

## Prior Informed Consent: An Emerging Compromise for Hazardous Exports

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# Prior Informed Consent: an Emerging Compromise for Hazardous Exports

Many developing nations lack a regulatory infrastructure capable of controlling effectively the importation of hazardous waste, dangerous chemicals, pesticides, and consumer products. Despite this, producer nations often allow the exportation of products they deem unsafe for domestic use. The resulting importation endangers foreign consumers and damages the economy and environment of importing countries. The United States, other national governments, and various international organizations have responded to the ever-increasing export of hazardous products with a variety of regulatory mechanisms. Neither the United States nor international policy-makers, however, have established a uniform, effective mechanism to govern hazardous exports.<sup>1</sup>

For the United States, a viable control mechanism must harmonize three competing interests: promoting U.S. exports, protecting world health, safety, and environment, and preserving sovereignty of other nations to choose which products to import.<sup>2</sup> Ideally, the control mech-

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1. Hazardous exports are often defined as products banned or severely restricted by the exporting nation's government. Because of inherent safety risks hazardous waste is also a hazardous export. See SPECIAL MEETING TO REVIEW IMPLEMENTATION OF THE OECD COUNCIL RECOMMENDATION CONCERNING INFORMATION EXCHANGE RELATED TO EXPORT OF BANNED OR SEVERELY RESTRICTED CHEMICALS, A REVIEW OF DEFINITIONS OF THE TERM "BANNED OR SEVERELY RESTRICTED" AS USED BY INTERNATIONAL ORGANIZATIONS (Sept. 8-10, 1986) (comparing definitions of "banned" and "severely restricted" as used by a variety of international organizations including the Organization for Economic Cooperation and Development, United Nations Environment Program and the United Nations Food and Agriculture Organization).

2. In 1978, the House Committee on Government Operations submitted a report, based on a study by the Commerce, Consumer, and Monetary Affairs Subcommittee, which investigated the export of products banned by U.S. regulatory agencies. The report expressed two findings:

(1) The United States has significant responsibility for the safety of goods it sells abroad. It cannot condone the export of regulated products which it knows to be harmful either to foreign consumers or the local or world environment.

(2) This responsibility must be exercised in a way which respects the sovereignty of other nations and accounts for differing conditions which may affect judgments of health or safety.

HOUSE COMM. ON GOV'T OPERATIONS, EXPORT OF PRODUCTS BANNED BY U.S. REGULATORY AGENCIES, H.R. REP. NO. 1686, 95th Cong., 2d Sess. 31 (1978) [hereinafter 1978 HOUSE REPORT]; see also "Dear Colleague" letter by Senator John Glenn (D-OH) dated June 26, 1985; 131 CONG. REC. S1380 (daily ed. June 26, 1985) (statement of Sen. Glenn) (available at *Cornell International Law Journal* office).

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anism should provide foreign governments with the information necessary to make health, safety, and environmental regulatory decisions.<sup>3</sup>

In recent years, an international movement has advocated adoption of a uniform policy requiring importing nations' *consent* for exports of products banned or severely regulated by exporting nations in their domestic markets. This approach to hazardous export control is most often known as "prior informed consent" (PIC). On a spectrum of possible policy choices, prior informed consent rests between an absolute export ban on products deemed unsafe domestically by the exporting nation and notice and information exchange systems. Environmentalists view prior informed consent as "at present, probably the most effective means of regulating international trade" in hazardous exports.<sup>4</sup> Industrialists, however, criticize the approach as "inherently impractical, burdensome, and bureaucratic."<sup>5</sup>

This Note examines the hazardous export problem and reviews several approaches that the United States and international organizations have taken to govern such exports. After describing recent adoptions of prior informed consent procedures, the Note assesses current policies and contends that prior informed consent, while no panacea, is the best approach for dealing with hazardous exports. The United States, therefore, should adopt prior informed consent domestically and urge its adoption in the international arena.

## I. Background

### A. The Hazardous Export Problem

Hazardous exports consist of products officials of the exporting state deem unsafe for domestic use.<sup>6</sup> Although the volume of U.S. hazardous exports is uncertain, one congressional committee estimated that "[a]mong the vast numbers of American products exported annually are millions of dollars worth of consumer products, drugs, pesticides, devices, and chemicals which a U.S. regulatory agency has determined to be unsafe for domestic consumption."<sup>7</sup>

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3. 1978 HOUSE REPORT, *supra* note 2, at 3.

4. International Organization of Consumers Unions, Regional Office for Asia and the Pacific, Communication of August 7, 1986 [hereinafter IOCU Communication]. David Bull, formerly of Oxfam and currently Executive of the Nairobi based Environmental Liaison Center noted that the Pesticide Action Network has argued: "Exports of banned, withdrawn, severely restricted, unregistered pesticides should be forbidden without the *explicit consent* of the importing country [sic] government after a full exchange of scientific and regulatory information." Bull, *The New International Pesticides Code: Unprecedented Tool for Activists*, 6 J. PESTICIDE REFORM NO. 1, 20, 21 (Spring 1986).

5. National Agricultural Chemicals Association Position on the "Prior Consent" Concept of Export Control of Agrochemicals in International Trade (November 30, 1986) [hereinafter NACA Position Paper] (available at the National Agricultural Chemicals Association, Washington, D.C.).

6. *See supra* note 1.

7. 1978 HOUSE REPORT, *supra* note 2, at 1.

To solve the hazardous export problem, nations must establish regulatory structures capable of balancing diverse national interests in economic development with concerns for health and environmental safety. Many developing states, however, lack the sophisticated administrative capacity needed to make choices balancing safety with development. As a result, these states are unable to monitor effectively an import's use. For example, highly toxic substances that only professionals or highly skilled experts may use in a developed country often fall into the hands of untrained workers in Third World countries.<sup>8</sup> The immediate problem, therefore, is how to handle current hazardous product exports from primarily western industrialized nations to the Third World.<sup>9</sup>

Some sources estimate that pesticides poison approximately 250,000 people annually, resulting in 6,700 fatalities.<sup>10</sup> As two commentators noted:

In 1981, over 600 million pounds of pesticides were exported to developing nations. U.S. exports comprised 75% of those shipments, a large proportion of which were pesticides that were either restricted or not registered in this country. Thirty-one million pounds of the exported pesticides had been suspended or cancelled in the U.S. due to the dangers they pose to humans, wildlife, and the environment.<sup>11</sup>

The situations of Indonesia, Thailand, and Malaysia exemplify these pesticide import problems. Malaysia, for instance, suffers from an alarming problem of paraquat poisoning.<sup>12</sup> Although several countries have banned or severely restricted the use of paraquat, one of the most hazardous chemicals in the world, the Malaysian Pesticides Board has

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8. MINISTER OF HOUSING, PHYSICAL PLANNING AND THE ENVIRONMENT OF THE NETHERLANDS, *THE EXPORT OF DANGEROUS SUBSTANCES AND PREPARATIONS* 7 (available at the Cornell International Law Journal office).

9. See Wirth, *Emerging Standards for Exports of Hazardous Substances*, 79 PROC. AM. SOC'Y OF INT'L L. 310, 312 (1985); see also Goldberg, *Efforts to Prevent Misuse of Pesticides Exported to Developing Countries: Progressing Beyond Regulation and Notification*, 12 ECOLOGY L.Q. 1025, 1030-33 (1985); J. Scherr, *Hazardous Exports: United States and International Policy Developments* 2 (May 1985) (unpublished manuscript available at the office of the Natural Resources Defense Council, Washington D.C.) (explaining concern over the last decade about the "double standard" in U.S. laws permitting exports of banned products and substances).

10. WORLD HEALTH ORGANIZATION, *SAFE USE OF PESTICIDES* (1973) (20th Report of the WHO expert Committee on Insecticides, Tech. Rept. Series No. 513). These may be conservative estimates, since a large number of poisonings are not diagnosed or are not reported. See Interagency Working Group on a Hazardous Substances Export Policy, 45 Fed. Reg. 53754, 53755 (1980) [hereinafter Working Group Report] (draft report); J. Scherr, *supra* note 9, at 6-7. Many of these poisonings result from use of certain classes of pesticides which degrade quickly but are extremely toxic when applied. *Id.*

11. Sheeline & Bramble, *Silent Spring Rerun: Pesticides in the Global Environment*, 6 J. PESTICIDE REFORM No. 1, 29, 31 (Spring 1986).

12. Sahabat Alan Malaysia, *Paraquat: Another Scourge from the Merchants of Death*, 6 J. PESTICIDE REFORM No. 1, 13 (Spring 1986). Since 1980, more than 1,200 people have died of paraquat poisoning due to accidental poisonings, suicide, or exposure from handling. *Id.*

registered paraquat for general use in Malaysia.<sup>13</sup> Malaysian workers routinely use paraquat without proper safety protections.<sup>14</sup> In 1987, researchers found similar pesticide import problems in Indonesia and Thailand.<sup>15</sup> They discovered the United States sending to one or both of the countries large quantities of six pesticides which it severely restricted for domestic use.<sup>16</sup> The researchers found the use of such pesticides in a Third World country presented clear dangers; whereas U.S. users must wear "long-sleeved clothing, gloves, goggles and an approved respirator," Third World users often use them with no knowledge of their danger.<sup>17</sup>

13. *Id.* at 13-14. Paraquat is either severely restricted or banned in Sweden, Canada, Denmark, Finland, New Zealand, the Philippines and Turkey. *Id.* at 15.

