite and fenazaquin “are more than quadruple” the cost of dicofol,²³ and thus dicofol “is the most cost effective miticide in India.”²⁴

Although India repeatedly declared the importance of dicofol to Indian agriculture, it did not assert, let alone demonstrate, that dicofol was critical for the functioning of society in India. India repeatedly stated that mites are a serious threat to India's agriculture and that dicofol is an effective and low cost miticide. However, India never claimed or substantiated that dicofol was the most effective miticide available. India

²⁰ *Id.* annex, para. (A)(1)(a).

²¹ Letter from the Permanent Mission of India to the United Nation's Offices, to the Secretariat of the Stockholm Convention on Persistent Organic Pollutants (May 2, 2008) at 2.

²² *Id.* at 3.

²³ *Id.* at 5.

²⁴ *Id.* at 4.

listed “advantages” to dicofol as a miticide, but never asserted that other miticides did not offer similar advantages.²⁵ Moreover, although India claimed that dicofol is the most cost effective miticide in India and, by way of proof, offered the higher prices of two alternative miticides, propergite and fenazaquin, India never claimed that these alternatives were the only other available options; indeed, India did not explain how or why the higher price of these two alternatives proves that dicofol is “is the most cost effective miticide in India.” Thus, India circumvented the question of whether there are other effective miticides available that are more cost effective than propergite or fenazaquin. By providing such vague information, India avoided disclosing whether it has developed or has access to other alternative miticides to dicofol and, if so, what their effectiveness and cost may be. This is essential information, because if effective and reasonably priced alternative miticides exist, then dicofol cannot be “necessary for the functioning” of India’s society.²⁶

Furthermore, regarding propergite and fenazaquin, the two alternative miticides that India mentioned in its extension request report, India never asserted that these miticides were so much more expensive than dicofol that it was economically unfeasible to replace dicofol with them. Instead, India merely maintained that dicofol was the “most cost effective miticide in India.”²⁷

Even if for the sake of argument that were true, it does not mean that India’s society cannot function if India’s exemption allowing it to produce DDT is not extended. Stockholm Convention Parties cannot reasonably expect that their efforts to comply with the Convention can all be undertaken without expense. Unless alternative miticides are so expensive that their use is economically impossible, and unless the loss of such use would impair the functioning of Indian society, India’s commitments under the Convention require it to assume the cost of a DDT-free miticide after its exemption expires. Hence, in the absence of more substantial information backed up by objective evidence, India’s claim that “dicofol as a miticide is essential for mite pest management in India agriculture”²⁸ is, at best, speculative and tenuous. Although India arguably *addressed* this first condition by asserting that dicofol is crucial to India’s agriculture, India failed to *meet* the condition, because it did not demonstrate that dicofol was critical to the functioning of India’s society.

2. Condition Two

The second condition that the COP is to apply in its review process is that the applicant Party’s National Implementation Plan (NIP) must contain a strategy for phasing out the production of DDT as an intermediate in the production of dicofol.²⁹ This condition requires that India’s extension request report must explain how its NIP has addressed its dependence on DDT in the production of dicofol, and how India plans to wean itself off of DDT production as it is used as an intermediate to produce dicofol. India’s report provided no information addressing this second condition. Neither did India’s report mention its NIP nor any plan for reducing, let alone discontinuing, its production of DDT as an intermediate in the production of dicofol.

In fact, India has yet to transmit its NIP to the COP; at the time of this writing, India’s NIP was more than nine months overdue.³⁰ India’s failure to comply with the mandatory Convention requirement to transmit its NIP is a crucial consideration in assessing whether to grant India’s exemption extension request. Developing and transmitting a NIP is among the most basic commitments a Party makes under the

²⁵ *Id.*

²⁶ Decision SC-2/3, annex, para. (A)(1)(a).

²⁷ Letter from Permanent Mission of India at 4.

²⁸ *Id.* at 5.

²⁹ Decision SC-2/3, annex, para. (A)(1)(b).

³⁰ See Stockholm Convention on Persistent Organic Chemicals – National Implementation Plans, <http://chm.pops.int/Countries/NationalImplementation/tabid/253/language/en-US/Default.aspx>.

Convention. India's failure to do that—including its transmittal of a plan to wean itself from DDT production—strongly suggests that India has no intention of weaning itself from DDT production.

