

ICC

Indian Chemical Council

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To
Executive Secretary
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Sir,

Subject : Information & comments on proceedings/ deliberations of POPRC-3 and decision to defer EU notification concerning Endosulfan to POPRC-4.

Indian Chemical Council (ICC) regularly attends meetings of Stockholm Convention as an observer representing Indian chemical industry and has earned wide recognition over years for voicing common concerns of chemical industries in developing world.

The undersigned attended POPRC-3 held in Geneva (19-23rd Nov 07) as an observer and would like to place on record certain events & developments chronologically in this communication. It traces the origin of EU-Endosulfan notification, explains what actually happened at the meeting of POPRC-3 concerning this notification and finally raises several strong questions- all in the interests of implementation of Stockholm Convention.

Soon after completion of COP-3 of Stockholm Convention in Senegal (30th April-4th May 07), Mr. Meriel Watts of PANAP(Pesticides Action Network of Asia Pacific) prepared and circulated a report in public domain(internet) that stated :

- *Very good networking on Endosulfan, especially with Europe, Norway, Turkey, Pacific Islands and the University of United Nations.*

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- *Very positive indications that Endosulfan will be nominated to the Stockholm Convention.*
- *A promise from EU that we [PAN] can access the EU dossier on Endosulfan[to be submitted to Stockholm Convention's Secretariat].*

Ms. Linda Craig of PAN UK claimed having “*assurances that one country will put forward Endosulfan for inclusion on the POPs list*”

The report ended with a note that “*when Endosulfan is put forward for POP listing..... PAN would need to work on a clear plan through to the 2009 COP-4.*”

The forecast of PAN indeed became a reality on 11th July 07, when European Commission(EC) released a communication in Brussels making public its decision to nominate two pesticides - Endosulfan and Trifluralin to Stockholm Convention.

While, PAN's priori knowledge of EU's notification is a matter for European Commission to worry about, dispassionate observers to the Convention would definitely disapprove and deplore the nexus between PAN and EU.

On 26th July 07, European Commission sent a letter to Stockholm Convention which stated:

“Having taken due account of Annex D of the Convention, it has been shown that Endosulfan exhibits characteristics of persistent organic pollutants.

The European Commission, on behalf the European Community together with Member States of the European Union which are Parties to the Convention propose to amend the relevant annexes to the Convention by adding the following substance:

- Endosulfan (CAS Number 115.29.7)

Find enclosed a dossier with the necessary information in support of this proposal. We ask the Secretariat to forward this proposal to the next meeting of the POP Review Committee in November 2007.

Though its original decision was to nominate two pesticides- Endosulfan and Trifluralin- the EC subsequently nominated only one i.e. Endosulfan in its communication to Stockholm Convention's Secretariat.

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The dossier submitted for Endosulfan by EC on 26th July07 had 64 pages with 191 references.

Paragraph 2 of Article 8 of Stockholm Convention states:

“ The Secretariat shall verify whether the proposal contains the information specified in Annex D. If the Secretariat is satisfied that the proposal contains the information so specified, it shall forward the proposal to the Persistent Organic Pollutants Review Committee”

Accordingly, on 26th Sept 07, the Secretariat published a document bearing reference UNEP/POPS/POPRC.3/INF/10 which expressly said that the **Secretariat was satisfied that EU’s proposal [to nominate Endosulfan] met the requirements of Annex D.**

On 11th October 07, the Secretariat of the Stockholm Convention published annotated provisional agenda for POPRC-3 (UNEP/POPS/POPRC.3/1/Rev.2/Add.1) . Paragraph 25 of this document said :

*“The committee will have before it a note by the Secretariat containing in its annex a proposal submitted by the European Community and its member States that are Parties to the Convention for listing Endosulfan in Annexes A, B or C of the Convention (UNEP/POPS/POPRC.3/5), a document containing background information on this proposal (UNEP/POPS/POPRC.E/INF/9) and a note by the Secretariat on verification of whether the proposal contains the information specified in Annex D of the Convention (UNEP/POPS/PORC.2/INF/10). **An expert designated by the European Community and its member States that are Parties to the Convention will be invited to present the proposal.** The Committee may wish to take note of the information provided in the documents and the presentation and consider the possible action listed in document UNEP/POPS/POPRC.3/5.*

This apparently shows that the Secretariat received a communication from the European Community that the EC would be sending an expert to POPRC-3 to present EU’s notification nominating Endosulfan. (The expert, however, did not show up at the POPRC-3 meeting).

Another document bearing reference UNEP/POPS/PORC.3/5 stated the following as **possible action by POPRC-3** on the EU notification on Endosulfan.