According to the United Nations, paraquat, a herbicide, is among the most hazardous chemicals in the world. "When ingested or absorbed by humans, paraquat is a highly toxic compound that causes injury primarily to the liver, kidney and lungs." *Id.*

14. *Id.* at 14. "Workers who constantly spray pesticides do so without any protection. They are not given proper safety equipment nor instructions on how to safely use the pesticides. Protective clothing or rubber boots are often dismissed as a cumbersome luxury." *Id.*

15. M. HANSEN & S. RENGAM, VIOLATING THE CODE: A PRELIMINARY SURVEY OF INDONESIA, THE PHILIPPINES AND THAILAND 3 (1987) [hereinafter VIOLATING THE CODE SURVEY] (available at the office of Institute for Consumer Policy Research, Mount Vernon, New York).

16. VIOLATING THE CODE SURVEY, *supra* note 15, at 14. The six pesticides included aldicarb, carbofuran, chlordane, heptachlor, methamidophos, and monocrotophos. The report held:

1. Aldicarb was restricted (i.e., can only be applied by certified trained applicators or those under their direct supervision) by the Environmental Protection Agency (EPA) on February 9, 1978.

2. Carbofuran was restricted by the EPA on August 8, 1979.

3. All uses of chlordane and heptachlor, except for ground insertion by trained certified applicators for termite control, were cancelled by the EPA in 1976.

4. Methamidophos was restricted by the EPA in January, 1981.

5. Monocrotophos was restricted by the EPA in August, 1979.

*Id.* The table below indicates, as an example, the quantity of pesticides, restricted in the United States, imported into Thailand between 1982 and 1984.

Quantity Imported in Thousands of Kilograms

Pesticide	Brand Name	1982	1983	1984	Country Imported From
Aldicarb 10%	Temik 10G	116.9	45.0	10.4	U.S.A.
Carbofuran 75%	Furadan	—	—	166.4	U.S.A.
Chlordane 100%	Chlordane	20.1	20.1	18.4	U.S.A.
Heptachlor 73%	Heptachlor	27.2	31.8	54.4	U.S.A.
Methamidophos	—	—	—	119.1	Korea and U.S.A.
Monocrotophos	Azodrin	—	—	416.3	U.S.A.

*Id.* (summarizing data from PESTICIDES BROUGHT IN OR IMPORTED, YEAR 1984 (compiled by Preecha Chupanish and Boonsong Huntangkabordee, Department of Agriculture, Ministry of Agriculture and Cooperatives, Thailand).

17. *Id.* at 15. The survey findings concluded:

Export of banned or severely restricted consumer products also poses a problem. For example, federal regulations required U.S. manufacturers to treat children's sleepwear with the chemical flame retardant TRIS;<sup>18</sup> in April 1977, however, the Consumer Product Safety Commission banned domestic sales of TRIS sleepwear after TRIS' carcinogenic properties were discovered.<sup>19</sup> Exports of TRIS-treated garments nevertheless continued for more than a year, resulting in the export to Asia, Africa, and South America of approximately 2.4 million pieces.<sup>20</sup>

Similarly, U.S. companies shipped several hundred thousand dangerous, domestically-banned baby pacifiers overseas between June 30, 1977, when the ban was announced, and February 26, 1978, when the ban became effective.<sup>21</sup> As a House Committee concluded, "[M]anufacturers took advantage of the time between the proposed and final action to export inventory of products which would be subject to the action."<sup>22</sup>

As these examples illustrate, many Third World nations, including relatively developed ones, are unable to protect their citizens from dangerous pesticides and consumer products.<sup>23</sup> In 1986, for example, the

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We found evidence of large quantities of restricted products being shipped into Thailand from the United States. No doubt this might also be happening with the other major exporters of pesticides. These restricted toxic pesticides are used by Third World farmers who often have no idea of their dangers. Some of the pesticides, like Temik 10G and Furadan, have been sold in unlabelled plastic bags. The U.S. regulations require protective clothing, "long-sleeved clothing, gloves, goggles and an approved respirator," which could be worn when these pesticides are used by certified trained applicators. In the Third World, pesticides may be repackaged by workers who use no protective clothing, and then sold unlabelled to farmers who often do not take the necessary precautions. Used in these conditions, these pesticides become potentially very hazardous. This shows a need for prior informed consent. PIC will serve to increase the sovereignty of importing countries by giving them active control over pesticide imports.

*Id.*

18. Working Group Report, *supra* note 10, at 53755; see also *Consumer Product Safety Commission's Ban on Tris: Hearings Before a Subcommittee of the Committee on Government Operations of the House of Representatives*, 95th Cong., 1st Sess. 2 (1977) [hereinafter *Tris Hearings*].

19. Working Group Report, *supra* note 10, at 53755; see also *Tris Hearings*, *supra* note 18, at 271-72; and J. Scherr, *supra* note 9, at 3.

20. Working Group Report, *supra* note 10, at 53755; see also J. Scherr, *supra* note 9, at 4.

21. 1978 HOUSE REPORT, *supra* note 2, at 10.

22. *Id.*

23. For example, the powerful nerve attacking pesticide, Leptophos, manufactured in the United States principally for export, was never registered by the Environmental Protection Agency (EPA) for domestic use. Millions of pounds were exported to 50 countries between 1971 and 1976. In 1971 and 1972, a number of Egyptian farmers suffered from hallucinations and impairment of vision and speech after using the pesticide.

Although the EPA established stringent training and certification standards for domestic users of registered pesticides, the United States annually exports tens of millions of pounds of pesticides to countries lacking similar user certification requirements. Moreover, the United States exports products that the EPA cancelled or sus-

Malaysian Pesticides Board Chairman, Datuk Abu Baker Mahmud, stated that the Pesticide Board lacked the expertise and equipment to study the effects of widespread toxic pesticide use.<sup>24</sup> Indeed, the Pesticide Board has not undertaken a single study during its nine years of existence.<sup>25</sup> Other Third World nations also lack the necessary governmental resources. Typically, the "entire staff of a ministry of agriculture in a developing country may consist of only one or two people with 'nothing but a motorcycle and no fuel.'"<sup>26</sup>

## B. Methods of Regulating Hazardous Exports

To address the hazardous export problem, the United States and various international organizations employ several hazardous export control techniques,<sup>27</sup> including export bans of unapproved products, notice and

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pended because product use posed unreasonable health and environmental risks. See UNITED STATES GENERAL ACCOUNTING OFFICE, BETTER REGULATION OF PESTICIDE EXPORTS AND PESTICIDE RESIDUES IN IMPORTED FOOD IS ESSENTIAL 50 (June 22, 1979) (report to Congress); see also Agege, *Dumping of Dangerous American Products Overseas: Should Congress Sit and Watch?*, J. WORLD TRADE LAW 403,404 (1985); Working Group Report, *supra* note 10, at 53755; J. Scherr, *supra* note 9, at 6-7 (noting that approximately 29% of the annual 522 million pounds of pesticide exports from the United States in 1976 were not registered for U.S. use and about 20% of these unregistered pesticides had been cancelled by the EPA because of health risks).

24. Sahabat Alan Malaysia, *supra* note 12, at 15.

25. *Id.*

26. Goldberg, *supra* note 9, at 1030.

27. The United States, for instance, lacks a uniform or comprehensive approach. Both the Carter and Reagan Administrations unsuccessfully attempted to achieve a uniform U.S. hazardous export policy. On January 15th, 1981, President Carter signed Executive Order 12,264, *On Federal Policy Regarding the Export of Banned or Significantly Restricted Substances*, 3 C.F.R. 86 (1982). The Order created a uniform notification system governing exports of "banned or significantly restricted" products and substances. *Id.*

The Order required improvement of export notice procedures and annual publication of a summary of U.S. government actions banning or severely restricting substances for domestic use. The Order also directed the State Department and other federal agencies to help develop international hazard alert systems. The Order required agencies to place formal export licensing controls on "extremely hazardous substances" that seriously threatened human health or the environment and on exports which threatened U.S. foreign policy interests. *Id.*; see also DISCUSSION PAPER OF THE INTERNATIONAL AFFAIRS GROUP OF THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION ON THE EXPORT OF HAZARDOUS SUBSTANCES 11-12 (Sept. 24-25, 1984) [hereinafter CMA PAPER] (available at the Chemical Manufacturers Association, Washington, D.C.); Goldberg, *supra* note 9, at 1035-37; J. Scherr, *supra* note 9, at 21-22.