If India had transmitted its NIP as required by the Convention, the COP could, on its own initiative, review it to determine whether it included a strategy for phasing out the production of DDT. However, because India failed, and continues to fail, to transmit its NIP, the COP does not have that option. Hence, the COP cannot determine whether India has even attempted to develop a phase out strategy for its DDT production. The COP has no choice but to conclude that India has not met this second condition of the review process.

3. Condition Three

The third condition of Decision SC-2/3 requires that India take all feasible steps to minimize the production of DDT as an intermediate in the production of dicofol and to prevent the illegal production of, and human exposure to, DDT.³¹ India provided no information regarding this third condition. To satisfy the third condition, India would have needed to demonstrate three things. First, India's report should have described the measures India has taken to reduce as much as possible its production of DDT as an intermediate in the production of dicofol. India's report made no mention of any initiatives it has taken to do that. Second, India's report should have discussed the steps India has taken to thwart any illegal production of DDT. Again, India provided no information about any steps it has taken to prevent the illegal production of DDT. Finally, India's report should have addressed what, if anything, it has done to prevent human exposure to DDT and its release into the environment. Once more, India did not provide any information about this requirement.

Without information on the measures that India has taken to minimize the production of DDT, to prevent the illegal production of DDT, and to prevent human exposure to DDT and its release into the environment, the COP cannot determine whether India has taken any, let alone *all*, feasible steps to minimize its production of DDT. Therefore, the COP has no choice but to conclude that India has not met this third condition.

4. Condition Four

The fourth condition contained in the "Production" section of the Annex to Decision SC-2/3 is that the requesting Party must prove that DDT is not available in stockpiles of sufficient quantity and quality to be used as an intermediate in the production of dicofol.³² Thus, to meet this condition, India needed to demonstrate that it does not have ample amounts of DDT stockpiled that could be used to produce dicofol. In its report requesting an extension, India made no statements regarding the existence, or lack thereof, of stockpiles of DDT. Without more information, the COP cannot determine if India has *any* stockpiles of DDT, let alone stockpiles of the quantity and quality necessary to produce dicofol. Therefore, the COP has no choice but to conclude that India has not met this fourth condition.

5. Condition Five

The fifth condition requires that a developing country Party or a Party with an economy in transition has requested the technical and/or financial assistance necessary to phase out its production of DDT as soon as is feasible.³³ India said nothing on this subject in its report requesting an extension to its specific exemption. Thus the COP has no information as to what assistance India may require to phase out its

³¹ Decision SC-2/3, para. (A)(1)(c).

³² *Id.*, para. (A)(1)(d).

³³ *Id.*, para. (A)(1)(e).

production of dicofol, nor can it know whether India has requested any such assistance. Because India has not provided any information that would allow the COP to determine whether India has fulfilled the fifth condition, the COP has no choice but to conclude that India has not met it.

6. Conclusion to the Analysis of the Production Exemption

The information that India provided for the COP did not adhere to the guidelines adopted in Decision SC-2/3 applicable to India's request for an extension to its specific exemption to produce DDT as an intermediate in the production of dicofol. India failed to address four of the five conditions that the COP is required to take into account when deciding whether or not to grant an extension. For the one condition that India did address, India provided information that was far too vague and extraneous to establish that it had *met* the condition.

With such little information, the COP cannot adhere to the rules it adopted in Decision SC-2/3, because it cannot take into account all of the conditions required by the decision. Without this information, the COP has no basis upon which it can conclude that the "conditions have been met."³⁴ Because India has failed to meet the required conditions, the COP should not grant India's request for an extension to its specific exemption that allows it to produce DDT as an intermediate in the production of dicofol.

B. India's Use Exemption Request

The extension request report that India submitted to the Secretariat does not supply enough information for the COP to grant an extension of India's specific exemption to *use* DDT as an intermediate in the production of dicofol. Decision SC-2/3 establishes six conditions that India needs to demonstrate it has met; further, it requires the COP to consider all of the enumerated conditions in evaluating India's request. While India provided some information related to two of the six conditions, it provided no information at all about the other four. Thus, the information that India provided was insufficient for the COP to review India's exemption extension request as required by Decision SC-2/3. India needs to provide information about all of the conditions enumerated in Decision SC-2/3 before the COP may grant India an extension for its exemption to use DDT. Moreover, it is not enough that India may make claims of compliance that are based merely on vague or partial information (as India did for conditions one and three). Rather, India should provide pertinent and comprehensive information that actually demonstrates India's compliance with Decision SC-2/3. Because India supplied very limited information and because the information it did provide was deficient and did not demonstrate India's compliance with Decision SC-2/3, the COP should not grant India's request for an extension of its specific exemption to use DDT as an intermediate in the production of dicofol.