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- (a) *To consider the information provided in the present note and in document UNEP/POPS/POPRC.3/INF9;*
- (b) *To decide whether it is satisfied that the proposal fulfils the requirements of Article 8 and Annex D of the Convention;*
- (c) *To develop and agree on, if it decides that the proposal fulfils the requirements referred to in subparagraph (b) above, a work plan for preparing a draft risk profile pursuant to paragraph 6 of Article 8.*

Clearly, the main task before POP review committee was (b) i.e. to ***decide whether it is satisfied that the proposal fulfils the requirements of Article 8 and Annex D of the Convention.***

Article 8 of the Convention states:

1. *A Party may submit a proposal to the Secretariat for listing a chemical in Annexes A,B and/or C. The proposal shall contain the information specified in Annex D. In developing a proposal, a Party may be assisted by other Parties and/or by the Secretariat.*
2. *The Secretariat shall verify whether the proposal contains the information specified in Annex D. If the Secretariat is satisfied that the proposal contains the information so specified, it shall forward the proposal to the Persistent Organic Pollutants Review Committee.*
3. *The Committee shall examine the proposal and apply the screening criteria specified in Annex D in a flexible and transparent way, taking all information provided into account in an integrative and balanced manner.*
4. *If the Committee decides that:*
 - a) *It is satisfied that the screening criteria have been fulfilled, it shall, through the Secretariat, make the proposal and the evaluation of the Committee available to all Parties and observers and invite them to submit the information specified in Annex E; or*
 - b) *It is not satisfied that the screening criteria have been fulfilled, it shall, through the Secretariat, inform all Parties and observers and make the proposal and the evaluation of the Committee available to all Parties and the proposal shall be set aside.*

Thus the Article 8 expressly makes it clear that:

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- **the POP Review Committee shall examine the proposal by applying the screening criteria of Annex D in a flexible and transparent way.**
- **if the Review Committee is not satisfied that the screening criteria have been fulfilled, the proposal shall be set aside and the evaluation of the Committee in this regard be made available to all Parties.**

This in turn poses some important questions considering what actually happened (rather what had not happened) on the floor of POPRC-3 on the afternoon of 21st Nov 07, when the EU notification on Endosulfan came up for discussion before the committee. The important questions are :

- a) Did any expert designated by the EC and its member states present the EU proposal on Endosulfan before the review committee as earlier communicated by the Secretariat?
- b) Did POPRC-3 examine the EU notification applying the screening criteria specified in Annex-D of the Convention in a flexible and transparent way as mandated?
- c) Did POPRC-3 make available the report of its evaluation of EU notification?

Answers to these questions remain hidden in the following details.

What happened on the floor of POPRC-3 was this:

Around 3.30 pm on 21st Nov 07 ,when the listed agenda (EU's proposal on Endosulfan) came up for discussions, POPRC member(Dr.Jose V. Tarazona of Spain) acting as EU's spokes person tersely announced that the ***EU would like to withdraw its notification*** concerning Endosulfan .Continuing to speak he, however, quickly changed his own words (or was he persuaded to change?) and said that EU wanted the discussions on the notification be deferred to POPRC-4(scheduled to be held in Oct 2008). This shocked the house leading to several questions.

The next day i.e. 22nd Nov 07, the Chair of POPRC-3 Dr.Reiner Arndt discretely moved a motion/decision seeking to defer the discussions on EU notification regarding Endosulfan to the next meeting of POPRC as though such a request was indeed made by the POPRC-3 members themselves!. This motion was hurriedly adopted by POPRC-3.

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Earth Negotiations Bulletin which officially covered the entire proceedings of POPRC-3 had this to say in its on line bulletin about POPRC-3 discussions on EU-Endosulfan notification:

On Wednesday, Tarzana was scheduled to present consideration on of the newly proposed chemical, Endosulfan, for inclusion in Annexes A, B or C (UNEP/POPS/POPRC.3/5, INF/9 and INF/10). He suggested postponing discussions to POPRC-4. He explained a number of problems, internal to the EU (the nominating party), made it impossible to release information necessary to the discussion. Chair Arndt noted that the document currently lacked substantial data relevant to decision making and the UK supported delaying the discussion.

*Thailand and Ecuador asked for clarification, and Ecuador requested a letter of justification from the proposing party and for the Stockholm Convention Legal Adviser to intervene. The Legal Adviser drew attention to the rules of procedure and the Convention text to underscore issues of timeframes for proposals to be made. **South Africa suggested the proposing party note that it withdraws its submission. The UK highlighted that the proposal was made by the EU and its Member States, but the representative of individual Member States lacked the mandate to withdraw the submission.***

China drew attention to a proposal on Endosulfan prepared with Sierra Leone and India, and asked for it to be considered at POPRC-4 if the discussion was postponed. Ecuador stressed that China, India and Sierra Leone's proposal concludes that Endosulfan does not fulfill Annex D criteria – which is the opposite of the EU's conclusion. Chair Arndt proposed holding informal discussions on the issue.

On Thursday, Chair Arndt highlighted that on Wednesday delegates had noted that the EU submission on Endosulfan lacked some data. The legal Adviser read out text to be included in the meeting report, to the effect that ; vital information was missing; the Committee agreed to suspend discussion and postpone consideration of the issue to the next meeting; and this should not set a precedent.

Further to a comment by an observer from India, Chair Arndt invited the notifying party and others to submit information to the Committee before POPRC-4. He further underscored that the proposal by China, Sierra Leone and India would be recorded.

