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Global Competition and EU Environmental Policy

Regulating Exports of Hazardous Chemicals: The EU's External Chemical Safety Policy

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Over the past decade, the EU has succeeded in developing an external chemical safety policy and in asserting its role as a major actor in the global debate on trade in banned and severely restricted chemicals. This paper analyses the development of this policy, its dependence on the internal dynamics of EU law-making as well as upon EU relations with third countries.

The issue of international trade in banned and severely restricted chemicals emerged on the international environmental policy agenda in the early 1980s, as a result of concern expressed by Third World governments in United Nations fora (Pallemaerts 1988) and reports published by various non-governmental organisations (Weir and Schapiro 1981, Bull 1982) about the serious health and environmental effects of the export to developing countries of hazardous chemicals, especially pesticides, whose use is prohibited or subject to severe regulatory restrictions in producing countries. As the world's largest exporter of pesticides,[2] the EC found itself under pressure from the international community and from a broad coalition of environmental, consumer and development NGOs to control trade in banned and severely restricted products.[3] The European Commission played a key role as a focal point for political pressure, policy initiator in the internal legislative process and later also as spokesperson in external policy negotiations. In developing an external chemical safety policy, it had to walk a tightrope between global health and environmental concerns on the one hand and the European chemical industry's trade interests and competitiveness concerns on the other.

The slow-motion development of an EU policy on hazardous chemical exports

European Community chemical safety legislation was originally concerned exclusively with the internal market. The exclusion of chemicals intended for export from the scope of such Community legislation was no more than a logical consequence of a regulatory policy focused on the internal market and was not perceived as a political issue until the early 1980s.[4] The legal vacuum

[2] In 1978, EC countries accounted for 61.5 % of world pesticide exports (Bull 1982:6). Since export statistics are not available on a substance-by-substance basis, it is impossible to distinguish exports of banned and severely restricted pesticides from total exports.

[3] In 1985, seven international NGO networks formed the *Coalition Against Dangerous Exports* (CADE) to lobby for controls on hazardous exports from the EC. See Chetley (1985).

[4] See, e.g., Council Directive of 26 June 1978 (78/631/EEC) on the approximation of the laws of the Member States relating to the classification, packaging and labelling of dangerous preparations (pesticides), O.J., 1978, L 206/13, art. 1, para. 2 (c); Council Directive of 21

with respect to exports was obviously in harmony with the interests of the EC chemical industry, heavily dependent as it is on export markets. In 1978, EC-based companies accounted for 38.6% of world pesticide sales, and the five largest of them (Bayer, Shell, ICI, Rhône-Poulenc and BASF) made 65% of their total sales outside Europe (Chetley 1985:32). In 1981, 31% of total EC exports of pesticides went to developing countries. The main pesticide-exporting member states were Germany, the United Kingdom, France, the Netherlands and Italy, and their respective shares of overall EC pesticide exports to the Third World in the same year 32%, 24%, 18%, 10% and 5%.[5]

As a result of this configuration of interests, the development of an external Community policy on chemical safety was very slow. The Commission initially did not regard such a policy as necessary. The earliest political initiatives in this field were actually taken by the European Parliament in the face of strong Commission opposition. It is only in the mid-1980s that the Commission, confronted not only with political pressure from the Parliament and from NGOs, but also from a number of member states contemplating unilateral measures, and with the initiatives of intergovernmental organisations such as the OECD, UNEP and FAO, changed its position and eventually submitted a proposal for legislation on the export of certain hazardous chemicals to the Council in 1986.[6]

Prior to this legislative initiative, the Commission consistently opposed regulation of hazardous chemical exports on the grounds that "it should be for the importing country to lay down its own rules for trade in these products" (EP 1982a) and that these rules "may differ from Community provisions for sound and objective reasons" (EP 1982b). Yet the Commission's policy was not entirely without contradictions. Ironically, when questioned in 1981 about possible exports of banned hazardous consumer products from the United States to the European Community, the Commission asserted "that every country engaged in international trade must ensure that any products liable to be a direct

December 1978 (79/117/EEC) prohibiting the placing on the market and use of plant protection products containing certain active substances, O.J., 1979, L 33/36, art. 5 (b). The rationale for this exemption, as spelled out in the preamble of Directive 79/117/EEC, is that "it is not appropriate to apply Community provisions to plant protection products intended for export to third countries *since in general these countries have their own regulations*."