On February 17, 1981, President Reagan revoked Executive Order 12,264, stating that export controls would be unduly burdensome for U.S. industry. See Exec. Order No. 12,290, 3 C.F.R. 127 (1982). See generally Childress, *Executive Authority: Revocation of Executive Order Requiring Notification of Export of Hazardous Substances*, 22 HARV. INT'L L.J. 683 (1981). Reagan also asked the Departments of State and Commerce to review current hazardous export regulations and make them more consistent and cost-effective. See Memorandum from President Reagan to the Secretary of State (Feb. 17, 1981) (available at the Cornell International Law Journal office); see also CMA PAPER, *supra*, at 12-13; Goldberg, *supra* note 9, at 1035-37; J. Scherr, *supra* note 9, at 22-23.

international information exchange systems, and the rule of *caveat emptor*. This section describes each of these techniques.

### 1. *The Two Extremes: Outright Prohibitions and Caveat Emptor*

Although outright prohibitions of exports receive relatively little discussion in the international regulatory debate,<sup>28</sup> United States drug regulations have long provided an example of such a ban. The Federal Food, Drug and Cosmetic Act,<sup>29</sup> enacted in 1938, until recently prohibited the export of drugs not approved by the Food and Drug Administration.<sup>30</sup> Similarly, since 1972, the Federal Republic of Germany has totally banned the production and export of DDT.<sup>31</sup>

*Caveat emptor*, or "let the buyer beware," essentially leaves the control of dangerous exports to market mechanisms. United States policy towards consumer products exports, for example, is essentially one of *caveat emptor*, since banned or severely restricted products made solely for export may be exported without warning to importing nations.<sup>32</sup> Although application of the doctrine can result from either inaction or

Commerce Secretary Baldrige and Secretary of State Haig submitted their recommendations and report to William Brock, U.S. Trade Representative, on May 12, 1982. The Haig-Baldrige report proposed eliminating existing requirements that the United States inform foreign governments of export-specific toxic chemical and pesticide shipments that the United States banned or restricted. The Report also recommended repealing the prohibition on export of drugs that the Food and Drug Administration (FDA) has not approved for domestic sale, and Department of State notification to foreign governments of information on all regulatory actions banning or severely restricting domestic use of a substance. See Haig-Baldrige report at 8-12 (available at the *Cornell International Law Journal* office); see also CMA PAPER, *supra*, at 12-13; J. Scherr, *supra* note 9, at 22-28.

The report did recommend creating international information exchanges and assisting other countries in developing regulatory expertise. However, the Reagan Administration neither acted upon the Haig-Baldrige Report nor replaced Executive Order 12,264 with an alternative, coherent policy.

28. Pallemmaerts, *Laissez-faire Alive and Well: The International Effort to Protect Trade of Banned or Severely Restricted Pesticides*, 6 J. PESTICIDE REFORM No. 1, 23, 26 (Spring 1986) (discussing pesticide export bans).

29. Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 344, 381(d) (1938); see also 21 C.F.R. §§ 312.1, 511.1 (1987).

30. A recent amendment loosened these trade restrictions, permitting unapproved drug exports to twenty-one countries that had approved the use of the drug in their marketplace. Drug Export Amendments Act of 1986, Pub. L. No. 99-660, 100 Stat. 3743. The twenty one countries are: Australia, Austria, Belgium, Canada, Denmark, Federal Republic of Germany, Finland, France, Iceland, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom. *Id.* The legislation erroneously presumes that nations that have agreed to accept imports have regulatory structures comparable to the Food and Drug Administration; in fact several of those countries, such as Portugal and Spain, lack the expertise and resources necessary to ensure safe drug imports from the United States. Telephone Interview with Joseph Goffman, Staff Attorney, Public Citizen's Congress Watch (Feb. 23, 1987). Some critics fear that importing nations will be unable or unwilling to ensure that those drugs remain in their borders. This "supervisory gap" might result in the drugs' importation into Third World countries, or even back into the United States. *Id.*

31. Pallemmaerts, *supra* note 28, at 26.

32. See *infra* notes 36-39 and accompanying text.



deliberate policy, the U.S. approach clearly seems deliberate rather than the result of oversight. The Consumer Product Safety Commission (CPSC), for example, regulates the export of some potentially harmful consumer products such as flammable fabrics and clothing,<sup>33</sup> household items presenting an electrical or mechanical hazard,<sup>34</sup> and some other consumer products under the Consumer Product Safety Act (CPSA);<sup>35</sup> these regulations, however, only affect exports that may harm U.S. citizens. The Commission may ban product exports only after determining that the export "presents an unreasonable risk of injury to persons residing within the United States (e.g, reimportation)."<sup>36</sup> Exporters of domestically regulated products need only label the product "for export"<sup>37</sup> and then notify the CPSC of the export.<sup>38</sup> The Commission may not further restrict export of goods made solely for sale outside the United States.<sup>39</sup>

## 2. Notice and Notice-Type Systems

### a. "Pure" Notice Systems: U.S. Chemical Export Policy

The U.S. chemical export policy typifies a "pure" notice system of controlling hazardous exports. Section 12 of the Toxic Substances Control

33. Flammable fabric and clothing regulations are codified at 15 U.S.C. §§ 1191-1204 (1982); see Note, *Exports of Hazardous Products from the United States: An Analysis of Consumer Product Safety Commission Policy*, 19 GEO. WASH. J. INT'L L. & ECON. 123 (1985).

34. See 15 U.S.C. §§ 1261-1276 (1982); see also Note, *supra* note 33, at 123.

35. See 15 U.S.C. §§ 2051-2083 (1982); see also Note, *supra* note 33, at 123-24.

36. Flammable Fabrics Act, § 15(a), 15 U.S.C. § 1202(a) (1982); Federal Hazardous Substances Act, § 5(b), 15 U.S.C. § 1264(b) (1982); Consumer Product Safety Act, § 18(a), 15 U.S.C. § 2067(a) (1982); see also Note, *supra* note 33, at 124-25.

37. Flammable Fabrics Act, § 15(a), 15 U.S.C. § 1202(a) (1982); Federal Hazardous Substances Act, § 5(b), 15 U.S.C. § 1264(b) (1982); Consumer Product Safety Act, § 18(a)(2), 15 U.S.C. § 2067(a)(2) (1982); see also Note, *supra* note 33, at 123.

38. Flammable Fabrics Act, § 15(c), 15 U.S.C. § 1202(c) (1982); Federal Hazardous Substances Act, § 14(d), 15 U.S.C. § 1273(d) (1982); Consumer Product Safety Act, § 18(a)(2), 15 U.S.C. § 2067(b) (1982); see also Note, *supra* note 33, at 123.

39. See Flammable Fabrics Act, § 15(a), 15 U.S.C. § 1202(a) (1982); Federal Hazardous Substances Act, § 5(b), 15 U.S.C. § 1264(b) (1982); Consumer Product Safety Act, § 18(a), 15 U.S.C. § 2067(a) (1982); Agege, *supra* note 23, at 405; see also Note, *supra* note 33, at 123.

Until 1983, the Commission's policy was that manufacturers could export goods not in compliance with Commission safety standards only if the manufacturers originally intended the products for export and labeled them accordingly. See Note, *supra* note 33, at 123.

In July, 1983, the Commission decided *In re Imperial Carpet Mills, Inc.*, 11 Prod. Safety & Liab. Rep. (BNA) 502 (July 7, 1983). See also Note, *supra* note 33, at 125. In that decision, the Commission permitted manufacturers to export flammable products not in compliance with domestic standards and distributed domestically without an export label. *Carpet Mills*, 11 Prod. Safety & Liab. Rep., at 511; see also 16 C.F.R. § 1010.1-3 (1985); Note, *supra* note 33, at 125-26.

The Commission contemplated extending this interpretation to the Federal Hazardous Substances Act and CPSA, but the Commission ultimately decided to retain its prior export policy under these two acts. See *CPSA Votes to Maintain CPSA, FHSA Policy Prohibiting Exportation of Violative Goods*, 12 Prod. Safety & Liab. Rep. (BNA) 421 (May 18, 1984); 16 C.F.R. § 1010.1-3 (1985); see also Note, *supra* note 33, at 126.

Act (TSCA),<sup>40</sup> detailing U.S. chemical export requirements, requires a two part notification procedure.

First, if the EPA has taken regulatory action against a chemical, the exporter must notify the EPA of the exportation.<sup>41</sup> Second, the EPA must notify the importing state as to available data concerning the exported chemical.<sup>42</sup> EPA regulations implementing TSCA then require the EPA to notify the importing country of the first shipment of each regulated chemical each year.<sup>43</sup> The TSCA notice system informs the importing state of both the chemical export and of EPA's regulatory action.<sup>44</sup>

#### b. The Awareness Statement: U.S. Pesticide Export Policy

United States pesticide export regulations employ a variant of the notice control technique, requiring the foreign purchaser to sign an awareness statement regarding U.S. regulatory action. Section 17 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulates pesticide exports and requires the EPA to implement three types of notification.<sup>45</sup> First, the EPA must notify all governments and pertinent international organizations each time the EPA takes major regulatory action on a pesticide (e.g., cancellation or suspension of a pesticides's registration).<sup>46</sup> Second, as a prerequisite to export, the foreign purchaser must sign a statement acknowledging awareness that the United States forbids domestic use of the pesticide.<sup>47</sup> Finally, after the exporter informs the EPA of the sale, the EPA must inform the importing country's govern-

40. 15 U.S.C. § 2611 (1976).