The final report of POPRC-3 ,however ,did not factually record what actually happened at POPRC-3 and misleadingly stated in its final report thus:

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The Committee noted that vital information required for the consideration of Endosulfan had not been made available to it. The Committee agreed to suspend consideration of the chemical at the present meeting and to resume it at its fourth meeting, with the understanding that the required information would be made available in time for that meeting. It was understood that its agreement in this regard would not set a precedent.

The Committee also noted that members from China and Sierra Leone had submitted a conference room paper elaborating their views on the technical details of the proposal to list Endosulfan by which they suggested that the information given therein was inadequate. It was suggested that the conference room paper be resubmitted for consideration by the Committee when it discussed Endosulfan proposal. The Committee invited members and observers to provide, in a timely fashion prior to the Committee's fourth meeting, any further relevant information and data with complete reference.

If one were to seek to cross check the wordings/text of POPRC-3 report with the sound (audio) recording of the discussions that took place on 21st Nov 07, one would come to know the discrepancies between what actually happened on the floor of POPRC-3 and what and how it was finally reported in POPRC-3 report.

I would like to reiterate questions mentioned earlier and raise a few more:

- a) Did any expert designated by the EC and its member States present EU notification on Endosulfan before the review committee as earlier communicated by the Secretariat?
- b) Did EU authorize the POPRC member from Spain to speak on its behalf?
- c) *Article 8(3) states that “the Committee shall examine the proposal and apply the screening criteria specified in Annex D in a flexible and transparent way, taking all information provided into account in an integrative and balanced manner. Did POPRC-3 examine at all, the EU notification applying the screening criteria specified in Annex-D of the Convention in a flexible and transparent way as mandated?*
- d) If yes, did POPRC-3 make available the report of its evaluation of EU notification to all Parties?
- e) The POPRC-3 report reads “*The Committee noted that vital information required for the consideration of Endosulfan had not been made available to it*”. Pray, who was the one in the Committee who decided (hopefully, after examining the EU notification) that some vital information required was not made available?

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- f) What's that missing **“vital information”**?
- g) Did anyone make his/her observations in this regard to all those present over there at POPRC-3 in a transparent manner as mandated by the Convention?
- h) The Convention has not vested POPRC with powers to defer examining a notification placed before it. POPRC has to either accept a notification if valid or set aside the notification if found invalid. Is not, therefore, POPRC-3 decision in plain contravention of Article 8 of the Convention?

Deliberations and recommendations of POPRC have primary importance as they form basis for final policy decision by Conference of Parties (COP). While only about 60 attend POPRC meeting, as much as 500 attend COP. Therefore, a distorted version of the POPRC report should not be allowed to remain on record and reach the COP.

The Convention's text stresses the significance of transparency all through and at every step. Textual version of the discussions in POPRC meetings should not be qualitatively different from the sound (audio) recording. The text report of POPRC should not lend itself susceptible to any allegations of *suppressio veri and/or suggestio falsi*

ICC suggests that audio recorded version of POPRC-3 discussions (especially the ones focused on EU notification on 21st and 22nd Nov 07) be made available to all concerned/connected so that necessary rectifications be made on the final report of POPRC-3 by members of POPRC at the next meeting.

Indian Chemical Council(ICC) is deeply concerned that the rules of procedure and the text of the Convention were not diligently followed while dealing with the Endosulfan notification submitted by the European Commission. The decision to defer EU notification to POPRC-4 without examining it is procedurally wrong. This decision is in plain contravention of Article 8 of the Convention.

ICC is of the firm opinion that the purported decision of POPRC-3 Chair on EU notification lacks merit. The Convention does not permit a submitted notification be kept in a state of suspended animation without subjecting it to screening criteria specified in Annex D. The EU notification on Endosulfan placed before POPRC-3 has, therefore, lost its validity and can not be considered again at POPRC-4.

Besides, ICC regrets to have to observe that the POPRC member from Spain acted with grave abuse of discretion amounting to lack and /or excess of assigned powers and responsibilities when as a member of the review committee he chose to speak for and on behalf of EU, the notifying Party. He prevaricated too. He said initially that EU would like to “withdraw” the notification and subsequently said that the discussion on EU notification be postponed to next POPRC.

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How could he do or say all this as a member of POPRC?

The EU/EC owes an explanation to all concerned about the whole episode.

Legal opinion may be required to know if Article 8 of the Convention in general and Article 8(4)(b) in particular lends itself be considered optional or unimportant or redundant under any situation/circumstances.

Legal opinion may also be required on certain other questions raised in this communication.

Stockholm Convention contains several Specific Trade Obligations (STOs) and is considered to be one of the most important Multilateral Environment Agreements (MEAs) in the era of WTO. Therefore, the procedures followed, discussions held and decisions made must all be seen and shown to be in strict and scrupulous adherence to the text of the Convention as finalized by Conference Of Parties (COP).

ICC would like to request the Secretariat to respond at the earliest to various issues/questions raised in this communication and to circulate this, together with the reply, among all those who attended POPRC-3 and also make it available at POPRC-4 and the next COP.

Thanking you

Yours truly,

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