This section first notes that the analysis of conditions one, two, and six related to *use* has been covered in the analysis above on *production*. The balance of the section then deals with conditions three, four, and five, and ends with a short concluding summary.

1. Conditions One, Two, and Six

Conditions one, two, and six of the criteria to be considered by the COP for granting India an extension for the *use* of DDT as an intermediate in the production of dicofol are the same as conditions one, two, and five, respectively, for determining if an extension for the specific exemption for *production* of DDT should be granted. Because the conditions for production and use are the same, the analysis of India's compliance with them for use is the same as the analysis in the preceding section for conditions one, two, and

³⁴ See Decision SC-2/3, annex, paras. (A)(1) and (B)(1).

five for the specific amendment for production. Thus the analyses for those conditions will not be restated here. Please refer to Section A.1, 2, and 5 above.

2. Condition Three

The third condition of use requires India to prove that there are no technically or economically feasible alternatives available and acceptable from a health and environment standpoint that could wholly replace the use of DDT as an intermediary after the specific exemption expires.³⁵ In other words, India must either show that (1) there is no acceptable alternative that is healthier or more environmentally friendly than the use of DDT as an intermediate in the production of dicofol, or (2) even if there is an acceptable alternative that is healthier or more environmentally friendly, it will not be feasible for India to replace DDT use with the alternative by the time that its current exemption expires, because India's technology is lacking, or because the alternative is too expensive for India entirely to replace the use of DDT with this alternative.

India's extension request report did not explicitly state that there are no practicable alternatives to DDT use in the production of dicofol. Instead, it discussed two dicofol alternatives: propergite and fenazaquin.³⁶ In its report, India never claimed that dicofol was better from an environmental perspective than propergite or fenazaquin. Instead, India stated the positive and negative hazardous properties of each miticide. India asserted that "dicofol is slightly toxic to birds and non-toxic to honeybees and other pollinators and does not cause harm to other beneficial predators"; propergite is "highly toxic to fish [and] slightly toxic to honeybees"; and fenazaquin has a "high mammalian toxicity[, is] highly toxic to fish, [and] slightly toxic to honeybees."³⁷ India was not explicit about why it listed the pros and cons of each miticide; it may have been attempting to demonstrate that dicofol is no worse (and possibly better) for the environment than the two alternatives, and that India therefore has no better alternative than dicofol, from an environmental perspective. Nevertheless, by simply making unsubstantiated claims that purport to compare the hazardous properties of three miticides, and without undertaking any analysis of which is the most environmentally friendly and why, India failed to establish that there are no better alternatives to dicofol, from an environmental standpoint.

India did not address whether there are safer alternatives to dicofol from a health standpoint. Additionally, India did not address the question of whether it may face technological limitations in adopting alternatives. Instead, India emphasized the economic limitations of propergite and fenazaquin, claiming that "dicofol as a miticide in India is of great significance and importance because of its effectiveness and affordability."³⁸ India went on to state that while dicofol costs \$5.9 per hectare per application, propergite costs \$20 per hectare and fenazaquin costs \$35.³⁹ India apparently was contending that dicofol alternatives are more expensive, and thus implicitly suggesting that it would not be economically feasible to replace dicofol with them.

³⁵ *Id.*, para. (B)(2)(c).

³⁶ Letter from Permanent Mission of India at 4. India did not specifically mention its use of DDT, but rather spoke of its exemption only in terms of dicofol. Thus India made no claims about alternatives to DDT use, only alternatives to dicofol use. Moreover, India did not prove, or even explicitly claim, that these two alternatives are the only alternatives to the use of DDT as an intermediate in the production of dicofol.

³⁷ *Id.* It should be noted that India does not address dicofol's toxicity in relation to fish. This memo does not undertake to confirm nor disprove India's claims. Instead, the memo examines India's claims in the context of whether or not they have provided sufficient information for the COP to grant its request for an extension. Nevertheless, it should be noted that India provided unsubstantiated claims about the relative *hazards* of these three miticides, while saying nothing about their respective *risks*, which would be essential in evaluating whether either of these two alternatives may be environmentally superior to dicofol.

³⁸ *Id.* at 5.