41. *Id.*; see also CMA PAPER, *supra* note 27, at 8-9.

42. 15 U.S.C. § 2611 (1976); see also CMA PAPER, *supra* note 27, at 8-9.

43. 40 C.F.R. § 707.70 (1987). The regulation states that:

(a) Notice by EPA to the importing country shall be sent no later than five working days after receipt by the Document Control Officer of the first annual notification for each regulated chemical.

(b) Notices shall:

(1) Identify the regulated chemical.

(2) Summarize the regulatory action taken, or indicate the availability of data under section 4 or 5(b) of TSCA.

(3) Identify an EPA official to contact for further information.

(4) Include a copy of the pertinent FEDERAL REGISTER notice.

(c) Notices shall be sent to the country's ambassador in Washington, DC, or other official designated by the foreign government, and to the United States Department of State.

*Id.*; see also CMA PAPER, *supra* note 27, at 9-10; Wirth, *supra* note 9, at 314.

44. 40 C.F.R. 707.70 (1987). See also CMA PAPER, *supra* note 27, at 9-10; Wirth, *supra* note 9, at 12-13.

45. 7 U.S.C. § 1360 (1978).

46. *Id.*; see also Statement of Policy on the Labeling of Exported Pesticides, Devices, and Pesticide Ingredients and Procedures for Exporting Unregistered Pesticides, 45 Fed. Reg. 50274 (1980) [hereinafter Labeling Policy Statement]; J. Scherr & E. Spitalnik, National Laws Relating to Exports of Chemicals, In Particular Pesticides a Selected Review 3-4 (March 1984) (unpublished manuscript available at the Environment Liaison Centre, Nairobi); Wirth, *supra* note 9, at 314.

47. 7 U.S.C. § 1360 (1978); Labeling Policy Statement, *supra* note 46, at 50274; see also J. Scherr & E. Spitalnik, *supra* note 46, at 3-4; Wirth, *supra* note 9, at 313-14.

ment via the State Department.<sup>48</sup>

### c. International Information Exchanges

International information exchanges are the multilateral counterpart of domestic notice systems. These exchanges provide world-wide notice of banned or severely restricted products, thus supplementing domestic notice systems.<sup>49</sup> Two organizations promoting such exchange are the Organization for Economic Cooperation and Development (OECD),<sup>50</sup> and the United Nations Food and Agriculture Organization (FAO).<sup>51</sup> The OECD adopted an information exchange system in 1984 regarding export of banned or severely restricted chemicals.<sup>52</sup> If an exporting state significantly restricts a chemical for domestic use, the state should notify any importing state before a first shipment of that chemical.<sup>53</sup> Similarly, the FAO, the leading international organization concerned with pesticide exports, established the "International Code of Conduct on the Distribution and Use of Pesticides," another information exchange, in 1985.<sup>54</sup> Like the OECD system, FAO regulations require

48. The Act requires an exporter to give notice when it first ships a pesticide unregistered for use in the United States to a particular foreign purchaser in a calendar year. 7 U.S.C. § 1360 (1978). This requirement covers both pesticides never registered for use in the United States and those whose registration for use has been cancelled or suspended. *Id.*; see also Labeling Policy Statement, *supra* note 46, at 50,274; J. Scherr & E. Spitalnik, *supra* note 46, at 3-4; Wirth, *supra* note 9, at 314.

49. See *supra* notes 40-48 and accompanying text.

50. The Organization for Economic Cooperation and Development (OECD) emerged in 1960. Its primary purpose was to coordinate economic policies and harmonize trade practices. The Organization consists of twenty-four members, primarily countries with industrialized market economies. Members include "western European States, the United States, Canada, Japan, Australia, and New Zealand." The OECD makes and adopts non-binding recommendations. See Wirth, *supra* note 9, at 310-11; see also Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891.

51. In the United Nations system, the FAO has special responsibilities in agriculture, fisheries, forestry, and nutrition. Founded in 1945, the FAO carries out a major program of technical advice and assistance for the agricultural community on behalf of governments and development funding agencies; it collects, analyzes and disseminates information; it advises governments on policy and planning; and it enables governments to meet and discuss food and agricultural problems. See FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, FAO: WHAT IT IS, WHAT IT DOES, I/R8559/E/4.86/1/100.000, at 2 (1986).

52. See Wirth, *supra* note 9, at 313; see also Goldberg, *supra* note 9, at 1040-41; Comment, *United States Export of Banned Products: Legal and Moral Implications*, 10 DEN. J. INT'L L. & POL'Y 537, 547 (1981).

53. Wirth, *supra* note 9, at 313.

54. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, INTERNATIONAL CODE OF CONDUCT ON DISTRIBUTION AND USE OF PESTICIDES, M/R8130/E/5.86/1/3000 (1986) [hereinafter FAO PESTICIDE CODE] (available at FAO Liaison Office for North America, Washington D.C.). David Bull, currently Executive of the Nairobi-based Environment Liaison Center, viewed the Code's significance as making industry responsible for adhering to its articles "irrespective of government's ability to observe the Code." Bull, *supra* note 4, at 21. He added:

This means that malpractices can no longer be justified by the bland assurance that a company was "operating within the law" of the country concerned. Industry is now officially responsible regardless of government

exporting nations to notify importing nations of significant domestic restrictions on pesticide use.<sup>55</sup> Moreover, exporters must notify importing states when they export such pesticides.<sup>56</sup>

## II. Recent Development: The Emergence of Prior Informed Consent

In addition to the above-described "traditional" approaches to hazardous exports, policy-makers have recently considered an alternative approach—prior informed consent (PIC). "Prior informed consent" allows export of hazardous products only under two conditions. First, the exporting state must inform the importing state of any bans or severe restrictions on the exported product and must provide the rationale behind the domestic regulation.<sup>57</sup> Second, the importing country must consent in writing to the product's import.<sup>58</sup>

This section explores the recent adoption of prior informed consent. For example, the United States Resource Conservation and Recovery Act (RCRA), as well as OECD and United Nations Environment Program (UNEP) guidelines, have applied prior informed consent to hazardous waste exports. Similarly, the Netherlands has adopted,

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inadequacy. . . . [I]ndustry . . . has given its formal support to the Code. . . . An infringement of the Code will clearly be a breach of proper corporate ethics and no excuses will be acceptable. Breaches can be reported to FAO. . . .

*Id.*

During the FAO Pesticide Code negotiations, prior informed consent was an integral part of the Code's seventh draft. In the final version, drafters removed prior informed consent from the Code despite the endorsement of more than a dozen nation's delegates. The members included Ethiopia, Malaysia, Congo, Brazil, China, Pakistan, Venezuela, Indonesia, Thailand, Kenya, and Mexico. *Id.* at 22. The FAO conference report recognized that "the majority expressed deep concern that the principle of 'Prior Informed Consent' no longer appeared in the present version of the Code." *Id.*

Bull commented: "The exporting countries [U.S. and European Economic Community] clearly appear to have sabotaged this aspect of the Code [prior informed consent] through covert action, while publicly declaring no specific position. They wanted to ditch PIC but lacked the guts to take the blame." *Id.*

55. Article 9 of the Code established an information exchange scheme. FAO PESTICIDE CODE, *supra* note 54, at 19-20. Article 9 provides, in relevant part:

9.1 The Government of a pesticide exporting country which takes action to ban or severely restrict pesticide use should notify directly or indirectly pertinent authorities of other nations.

9.2 The minimum information to be provided includes:

- \* the identity of the chemical
- \* the summary of control action and reasons for it
- \* reference for gaining more information.

*Id.*

56. Section 9.4 of the Code concerns exporting states' responsibility to inform the importing states of banned or severely restricted pesticide exports. *Id.* at 20. Section 9.4 provides, in relevant part: "The information to be provided if export occurs includes: . . . reference of information provided at the time of the notification of control action . . . [and] indication that export of the chemical concerned is about to occur." *Id.*

57. See VIOLATING THE CODE SURVEY, *supra* note 15, at 14.

58. *Id.*

and UNEP and the European Community Commission have recommended, the application of prior informed consent in the context of chemical exports.

#### A. Hazardous Waste Exports

##### 1. *Prior Informed Consent Under the Resource and Conservation Recovery Act*

The United States annually generates about 35 million metric tons of hazardous waste.<sup>59</sup> In 1980, Congress enacted legislation mandating that EPA implement "cradle to grave" regulations concerning hazardous waste generation, transport, treatment, storage, and disposal under RCRA.<sup>60</sup> Because of the increased cost of complying with these regulations and public opposition to waste site locations, U.S. companies began seeking other countries willing to accept hazardous waste deposits.<sup>61</sup> For instance, one Colorado company offered the President of Sierra Leone \$25 million for the right to transfer waste to his country,<sup>62</sup> while in 1986, several California companies illegally dumped hazardous waste into Mexico.<sup>63</sup>

Due in part to the embarrassing foreign policy ramifications such actions have for the United States,<sup>64</sup> Congress added a "prior informed consent" requirement to the 1984 amendments of the RCRA which became effective in 1986.<sup>65</sup> In adopting this legislation, Congress declared that the existing notification system was "inadequate to address the present and potential environmental, health, and foreign policy problems which occur when wastes are exported to nations which do not wish to receive them, or lack sufficient information to manage

59. J. Scherr, *supra* note 9, at 14.

60. 42 U.S.C. § 6901 *et seq.*; see also 42 U.S.C. § 6902 (Supp. 1986). The RCRA defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1982).