[5] Based on figures published by the Central Statistical Office of the Netherlands in 1986 (CBS 1986:5).

[6] For a discussion of national legislative measures in the Netherlands, Germany and the United Kingdom, see Pallemaerts (1987). For an overview of these intergovernmental initiatives, see Pallemaerts (1988).

hazard to users or consumers should not be exported" (EP 1981a). However, at that time it was clearly not prepared to apply the same principle to the Community's own exports of toxic chemicals. To rationalise this double standard, the Commission relied on the familiar argument that local conditions in developing countries may lead to a different risk/benefit assessment, and that any attempt to "impose Community rules on non-member countries or deny them supplies of pesticides they need could cause vexed political problems" (EP 1982a).

Later, however, the Commission, while still unwilling to take any action to amend Community directives, expressed some support for the concept of organised information exchange on hazardous chemicals in international trade, but deferred to the initiative of other international organisations in this field (EP 1982a). In particular, the Commission seemed to favour the FAO as the most appropriate forum to address the issue, and it participated in the consultations on the FAO International Code of Conduct on the Distribution and Use of Pesticides (EP 1982b, EP 1983b:240). In its statements about the desirability of international notification arrangements for hazardous products generally, the Commission continued to place heavy emphasis on the "observance of [the] sovereign rights of each state," stressing "that it is up to each country to decide whether a product may be imported or not" (EP 1981b:16).

In 1983, in response to a motion for a resolution introduced by the Socialist Group, the European Parliament's Environment Committee adopted a report recommending that exports of banned pesticides from the EEC be made subject to notification and the express consent of the importing country and that all exported pesticides should comply with EEC packaging and labelling standards (EP 1983a). On 14 October 1983, the European Parliament adopted the resolution proposed by its Environment Committee. This resolution recommended amendments to existing Community pesticides control legislation to make pesticide exports subject to the twin conditions

> (a) *that the government of the importing country is informed* of the particular nature of the product and of the restrictions to which it is subject in the exporting country and the reasons for such restrictions;
>
> (b) *that the government of the importing country*, having received such notification, *explicitly requests the purchase* (EP 1983c, emphasis added).

Additionally, the resolution called for legislation to ensure that all pesticides exported from the Community to developing countries are packaged and labelled in accordance with the standards laid down for their placing on the market within the Community and "that the directions for use are written in the most common language of the country of destination, preferably accompanied by diagrams, unless specified otherwise by the importing countries."

In 1983, the European Parliament resolution was the clearest pronouncement thus far by a political institution from the pesticide-exporting countries in favour of a system of export controls to ensure the prior informed consent (PIC) of the importing country. However, the resolution had no immediate effect on the position of the Commission, which continued to oppose any export regulation by the Community.

During the plenary debate in Parliament, the European Commissioner then in charge of environmental affairs, Karl-Heinz Narjes, criticised the resolution for seeking to force EC standards on other countries and reiterated the Commission's standard position that "the autonomy and the principle of respect of the sovereign rights of these third countries would thereby be affected, [while] these countries must and can make their own decisions concerning the safety and health of their citizens" (EP 1983b).