³⁹ *Id.*

However, it does not logically follow that because an alternative is more expensive, it is not economically feasible to replace dicofol with it. This is evidenced by India's current use of these alternatives. Although India did not provide information regarding how widespread the current usage of the alternative miticides is, India did give information about the annual consumption rates of the three miticides. India stated that the annual consumption of dicofol in India is 200-250 MT, while the annual consumption rate of propergite is 85 MT, and the annual consumption of fenazaquin is 5 MT.⁴⁰ Hence, if the consumption rate reflects the usage rate, then these two alternatives combined are already used more than one-third as much as dicofol. This suggests that replacing dicofol with these alternatives is not unfeasible. On the contrary, these consumption rates suggest that replacing dicofol is very feasible, because India is already doing so to a significant extent.

Moreover, India never asserted that propergite and fenazaquin are the only alternatives to dicofol. Thus it remains uncertain as to whether there may be other alternative miticides available to India that are less expensive, or more environmentally friendly, than propergite or fenazaquin.

In light of these considerations, India failed to demonstrate that, from a health or environmental standpoint, there are no technically and economically feasible alternatives to dicofol that can replace dicofol after India's specific exemption expires. Accordingly, the COP should conclude that India did not meet the third condition.

3. Condition Four

The fourth condition of the "Use" section of the Annex of Decision SC-2/3 requires that India demonstrate that, in accordance with its NIP, it has taken all feasible measures to minimize the use of DDT and to prevent the illegal use of DDT as an intermediate in the production of dicofol.⁴¹ In its extension request report, India failed to mention any measures it has taken to reduce its use of DDT as an intermediate in the production of dicofol. Moreover, India did not cite any steps it has taken to prevent the illegal use of DDT. Hence, because the COP has no information about the measures India has taken to minimize its use of DDT or to prevent the illegal use of DDT, the COP cannot determine if India has taken any, much less *all*, feasible measures to minimize the legal and illegal use of DDT as an intermediate in the production of dicofol. Because India has not provided any information that would allow the COP to determine whether India has fulfilled this fourth condition, the COP has no choice but to conclude that India has not met it.

4. Condition Five

To satisfy the fifth condition, India must demonstrate that, in accordance with its NIP, it has adopted measures to prevent or minimize both human exposure to DDT and the release of DDT into the environment. India must also show that it has ensured that information about release prevention controls is available to the Indian public.⁴² India did not report any measures it has taken to prevent or minimize human exposure to DDT or the release of DDT into the environment. Likewise, India did not provide any information about steps it has taken to guarantee that the Indian public has access to information about release prevention controls. Because India provided no information about these things, the COP cannot determine if India has satisfied the fifth condition, and the COP has no choice but to conclude that India has not met it.

⁴⁰ *Id.* at 4-5.

⁴¹ Decision SC-2/3, para. (B)(2)(d).

⁴² *Id.*, para. (B)(2)(e).

5. Conclusion to the Analysis of the Use Exemption.

The information that India provided to the COP did not adhere to the guidelines the COP adopted in Decision SC-2/3. India failed to address four of the six conditions that the COP is required to take into account when deciding whether or not to grant an extension of the use exemption. For the two conditions that India did address, India failed to provide information that demonstrated that it had *met* the conditions.

With so little information, the COP cannot take into account all of the conditions as required by the rules it adopted in Decision SC-2/3, and it has no basis upon which it can conclude that the “conditions have been met.”⁴³ Moreover, the information that India did supply did not demonstrate India’s compliance with any of the conditions. Because India has failed to meet the required conditions, the COP should not grant India’s request for an extension to its specific exemption that allows it to use DDT as an intermediate in the production of dicofol.

CONCLUSION

The COP should not grant India’s request for an extension of its specific exemptions for the *production* or the *use* of DDT as an intermediate in the production of dicofol. Decision SC-2/3 requires the COP to take into account all of the conditions enumerated in that decision. For the COP to grant India’s request, India should have demonstrated that it has satisfied each condition or, at a minimum, that it has at least attempted to satisfy each condition. Because India neglected to provide any information about the majority of the conditions, and because India failed to demonstrate that it had satisfied the conditions that it arguably addressed, the COP should not grant India’s request for an extension to its specific exemption to *produce* or *use* DDT as an intermediate in the production of dicofol.

⁴³ See Decision SC-2/3, annex, paras. (A)(1) and (B)(2).