61. See N.Y. Times, Jan. 25, 1980, at A13, col. 5; Washington Post, Jan. 26, 1980, at A4, col. 1; see also J. Scherr, *supra* note 9, at 14.

62. N.Y. Times, Jan. 25, 1980, at A13, col. 5; Washington Post, Jan. 26, 1980, at A4, col. 1; see also J. Scherr, *supra* note 9, at 14-15.

63. L.A. Times, Feb. 14, 1986, at 1; San Diego Tribune, Feb. 13, 1986, at A3; San Diego Union, Feb. 13, 1986, at A3; L.A. Times, Feb. 12, 1986, at 3; San Diego Tribune, Feb. 12, 1986, at A3; San Diego Union, Feb. 12, 1986, at A3, col. 1.

64. When the State Department learned of the proposal to the President of Sierra Leone, it warned that African nations might condemn the United States for "dumping its wastes in the black man's backyard." N.Y. Times, Jan. 25, 1980, at A13, col. 5; Washington Post, Jan. 26, 1980, at A4, col. 1.

65. The 1984 amendment added a new § 3017 to the Solid Waste Disposal Act. See Public Law No. 98-616, § 245(a), 98 Stat. 3221, 3262-63 (1984) (codified at 42 U.S.C. § 6938 (Supp. 1986)) [hereinafter textual references to § 3017 will be footnoted to the codified version]; see also Wirth, *supra* note 9, at 312.

them properly."<sup>66</sup> Under the RCRA's new section 3017, manufacturers cannot export hazardous waste unless they obtain prior written consent from the receiving country's government.<sup>67</sup>

The exporter must notify the EPA of its plan to ship hazardous waste.<sup>68</sup> The EPA, through the State Department, then notifies the importing state of the exporter's request for consent to the shipment.<sup>69</sup> If the country gives its consent, the EPA so informs the exporter who then may ship the waste.<sup>70</sup> Additionally, section 3017 requires exporters to submit annual reports detailing hazardous waste exports.<sup>71</sup> These requirements are waived if the United States and the government of the receiving country have formally agreed to hazardous waste transfers and the proposed shipment comports with that agreement.<sup>72</sup>

66. S. REP. NO. 284, 98th Cong., 1st Sess. 47 (1983) [hereinafter SENATE REPORT]. The Senate Report of the Committee On Environment and Public Works noted that when it considered the amendments the law required hazardous waste exporters to inform the EPA four weeks before the initial shipment. The notification did not include "any reference to the amounts to be exported; the frequency of exports; the point at which the waste will enter the receiving country; the methods of storage, treatment or disposal in the receiving country; or the ultimate destination of the waste." *Id.*

67. 42 U.S.C. § 6938 (Supp. 1986); *see also* Wirth, *supra* note 9, at 312.

68. The exporter must include:

- the types and quantities of hazardous waste to be exported;
- the frequency or rate at which it is expected to be exported;
- the ports of entry; and
- the description of the manner in which such hazardous waste will be transported to and treated, stored, or disposed in the receiving country.

H. REP. NO. 1133, 98th Cong., 2d Sess. 45 (1983) [hereinafter 1983 HOUSE REPORT]; *see also* 42 U.S.C. § 6938(c) (Supp. 1986).

69. Within 30 days of the Administrator's receipt of a complete notification under this section, the Secretary of State, acting on behalf of the Administrator, shall:

- 1) forward a copy of the notification to the government of the receiving country;
- 2) advise the government that United States law prohibits the export of hazardous waste unless the receiving country consents to accept the hazardous waste;
- 3) request the government to provide the Secretary with a written consent or objection to the terms of the notification; and
- 4) forward to the government of the receiving country a description of the Federal regulations which would apply to the treatment, storage, and disposal of the hazardous waste in the United States.

1983 HOUSE REPORT, *supra* note 68, at 46. *See also* 42 U.S.C. § 6938(d) (Supp. 1986).

70. Within 30 days of obtaining the written consent, objection or other communication from the receiving country, the EPA shall forward the communication to the exporter. 1983 HOUSE REPORT, *supra* note 68, at 46; *see also* 42 U.S.C. § 6938 (Supp. 1986).

71. The EPA now requires exporters to submit a report summarizing the types, quantities, frequency, and ultimate destination of all hazardous wastes exported during the previous year. 50 Fed. Reg. 28,702, 28,746 (1985).

72. H. REP. NO. 1122, 98th Cong., 2d Sess. 45 (1984). In fact, the Senate report states that "[e]ffective monitoring and enforcement programs must be part of any agreement between the United States and a receiving country." SENATE REPORT, *supra* note 66, at 48.

## 2. *The United Nations Environment Program Guidelines for Hazardous Waste*

In 1985, UNEP recommended that countries engage in information exchange and prior informed consent practices to regulate hazardous waste exports.<sup>73</sup> The guidelines suggest that, absent bilateral, regional, or multilateral arrangements, exporting states should prohibit hazardous waste exportation until both the receiving state and any transit state indicate their explicit consent to such movement.<sup>74</sup>

UNEP concluded that the exporting state could best handle authorization for hazardous waste export,<sup>75</sup> but noted that the importing state had sole responsibility for deciding to admit the shipment.<sup>76</sup> UNEP further recommended that each state designate an agency to which other countries could direct notifications and inquiries.<sup>77</sup> However, the UNEP recommendations reach beyond traditional notions of prior informed consent, placing additional responsibility on an exporting state. Even where consent exists, an exporting state must prohibit "a transfrontier movement of hazardous wastes . . . if it is not satisfied that the wastes in question can be managed in an environmentally sound manner, at an approved site or facility."<sup>78</sup>

## 3. *The Organization for Economic Cooperation and Development Draft Agreement for Hazardous Waste*

In 1987, the OECD adopted a draft agreement similar to the UNEP guidelines, including both an information exchange provision and prior informed consent mechanisms for hazardous waste shipments.<sup>79</sup> The agreement's prior informed consent provision requires exporters to provide specific information to the "competent authority of the exporting country,"<sup>80</sup> including a copy of the pertinent regulatory informa-

73. UNEP was established at the Conference on the Human Environment in Stockholm in 1972. In 1981, UNEP's Governing Council adopted the 1981 Montevideo Program which provided that UNEP's Environmental Law Program convene a number of ad hoc working groups to elaborate guidelines on such issues as hazardous waste, chemicals, and pesticides. See Wirth, *supra* note 9, at 311. Unlike the OECD Draft Agreement, *infra* notes 97-104 and accompanying text, the UNEP document addresses both domestic and international hazardous waste management. Negotiations took place in 1984, U.N. Doc. UNEP/WG.111/3 (report of the second session); see also Wirth, *supra* note 9, at 311. In December 1985, the UNEP *Ad Hoc* Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes delivered its final report. See UNEP *Ad Hoc* Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes, Final Report of the Working Group, U.N. Doc. UNEP/WG.122/3 (1985) [hereinafter UNEP Report].

74. UNEP Report, *supra* note 73, at Annex III, 10-11.

75. UNEP called on each State to ensure that hazardous waste exports be controlled as stringently as those for domestic disposal. *Id.* Annex III, at 5.

76. *Id.* UNEP requires explicit consent from the importing state but finds tacit consent sufficient to protect a transit state. *Id.* Annex III, at 11.

77. *Id.*

78. *Id.*

79. See OECD Environmental Committee, Revised Draft International Agreement on Control of Transfrontier Movements of Hazardous Wastes, ENV(87) 9 (1st Revision) W.5432K (Aug. 21, 1987).

80. *Id.* art. V(2)(a).

tion, adequate "proof of notification," and a "copy of the written consent from the importing country."<sup>81</sup> Like the UNEP guidelines, the agreement gives the exporting state authority to prevent the export, even where the importing state has consented. After receiving the required information from the exporter, the exporting state has thirty days to object to the shipments.<sup>82</sup> The exporting state must relay its environmental concerns to the importing state and/or its decision to prohibit the export to the importing state.<sup>83</sup>

The agreement gives exporting states four reasons to prohibit an export: when the importing state is dissatisfied with the information the exporter supplied the importing state; when it believes the wastes will be placed in an inadequate disposal facility; when previous exports to the same destination were disposed of inadequately; or when the operation "can be shown to be likely to cause significant damage" to nations outside the importing country.<sup>84</sup>

## B. Chemical Exports

### 1. *The Netherlands: Prior Informed Consent Implemented*

The Netherlands adopted a voluntary prior informed consent procedure for banned or severely restricted chemical exports in December 1985.<sup>85</sup> The Dutch procedure, which entered into force on June 1, 1986,<sup>86</sup> empowers the government to require prior informed consent for exports of dangerous chemicals.<sup>87</sup> On January 31, 1986, the Minister of

81. *Id.* art. V(2)(a)(iv), (v), (vi).