Towards an EEC regulation on exports of banned and severely restricted chemicals

Several factors contributed to prompting a change in the Commission's negative attitude towards regulation of international trade in banned and severely restricted chemicals. Apart from the strong position taken by the European Parliament in its resolution of 14 October 1983, there were also indications of support for Community action on the part of some member states. In June 1983, the Dutch government, in an attempt to prod the Commission into action, put the pesticides export issue on the Council agenda and submitted a memorandum suggesting "that Community rules be adopted regarding the export of specified pesticides to countries outside the Community" (ND 1983). In response to this proposal, the Council requested the Commission to prepare a report on the issue and referred the matter to the Committee of Permanent Representatives for further discussion (TSCN 1983:2).

Apart from the Council request and the European Parliament resolution, other factors which seem to have incited the Commission to act are the fact that various intergovernmental organisations such as the OECD, UNEP and FAO were developing regulatory instruments and that several member states were in

the process of enacting national legislation on exports of chemicals. In 1985, the Netherlands and the United Kingdom, followed by the Federal Republic of Germany in 1986, introduced new legislation providing statutory authority for certain measures to regulate exports of banned or severely restricted chemicals. The taking of unilateral legislative action by a number of member states, all three of them major exporters of chemicals, threatened to cause trade distortions and was a strong incentive for Community action.

The Commission took a long time to elaborate concrete proposals for Community action, still fearing that unilateral action would jeopardise EC trade interests. Initially, it merely observed developments in international fora and waited for the outcome of the ongoing negotiations on export notification schemes in UNEP and FAO before taking any initiative of its own. The Commission participated in the UNEP and FAO negotiations but acted as a follower rather than a leader in the international regulatory debate. Its position in these negotiations was essentially conservative, as it joined the majority of EC member states and other OECD countries in an effort to ensure that the non-binding international standards for the responsibility of exporting countries being established by UNEP and FAO did not go beyond mere information exchange.

Although it initially opposed the principle of PIC in FAO and UNEP, the Commission eventually changed its position on this question too and moved closer to the Parliament's view that regulation of exports of banned and severely restricted chemicals must be based on the PIC principle. This important shift in the Commission's position was prompted by discussions in the OECD on the control of exports of hazardous wastes. In March 1985, an OECD ministerial conference adopted a recommendation urging member states not to allow the export of hazardous wastes, in particular to developing countries, unless the importing country possesses "adequate disposal facilities" and has given its formal consent (OECD 1985). Thus, the member states of the OECD, which in 1984 explicitly rejected export controls with respect to banned and severely restricted chemicals (Pallemaerts 1988:65), agreed in 1985 that hazardous wastes should not be shipped abroad without the consent of the importing country. In June 1986, this OECD recommendation was translated into Community law through an amendment of the 1984 EEC Directive on transfrontier shipments of hazardous wastes (ECM 1986a).

Barely two weeks after the adoption of this amendment by the Council, the Commission officially put before the Council its proposal for a Regulation concerning exports of dangerous chemicals (EC 1987), in which it proposed to make such exports subject to the principle of "prior informed choice". In

explaining this proposal, the Commission described the issue of hazardous exports as "one of the most important political issues of the moment in respect to environmental matters and international trade" (EC 1987:4) and established a clear parallelism between the export of banned and severely restricted chemicals and that of hazardous waste, by referring in its explanatory memorandum to the 1985 OECD recommendation.[7]

The Commission's 1986 "informed choice" proposal

The Commission's original proposal (EC 1987) for what eventually became Regulation (EEC) No. 1734/88, is worth analysing in some detail, in view of the originality of the informed choice system proposed by the Commission. Even though this system was not endorsed by the Council, the proposal nevertheless constituted an important political decision of the Commission of the European Communities and a significant contribution to the international regulatory debate in its own right.

After its initial reluctance to get involved in the regulation of chemical exports, the Commission realised that the Community as a major trading power could not ignore this issue and that the common commercial policy was in fact the most appropriate framework for addressing it. At the time it was formulated, the proposed Regulation was the most far-reaching and interventionist international regulatory proposal, which contrasted sharply with the minimalist approach which had initially prevailed in other international fora. The measures proposed by the Commission were more stringent than anything contained in the then existing recommendatory instruments developed by OECD, UNEP and FAO (Pallemaerts 1988). It was also especially significant as the first proposal for a *binding* legal instrument to regulate exports of banned and severely restricted chemicals.

The Commission proposed to introduce restrictions on the export of dangerous chemicals in two stages. In a first stage, it aimed to "bring Community practice into line with existing international codes," by establishing a mandatory export notification procedure, which would ensure the application of those existing international standards "at Community level and in a uniform manner" (EC 1986:2).[8] The informed choice system, as proposed by the

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[7] Ironically, the preamble of an OECD Council recommendation on exports of hazardous wastes adopted a few weeks before the Commission issued its proposal explicitly refuted this parallelism by stressing "the particular nature of wastes and *the distinction between wastes and products which are traded internationally*" (OECD 1986, emphasis added).

Commission, would only have come into effect two years after the entry into force of the Regulation. The Commission hoped that, in the meantime, UNEP and OECD could be convinced to include the same system in their respective instruments, and it requested a mandate from the Council to negotiate on behalf of the Community in those organisations.

Under the proposed informed choice system, the export from the Community of the chemicals covered by the Regulation would have required an authorisation to be issued by the designated authority of the member state of exportation. This export authorisation would have been issued not only "if the country of destination consents to the import of the chemical concerned," but also "*if no communication is received from that country within 60 days* of the date on which notification was sent by the Commission." The system proposed by the Commission was a somewhat imperfect implementation of the principle of prior informed consent. The *explicit* consent of the importing country, which was called for in the 1983 European Parliament resolution, would not actually have been required. If the importing country did not react within 60 days, its silence would have been interpreted as *tacit* consent. This is apparently why the Commission opted for the term "informed choice" instead of the more explicit term "prior informed consent".

The Commission's proposal also comprised a recommendation for a Council decision authorising the Commission to negotiate on behalf of the Community within the framework of the OECD and UNEP. Having at last endorsed some form of informed consent, the Commission proposed to take the lead in the international regulatory debate and to try and "export" the informed choice formula to other international fora. The Commission's objective in these fora was to seek to ensure that exporters in other countries would be subject to similar constraints as those to be imposed on EEC exporters.

Community Internal Legislation

The 1988 Export Notification Regulation

When finally adopted by the Council in June 1988, the Regulation (ECM 1988a, hereafter referred to as Regulation 1734/88) was substantially weaker than the Commission's initial proposal.

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[8] Similar objectives were espoused by the Commission in the field of marine pollution. See the Working Paper of André Nollkaemper.

The Regulation was based on Article 130s of the Treaty, instead of Article 113 as originally proposed by the Commission.[9] The Council did not follow the Commission in considering the Regulation as a trade policy measure, but chose to treat it as an environmental policy measure under Article 130s, in view of its objective of protecting health and the environment. This choice was probably based primarily on political considerations related to the decision-making procedure. Apparently the member states were reluctant to accept the decision-making by qualified majority which would have resulted from the choice of Article 113 EEC as legal basis, and opted instead for Article 130s because, at that time, it provided for unanimity.[10] The Commission had strongly argued that Article 113 was the proper legal basis for this measure, and entered a formal statement in the minutes of the Council criticising the Council's decision to change the legal basis to Article 130s and reserving the right to challenge that decision in Court (AE 1987a). It did not, however, carry out this threat and initiate annulment proceedings against the Regulation.

The Council did not accept the informed choice procedure proposed by the Commission, but opted instead for a minimal notification system modelled on the OECD Guiding Principles and corresponding FAO and UNEP provisions. The Council rejected the Commission's view that the Community should take the lead internationally by applying PIC unilaterally, while simultaneously trying to convince other international fora to do the same. The Council did not wish to risk imposing on Community exporters a competitive disadvantage but chose to await further developments at the international level before taking any initiatives in this field.