82. *Id.* art. V(3)(b).

83. *Id.* art. (V)(3)(c), (d).

84. *Id.* art. v(4). Nations signing the Agreement must take appropriate measures to enforce the prior informed consent provision. The OECD suggests that they enact laws and promulgate regulations to ensure that private parties comply with the Agreement. *Id.* art. II.

85. Bill on Voluntary Regulation of Exports Under Chemicals Act, 9 INT'L ENV'T REP. (BNA) No. 3, at 76 (March 12, 1986). *See also* Letter from the Minister of Housing, Physical Planning and the Environment of the Netherlands to the Parliament of the Netherlands, at 1-2 (July 7, 1987) (concerning the export of dangerous substances) (available in English at the Netherlands Embassy in Washington, D.C.) [hereinafter Minister's 1987 letter] and Letter from the Minister of Housing, Physical Planning and the Environment of the Netherlands to the Parliament of the Netherlands, at 23-26 (Nov. 20, 1985) (concerning the export of dangerous substances) (available in English at the Netherlands Embassy in Washington, D.C.) [hereinafter Minister's 1985 letter].

86. UNEP/IRPTC NLD 86-1, at 3. On Sept. 1, 1986, Jan W. Huismans, Director of UNEP, issued a memorandum to designated national authorities regarding the Netherlands action. [hereinafter Huismans Memo] (available at Netherlands Embassy in Washington, D.C.).

87. Bill on Voluntary Regulation of Exports Under Chemicals Act, 9 INT'L ENV'T REP. (BNA) No. 3, at 76 (March 12, 1986). For a copy of the legislation see MINISTRY OF HOUSING, PHYSICAL PLANNING AND ENVIRONMENT OF THE NETHERLANDS, NETHERLANDS CHEMICAL SUBSTANCES ACT AND REGULATIONS CONCERNING THE NOTIFICATION OF NEW CHEMICAL SUBSTANCES, § 29, at 16 (1987) (available at the Netherlands Embassy, Washington, D.C.) [hereinafter the Netherlands Chemical Substances Act]. *See also* MINISTRY OF HOUSING, PHYSICAL PLANNING AND ENVIRONMENT OF THE NETHERLANDS, NETHERLANDS CHEMICAL SUBSTANCES ACT: KEY ISSUES, at 18-19 (available at



Environment explained that implementation of the procedure could be voluntary and non-binding if "industry itself is prepared and able to make agreements that lead to the desired results."<sup>88</sup> The Dutch prior informed consent scheme allows the export of specified banned or severely restricted chemicals only if the exporter has certified that the importing country does not forbid the chemical from entering its market and if the importing state's designated authority approves of the import.<sup>89</sup> The exporter shall annually send a notification to the designated authority of the importing state prior to the first export of that year.<sup>90</sup> If the exporter cannot obtain an adequate reply to its notification, the government may still permit the export to enter the country

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the Netherlands Embassy, Washington, D.C.) [hereinafter Key Issues]. For general legislative history, see Minister's 1985 letter, *supra* note 85, at 3-7 and Minister's 1987 letter, *supra* note 85, at 1-2. The Minister explained that the objective of the prior informed consent scheme is to "improve the infrastructure in developing countries for assessing the dangers which chemical substances pose to man and the environment and improve the regulations required for this purpose and . . . to encourage safe use and responsible handling of chemicals." Minister's 1987 letter, *supra* note 85, at 2.

88. Bill on Voluntary Regulation of Exports Under Chemicals Act, 9 INT'L ENV'T REP. (BNA) No. 3, at 76 (Mar. 12, 1986). The Minister explained his intentions prior to the enactment of prior informed consent provision, § 29, of the Chemical Substances Act:

The ultimate aim is to implement section 29 of the Bill by means of a general administrative order, but there are still a number of . . . aspects which must be investigated further before it will be possible to formalise statutory provisions on the export of dangerous substances and preparations and bring them into force.

Furthermore, I believe that the self-regulatory scheme proposed by the industry could be a good way of achieving the objectives of section 29 of the Bill. . . . By cooperating with the industry in the use of its scheme to put section 29 into effect provisionally, it will be possible in the short term to take steps to achieve objectives of those who initiated the amendment, [and] to gain experience which can then be put to good effect in the general administrative order.

Minister's 1985 letter, *supra* note 85, at 6.

89. Huisman's Memo, *supra* note 86, at 1; Netherlands Chemical Substances Act, *supra* note 87, § 29.3, at 16. As of June 7, 1987, nineteen nations have cooperated with the Netherlands by designating authorities to handle the prior informed consent procedure. The nineteen countries include: Algeria, Burkina Faso, Columbia, Ghana, Ivory Coast, Lesotho, Malta, Mozambique, Panama, Peru, Republic of Nauru, Republic of Vanuatu, Saint Christopher and Nevis, Solomon Islands, Sri Lanka, Tanzania, Tonga, Trinidad and Tobago and Zimbabwe. Minister's 1987 letter, *supra* note 85, at 10. For a list of the specified banned or severely restricted chemicals, see Minister's 1987 letter, *supra* note 85, at 10. For legislative history of § 29.3 of the Netherlands Chemical Substances Act, see Minister's 1985 letter, *supra* note 85, at 19-21.

90. Huisman's Memo, *supra* note 86, at 2. The notification shall consist of data concerning at least:

- the chemical identity;
  - the control action in the Netherlands;
  - the address in the Netherlands where further information may be obtained.
- If the designated authority of the importing country states that the use of such chemical has been banned and that it will not approve of its import, the exporting person shall voluntarily refrain from exporting the chemical.

under certain circumstances.<sup>91</sup> In addition, in certain circumstances, the exporter need not send a notification.<sup>92</sup> The Netherlands program, in its first year, showed modest success.<sup>93</sup>

## 2. *UNEP Proposes Prior Informed Consent*

On June 17, 1987, the Governing Council for UNEP adopted a draft decision, acknowledging prior informed consent's effectiveness in enhancing the information exchange system between importing and exporting countries.<sup>94</sup> The Governing Council stated that "additional measures [based on the principle of prior informed consent] are required to enable importing countries to give or withhold their consent to particular exports following receipt of adequate information from exporting countries."<sup>95</sup>

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*Id.* See also Minister's 1985 Letter, *supra* note 85, at 24-25.

91. If the exporting person is unable to obtain a reply or a clear reply to the notification, the export will only take place if: "it appears that the designated authority of the importing country otherwise approves the import or use of the chemical concerned . . . [and] the authorized government body in the importing country does not react to the notification of the exporter even after having been pressed for an answer." Huisman's Memo, *supra* note 86, at 2. Minister's 1985 letter, *supra* note 85, at 25.

92. The exporting firms shall not send a notification if:  
 the full name and address of the authorized government body of the importing country, is not available;  
 the government of the importing country has shown no interest for implementation of a prior informed consent procedure;  
 if the central government of the importing country is directly or indirectly party to the transaction.

Huisman's Memo, *supra* note 86, at 2-3. See also Minister's 1985 letter, *supra* note 85, at 25.

93. During the first year of the Netherlands prior informed consent program only a small number of notifications of export took place due to the involvement of a small number of countries, fourteen at that time, and that "only a small number of substances . . . whose use is banned or severely restricted are exported from the Netherlands to these developing countries." Minister's 1987 letter, *supra* note 85, at 3.

Nevertheless, the procedure proved to be successfully implemented. For example, Shell Netherlands used the procedure eight times regarding the pesticides aldrin and dieldrin. *Id.* The Minister reported that:

In one instance the country responded to the notification by stating that it would in [the] future no longer import aldrin, dieldrin or other organochlorine insecticides. This country is afraid that if it continues to use these pesticides certain industrialized countries will refuse to import its agricultural products because of the presence of residues from these insecticides. Shell has now ceased to export to this country and the country in question has apparently now banned imports of all organochlorine compounds from other countries too. A second country issued a statement of no objection to the sale and use of a specific product containing aldrin for a number of named uses for a few months on a provisional basis.

*Id.* For a discussion of the Dutch scheme in international circles, see *id.* at 6-9.

94. Report of the Governing Council of the United Nations Environment Programme on the Work of its Fourteenth Session, No. 87-1079-0047c, Nairobi Meeting, June, 1987 [hereinafter Governing Council Report].

95. *Id.*

The Governing Council stated that the London Guidelines for the Exchange of Information on Chemicals in International Trade should incorporate prior informed consent and requested that an *Ad Hoc* Working Group of Experts develop "modalities of prior informed consent" for the London Guidelines.<sup>96</sup>

### 3. *European Community Commission Proposes Modified Prior Informed Consent*

Like UNEP, the European Economic Community (EEC) has considered prior informed consent but has not adopted a binding procedure. On July 2, 1986, the Commission of the European Community submitted to the Council a proposal for regulating chemical exports that would implement prior informed consent.<sup>97</sup> If the Council of Ministers approves the proposed regulations, it will bind all member states of the EEC and carry the force of law in member state courts.