Together with the Regulation, the Council adopted a resolution which, referring implicitly to the Dutch initiative to introduce PIC at the national level, welcomed "action by Member States to test the practical value" of PIC and invited the Commission "to examine this question in greater detail and to

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[9] Article 113 confers broad powers on the Community in the field of the "common commercial policy" which covers all aspects of external trade with non-member countries, including, *inter alia*, "export policy". As early as 1979, the Court of Justice of the European Communities, in an important opinion on the scope of the common commercial policy, held that art. 113 could serve as a basis for "a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalisation of trade." See ECJ (1979).

[10] The legal basis of legislation plays a crucial role in several of the cases under investigation in this volume. Unanimous voting has prevented the adoption of an EU carbon-energy tax (see Thomas Heller's paper), whereas the possibility of qualified majority voting facilitated the adoption of EU measures restricting methyl bromide (see Ian Rowlands's paper).

submit, where necessary, in the light of the information supplied by the Member States and *developments in relevant international practices*, appropriate proposals with a view to the possible adjustment of the Community instrument" (ECM 1988b). This resolution, which also noted the Commission's intention to participate in the UNEP negotiations on PIC, clearly indicated that developments in other international fora would be a key determinant of further action by the Community. Thus the Community elected to remain a follower rather than become a leader.

Regulation 1734/88 established "a common system of notification and information" (ECM 1988a, art. 1). This system applies to a common list of chemicals banned or severely restricted *by Community law*, as laid down in Annex I of the Regulation. It provides for a single export notification for the Community as a whole. This single notification covered "every subsequent export of the chemical concerned from the Community to the same third country" (ECM 1988a art. 4 para. 3). There is no notification requirement for chemicals which are banned or severely restricted in individual member states.

The provisions of the Regulation left the member states considerable discretion as to *how* notification will be effected. It only provided that the designated authority of the exporting member state "shall take the necessary measures to ensure that the appropriate authorities of the country of destination receive notification" (ECM 1988a, art. 4 para. 1). This language does not explicitly require that the designated authority *itself* give notification. It was possible for a member state to delegate that responsibility to the exporter, provided it could ensure that the notification requirement is effectively complied with. As a matter of fact, this eventuality was explicitly envisaged in a footnote to Annex II of the Regulation, which specified the information to be given "where the designated authority provides that the notification be made *by the exporter*."

According to a 1993 Commission report on the implementation of Regulation 1734/88, in a period of over three years, from the entry into force of the Regulation until 1 November 1992, not more than 60 export notifications were effected pursuant to it for the Community as a whole. Only six member states reported notifications to the Commission. The other six confirmed to the Commission that, "to their knowledge," they did not export any of the products covered by the Regulation (EC 1993b:3). Of the 21 substances or groups of substances listed in Annex I to the Regulation, only eight were the subject of notifications. In all, notifications were addressed to only some thirty importing countries (EC 1993a, annex A2). Whether due to non-compliance or to other causes, the small number of notifications, products and third countries of

destination involved indicates the limited significance of Regulation 1734/88. It does not seem to have imposed any real constraints on trade. The measure appears to have been largely symbolic, in that most of the products which were made subject to the notification requirement were no longer produced in the Community or traded on any significant scale in the first place.

The 1992 Prior Informed Consent Regulation

In a compromise between advocates and opponents of PIC among the member states, the Council, when it adopted Regulation 1734/88, had undertaken to reconsider the introduction of a PIC procedure at Community level two years later and invited the Commission to submit appropriate proposals before July 1990. The Commission, in a formal statement recorded in the Council minutes, had expressly "dissociated itself" from the Council decision not to translate the principle of PIC into EC law immediately, as it had originally proposed in 1986. The Commission had reaffirmed its commitment to PIC as "the only acceptable basis for the Community's exports of chemical products whose use is banned or strictly limited in the Community" and announced its intention to ask the Council to reconsider its rejection of the principle, noting "growing international pressure for its adoption" (AE 1987). One could say that there was in fact a political understanding between the Council and the Commission that the matter would be reconsidered on the basis of the outcome of the negotiations on PIC that were then going on in UNEP and FAO.