Under the consent aspect of the notice aspect of the Commission proposal, each member state will have a "designated authority" to deal with hazardous exports.<sup>98</sup> Exporters shall inform their state's pertinent designated authority of planned exports of twenty-three banned or severely restricted chemicals.<sup>99</sup> The designated authority shall inform the Commission of the intended export and submit all relevant information.<sup>100</sup> The Commission shall then notify the importing state's designated authority of the export and relay any pertinent information.<sup>101</sup>

Under the proposal, a member state's designated authority should authorize a hazardous export "only if the country of designation consents to the import of the chemical concerned or if *no communication is*

96. *Id.* The London Guidelines can be found at UNEP/GC.14/17, Annex IV.

97. *EEC Proposes Regulation on Notification of Export of Banned, Restricted Chemicals*, 9 INT'L ENV'T REP. (BNA) 276 (Aug. 13, 1986). For full text of the proposal, entitled "The European Community Commission Proposal for a Council Regulation Concerning Export from and Import into the Community of Certain Dangerous Chemicals, Com (86) 362 Final, 2 July 1986," see *id.* at 300 [hereinafter Commission Proposal].

The Commission proposal adopted the principal that "dangerous chemicals should be exported only to States which have previously agreed to allow their importation." *Id.* art. 4, para. 1. The Commission of the European Communities comprises thirteen individuals appointed by the Council, on the recommendation of the nine member governments. Commissioners owe their allegiance to the Community alone, not to any other government or body. The Commission initiates policy and drafts the legislation as proposals for the disposition by the Council of Ministers. The Council of Ministers consists of representatives of the governments of member states. The Council is the main decisionmaking body within the community, making the final decision for most community problems.

98. Commission Proposal, *supra* note 97, art. 2. Article 2 states: "The term 'designated authority' shall refer to the competent authority in each state for the notification and information procedures with regard to the import and export of banned or severely restricted chemicals." *Id.*

99. *Id.* art. 3, para. 2. For a list of the twenty-three banned or severely restricted chemicals, see *id.* at Annex I.

100. *Id.* art. 3, para. 3.

101. *Id.*

received from that country within 60 days of the date on which notification was sent by the Commission."<sup>102</sup>

Environmental groups, however, criticized the proposal for returning a presumption in favor of exportation.<sup>103</sup> For example, the Coalition Against Dangerous Exports said the proposal "amounts to 'little more' than the incorporation into EEC law of the 'inadequate' notification systems" recommended by OECD, UNEP, and the FAO.<sup>104</sup>

### III. Analysis

This section contrasts the advantages of a pure prior informed consent procedure with the failings of current hazardous export control techniques. It then assesses the criticisms of prior informed consent, concluding that prior informed consent's clear benefits outweigh any speculative disadvantages. Finally, the section explores the United States's potential leadership role in curtailing unnecessary hazardous exports and anticipates emerging issues regarding prior informed consent.

#### A. The Inherent Flaws of Notice-Type Systems

Notice systems leave importing states, especially developing nations, vulnerable to health and safety dangers. Many countries lack the regulatory infrastructure to unilaterally protect their citizens from hazardous products already banned or severely restricted in an exporting country.<sup>105</sup> Policing their borders against undesired imports is similarly beyond their capabilities.<sup>106</sup> Moreover, hazardous product importers may not have the resources or expertise to use the products safely.<sup>107</sup>

The inherent flaws of notice systems undermine the ability of importing states to know a product's potential risks. Notice of a hazardous shipment may not reach proper authorities until after completion of the shipment.<sup>108</sup> Additionally, because notice systems are usually gen-

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102. *Id.* art. 4, para. 2 (emphasis added). The authorization will be effective for twelve months, allowing the export to clear customs. *Id.* art. 4, para. 4.

103. *Proposal Would Regulate Exports of Dangerous Chemicals From Community*, 9 INT'L ENV'T REP. (BNA) 68 (Mar. 12, 1986).

104. *Id.* Most EEC members have already pledged to implement these nationally anyway. *Id.*

105. Goldberg, *supra* note 9, at 1030. One commentator stated: "There is a considerable difference in most Third World countries between paper legislation and actual practice. Enforcement is usually minimal, with virtually no inspectors. In some countries the equivalent of the Environmental Protection Agency amounts to a single person with little power and less resources." Bull, *supra* note 4, at 20 (1986).

106. Telephone interview with David Wirth, former State Department official (Feb. 27, 1987).

107. Goldberg, *supra* note 9, at 1030; see also SENATE REPORT, *supra* note 66, at 47. See generally VIOLATING THE CODE SURVEY, *supra* note 15.

108. UNITED STATES DEPARTMENT OF STATE AND THE UNITED STATES NATIONAL COMMITTEE FOR MAN AND THE BIOSPHERE, PROCEEDINGS OF THE U.S. STRATEGY CONFERENCE ON PESTICIDE MANAGEMENT, 3-4 (1979) [hereinafter STATE DEPARTMENT PROCEEDINGS].

eral, not shipment-specific, importing nations have less control than under a prior informed consent framework.<sup>109</sup> A nation may not object to a small, initial shipment, not knowing that shipments will continue indefinitely. Finally, the exporting state has little assurance that the proper authorities in the importing state have considered and examined the relevant information, especially when the importing state lacks a sophisticated regulatory system.<sup>110</sup> Hazardous products, therefore, may enter the importing state's marketplace without adequate deliberation.

### 1. American Notice Systems

Prior informed consent achieves the goals of the pure notice system more effectively than current notice schemes. For example, the U.S. notice system for chemical exports under the Toxic Substances Control Act alerts the importing country's government of both the chemical export and the EPA's regulatory action.<sup>111</sup> Prior informed consent's explicit consent provision, however, would increase the likelihood that the importing state's authorities are aware of and have examined the information.<sup>112</sup>

A prior informed consent framework would also be more advantageous in the pesticide export area. Although in theory The Federal Insecticide, Fungicide, and Rodenticide Act requires that foreign purchasers be aware of U.S. restrictions on domestic use of the product,<sup>113</sup> the EPA awareness statement often reaches local authorities long after the pesticides have arrived.<sup>114</sup> The EPA itself has stated that it "does not consider that the acknowledgement statement is primarily intended to serve as pre-shipment notification to foreign governments in order that they may intercept shipments of such pesticides."<sup>115</sup>

109. See J. Scherr & E. Spitalnik, *supra* note 46, at 3.

110. See 1978 HOUSE REPORT, *supra* note 2, at 15; STATE DEPARTMENT PROCEEDINGS, *supra* note 108, at 3-4.

111. See *supra* note 44.

112. For example, under the TSCA and FIFRA notice systems, *supra* note 46, the exporter mails the notice to the importing nation's embassy in Washington D.C., rather than to regulatory authorities. This system lessens the likelihood of pre-shipment notice. Telephone Interview with David Wirth, former State Department official (Feb. 27, 1987).

One critic of the notice system stated:

[N]otifications of control actions do not have much impact on exports of banned or severely restricted pesticides. In fact, the notices transmitted by EPA rarely reach the appropriate officials in developing countries, who might be able to evaluate the information and use it for national regulatory action. There are very few known cases in which importing countries actually decided to ban the importation and use of a particular pesticide as a result of a notification from the United States.

Pallemaerts, *supra* note 28, at 25.

113. See *supra* notes 45-48 and accompanying text.

114. Pallemaerts, *supra* note 28, at 25.

115. 45 Fed. Reg. 50,276 (1980).

## 2. *International Information Exchanges*

Commentators, including the Secretary-General of the United Nations, recognize that voluntary information exchange systems "may not be a completely adequate response to the problem [of hazardous exports]."<sup>116</sup> For example, in the chemical export area, the OECD advocates information exchange rather than prior informed consent.<sup>117</sup> Under the OECD approach, however, chemicals which the exporting state domestically bans may enter the importing nation's marketplace with little deliberation by local governments.<sup>118</sup> Even if states implement the OECD system in good faith, importing states might fail to recognize and act on the information supplied. For example, while the U.S. export policy for chemicals and pesticides requires annual notice,<sup>119</sup> the OECD notice scheme requires only first export notice.<sup>120</sup> Thus, dangerous imports may continue indefinitely without assurance that the importing state recognizes or remembers the single, initial notice.

The same problems occur under the FAO information exchange for exports of banned or severely restricted products.<sup>121</sup> The FAO system fails to provide shipment-specific information to the importing state. Notice, therefore, may not reach the importing state until after the shipments have arrived.<sup>122</sup> Like other information exchanges, the FAO policy creates a presumption in favor of hazardous exports instead of against them, failing to recognize the vulnerability of many states lacking regulatory expertise.