The Commission closely followed those negotiations and, as soon as agreement on a PIC scheme started taking shape in those international fora, began to draft proposals for amending Regulation 1734/88. It is quite symptomatic of the recognised inadequacy of that Regulation that proposals for amending it were already being drafted even before it had entered into force on 22 June 1989.[11] Nevertheless, the Commission did not manage to meet the target date of 1 July 1990 mentioned in the preamble of the 1988 Regulation, but submitted its proposal to the Council a few months later, on 17 December 1990 (EC 1991). The new Regulation concerning Community exports and imports of certain dangerous chemicals was eventually adopted by the Council on 23 July 1992 (ECM 1992). It entered into force on 29 November 1992,

[11] A first draft proposal for amendments was presented by the Commission to national experts at the first meeting of the designated authorities for the application of Council Regulation No. 1734/88 on 22-23 June 1989 (EC 1989).

replacing Regulation 1734/88, which it formally repealed (ECM 1992, art. 12 para. 1).

The 1992 Regulation considerably expands on the 1988 Regulation, by supplementing the Community export notification system, in force since 1989, with a legally binding PIC procedure, based on the voluntary scheme contained in the UNEP London Guidelines and the FAO Code of Conduct, as both amended in 1989. Apart from introducing the PIC procedure, Regulation 2455/92 also makes a number of improvements in the existing export notification procedure. It specifies that the designated national authority of the Member State of export shall *itself* notify the country of destination, and that the exporter is under an obligation to provide it with the information necessary to that effect no later than 30 days before export is due to take place. The new Regulation also provides that the export notification "shall as far as possible take place at least 15 days before export" (ECM 1992 art. 4 para. 1).

The export notification procedure, originally introduced by the 1988 Regulation, continues to apply only to chemicals banned or severely restricted under Community law. The list of these chemicals, laid down in Annex I of Regulation 2455/92, is an expanded version of Annex I of Regulation 1734/88.[12] The 1992 Regulation also strengthens the packaging and labelling requirements for exported chemicals, initially introduced by Article 5 of Regulation 1734/88. These requirements now apply not only to chemicals banned or severely restricted under Community law, as provided in the 1988 Regulation, but generally to all "dangerous chemicals (...) intended for export" which would be subject to Community provisions relating to packaging and labelling if they were marketed within the EC (ECM 1992 art. 7 para. 1).[13] However, a provision specifying that the requirement of compliance with EEC packaging and labelling standards "shall be without prejudice to any specific requirements of the importing country" (ECM 1992, art. 7 para. 1), emphasises the priority to be given to the standards of the importing country and stresses the complementary function of the EEC standards.

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[12] Three chemicals were added to the list at the time of adoption of the new Regulation in 1992, and 15 more in December 1994. See ECM (1994).

[13] It should be noted that the Council went beyond the Commission's initial proposal in making the labelling and packaging requirements applicable to *all* exported dangerous chemicals. The Commission had originally proposed that they should apply only to the chemicals listed in Annexes I and II of the Regulation, i.e. those subject to the export notification and/or PIC procedure. See EC (1991), art. 6 para 1.