### B. *Modified PIC Procedures*

A pure prior informed consent procedure, such as the U.S., OECD, and UNEP hazardous waste policies, forbids the export of banned or severely restricted products unless the importing state explicitly consents. Although the Netherlands and the Commission of European Communities have offered modified prior informed consent procedures, these procedures are flawed; the Commission's proposal, in particular, resembles a notice system more than prior informed consent.

The Commission's modified prior informed consent proposal places the presumption in favor of export; hazardous waste export is prohibited only when the importing country responds negatively to the notice.<sup>123</sup> Indeed, the modified prior informed consent proposal differs only slightly from a notice system. Both systems rely upon the importing nation's objection before stopping export, but the Commission's

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116. United Nations Secretary-General, "Exchange of Information on Banned Hazardous Chemicals and Unsafe Pharmaceutical Products," U.N.Doc. a/36/255 (1981), 8.

117. *See supra* notes 49-53 and accompanying text.

118. *See supra* notes 111-15 and accompanying text.

119. *See supra* notes 40-48 and accompanying text.

120. *See supra* notes 50-53 and accompanying text.

121. *See supra* notes 54-56 accompanying text.

122. Pallemarts, *supra* note 28, at 25.

123. *See supra* notes 97-104 and accompanying text.

proposal sets in place a regularized mechanism for states to make such objections. For many Third World states, an effective prior informed consent procedure for banned or severely restricted chemicals must presume the prohibition on trade unless the importing state affirmatively consents to the import. Only a presumption against hazardous exports would enable importing states to make informed decisions regarding imports.

Although the Netherlands adopted a prior informed consent procedure for banned or severely restricted chemicals, countries should be wary of using the Dutch program as a model. The Dutch program is voluntary. The program may well be effective in the Dutch regulatory system, which, according to the Dutch embassy, often relies on governmental and business cooperation more than on governmental coercion. To be effective in the more adversarial American system, however, prior informed consent needs mandatory requirements with sanctions for failed compliance.

### C. Non-Notice Systems: The Extremes of *Caveat Emptor* and Bans

*Caveat emptor* is essentially a policy of non-action. Many countries practicing it, like the United States in its policy towards consumer product exports, do not practice it at home. If market mechanisms are less adequate in the developed U.S. economy, they are likely even more inadequate in less developed economies, where both business and individual consumers lack the access to a wide range of information necessary for informed decision-making and the sophisticated tools that enable richer consumers to use a hazardous product safely. Any product so dangerous that a country feels the need to severely regulate or ban its use internally requires regulation when sold to poorer countries.

Bans on hazardous exports, in contrast, are admittedly even more effective than prior informed consent. A ban on products deemed unsafe by an exporting nation protects nations lacking the capacity to make sophisticated or frequent regulatory decisions.<sup>124</sup> Bans also protect nations from corrupt officials who may accept bribes in exchange for admitting unduly hazardous products.<sup>125</sup> Bans, however, are paternalistic and conflict with notions of state sovereignty.<sup>126</sup> States often have different needs. One state may find, for example, that a particular pesticide's dangers outweigh its benefits, while another state legitimately decides the opposite. The second state may reap quite different benefits from the pesticide's use because the pesticide addresses a problem dif-

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124. For a description of inadequate Third World regulatory capacity, see Goldberg, *supra* note 9, at 1030; see also Agege, *supra* note 23, at 406; Wirth, *supra* note 9, at 312-13.

125. For a discussion on the merits of bans, see Pallemerts, *supra* note 28, at 26.

126. Exporting states, such as West Germany, believe this policy irresponsible because it infringes on "the sovereignty of importing countries and their freedom to make their own risk/benefit assessments and regulatory decisions." *Id.*

ferent in kind or degree from the problem it would address in the first state.

#### D. The Need for Notice and Consent

Prior informed consent preserves the sovereignty and self-determination of importing states,<sup>127</sup> while enhancing the ability of states to protect their citizens and environment. Because prior informed consent places the burden to accept on the importing state, it ensures a state receives hazardous products only after affirmatively deciding that it needs them. Prior informed consent avoids infringing state sovereignty as do bans, yet effectuates the policies of notice better than notice systems themselves. Requiring affirmative consent heightens the importing state's attention and deliberation.

Prior informed consent, however, is not without critics. Opponents worry that, since information exchanges already exist for many products, the system may be duplicative.<sup>128</sup> This criticism, however, ignores the purpose of prior informed consent, which is not to give decision-makers new information, but to encourage well-considered decisions based on available information.

A more troubling criticism of prior informed consent is that the system will prove impractical, bureaucratic, and burdensome.<sup>129</sup> In the pesticide area, for example, where timely response to food production needs necessitates quick shipments, delays may cause crop losses.<sup>130</sup> Although the prior informed consent experience of hazardous waste control under the Resource Conservation and Recovery Act suggests that prior informed consent can be efficient, it does not answer this particular concern. Hazardous waste shipments do not require the kind of timely approval and shipment critics fear will be needed occasionally for pesticides. Moreover, the same problems of inadequate Third World regulatory structures that render notice systems ineffective could likewise interfere with the ability of Third World regulators to make quick decisions when needed. Such problems, however, remain speculative. If they arise after implementation of prior informed consent, the states creating the procedure can modify it in the pesticide area to provide greater flexibility.

For the typical situation, importers can avoid prior informed consent-related delays by advance planning and by making product safety a purchasing criteria. Although the transition period under a prior informed consent scheme might be difficult, over time prior informed consent would become a regular aspect of business activity. An importing state need only consent as promptly as possible to trigger the import. Moreover, since prior informed consent only targets products that the exporting state banned or severely restricted for domestic use,

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127. See Goldberg, *supra* note 9, at 1033.

128. NACA Position Paper, *supra* note 5.

129. *Id.*

130. *Id.*



importers concerned about delays may choose non-restricted, alternative products.<sup>131</sup>

A final concern that even prior informed consent supporters must concede is that the system's effectiveness depends on the diligence of importing state authorities. Government indifference to environmental or consumer protection due to corruption or the ability of powerful multinational corporations to hold a government "hostage" could make a mockery of that country's prior informed consent policy. Such problems might require modifying prior informed consent in the direction of a traditional ban. Such a modification would require exporting states to forbid export if they believe that, despite the importing state's affirmative consent, the state could not manage the product safely. The United States, for instance, may ultimately address such an issue under the RCRA. Prior informed consent is not a panacea. It serves as a reasonable halfway point between notice and an outright ban. The possible remaining problems reflect a deliberate policy choice of sacrificing some safety so as to respect state sovereignty.

#### E. The Need For U.S. Leadership in Hazardous Export Control

As one commentator observed, "[t]he role of the U.S. Government, and particularly Congress, in this process should not be underestimated. Other nations have repeatedly stressed the catalytic role of the United States for foreign undertakings and international cooperation in the environmental field."<sup>132</sup> The FIFRA notice system for pesticides, for example, influenced the development of international information exchange ideas;<sup>133</sup> and the RCRA prior informed consent procedure for hazardous wastes influenced UNEP's adoption of a similar procedure.<sup>134</sup> The United States generally has elaborate regulatory structures for consumer and environmental protection, while many nations' regulatory structures are inadequate to handle complex health and safety problems.<sup>135</sup> The United States is thus in a position to pioneer new hazardous export control techniques such as prior informed consent.

Domestic industry could benefit from prior informed consent procedures, as might U.S. foreign policy. For example, American industrial competitiveness diminishes when "made in USA" stands not for safety, but for "let the buyer beware" of injury, illness, or even death.<sup>136</sup> Similarly, hazardous exports may create diplomatic problems for the United States. Developing nations may view U.S. policy as constituting a

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131. Safer product use might therefor increase because of the comparative disadvantage of banned or severely restricted products.

132. See Wirth, *supra* note 9, at 314.

133. *Id.*; see *supra* notes 45-48 and accompanying text.

134. See *supra* notes 80-105 and accompanying text; see also Wirth, *supra* note 9, at 312.

135. Goldberg, *supra* note 9, at 1030.

136. Working Group Report, *supra* note 10, at 53754, 53758; see also Agege, *supra* note 23, at 407.

double standard, placing citizens of developing nations at much greater risk than Americans.<sup>137</sup> Prior informed consent allows the United States the opportunity to demonstrate concern for other countries' well-being in a way respectful of their sovereignty.

#### IV. Conclusion

Current U.S. law and international guidelines for the export of banned or severely restricted products inadequately protect world health and the environment. Notice and information exchange schemes, for example, fail to ensure that the importing state's authorities use due consideration for the hazardous import. Prior informed consent offers the best balance of health, safety, and environmental protection while permitting exportation of hazardous products when desired or necessary. Because of the United States' well-developed product regulatory structure and economic leverage, the United States may be best suited to encourage greater safety standards in the international marketplace. The United States, therefore, should implement prior informed consent procedures domestically and advocate their adoption in the international arena.

*Cyrus Mehri*

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137. See J. Scherr, *supra* note 9, at 2; see also *supra* notes 6-26, 32-39 and accompanying text. The Carter Administration reached this conclusion regarding some extremely dangerous products. See *supra* note 27; see also Working Group Report, *supra* note 10.