The most important provisions of Regulation 2455/92 are those relating to the PIC procedure. The necessary information for the application of the PIC procedure in the Community is to be incorporated in Annex II of the Regulation. According to Article 5, para. 3, this Annex shall include the international list of banned and severely restricted chemicals subject to the PIC procedure, as established jointly by UNEP and FAO, the list of countries participating in the UNEP/FAO PIC scheme and the decisions taken by these countries regarding the import of the listed chemicals. The purpose of including all this information in an annex to the Regulation is to make the international PIC procedure enforceable as part of European Community law. Indeed, the Regulation explicitly provides that "the exporter shall be required to comply with the decision of the country of destination participating in the PIC procedure" (art. 5, para. 4). However, the enforcement measures to be taken are left to the discretion of the member states, as Article 6 only provides that they "shall take appropriate legal or administrative action in case of infringement." The Commission had initially proposed the imposition of "severe or dissuasive sanctions...on persons exporting chemicals subject to the international PIC procedure...contrary to the PIC decision of the country of destination" (EC 1991, art. 5 para. 4), but that requirement apparently proved too specific for certain member states.

It should be noted, however, that when the Regulation was formally adopted in July 1992, Annex II was left blank. In the text of Regulation 2455/92 as published in the *Official Journal*, Annex II bears the heading "Chemicals subject to the international PIC procedure and the PIC decisions of importing countries," but contains no entries. The first entries in Annex II were formally adopted in January 1994 (EC 1994).[14] Thus, it is only one and a half year after the adoption of Regulation 2455/92 that the Community actually took the necessary legislative action to make the PIC provisions of the Regulation operational. Ironically, in May 1993, the Commission published a brochure on the Community's policy with respect to exports of banned or severely restricted chemicals (EC 1993a), boasting that Regulation 2455/92 "makes the PIC procedure mandatory for the export of chemicals from the Community to participating countries" and "could serve as a model for a workable international PIC system." However, at the time of the brochure's publication, the Community's much-hailed mandatory PIC procedure was not yet operational for lack of any entries in Annex II of the Regulation.

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[14] The first entries in Annex II were very incomplete at the time of their adoption, as they covered only six PIC chemicals and a limited number of participating importing country decisions. Annex II was updated and completed only two and a half years later (EC 1996).

The delay in making the PIC provisions operational is due to the formal procedure laid down in the Regulation for any amendments to Annex II. This procedure requires the Commission to submit the proposed amendments to a committee composed of member state representatives, which shall give an opinion by qualified majority vote (ECM 1992 art. 11 para. 2). Some member states have used the committee procedure to delay the adoption of Annex II and its subsequent modifications. Their attitude is contrary to the spirit and letter of the UNEP/FAO voluntary PIC scheme, under which changes to the list of PIC chemicals and PIC decisions of importing countries are not subject to the discretion of EC institutions but result automatically from decisions taken by an international expert committee or by importing countries and notified by UNEP/FAO. Exporting countries have no discretion whether or not to "adopt" these changes but are committed to apply the PIC list as established by UNEP/FAO and to respect the decisions of importing countries. Amendments to Annex II should in fact be a mere formality, but the procedure laid down in Regulation makes it impossible for the Community to keep up with the PIC decisions which are communicated by UNEP/FAO on a routine basis every six months.

The implementation and effectiveness of Regulation 2455/92

In July 1995, the European Commission, in cooperation with the European Parliament, organised a three-day "Conference on International Trade in Dangerous Chemicals" in Brussels. This conference, which had no formal decision-making authority, was intended to assess the effectiveness of Regulation 2455/92, to analyse the chemicals management situation in developing countries and the role of information exchange and PIC procedures in improving it, and to formulate recommendations for future measures and policy in this field. The conference was attended by representatives of all interested parties, including government representatives from EU member states and non-EU countries, in particular chemical-importing developing countries, as well as representatives of various intergovernmental organisations with an interest in chemical safety, industry, trade unions and NGOs.

In preparation for the conference, the Commission had commissioned the German aid agency GTZ to conduct a survey of designated national authorities in importing countries and other interested actors to evaluate the impact of the EU's export notification and PIC procedures. This survey showed that many authorities in importing third countries were not familiar with the EU measures of which they are the supposed primary beneficiaries, that notifications often did not reach the competent authorities and that the information provided in export notifications was inadequate to meet the needs of importing countries.

During the conference it was stressed by all participants that information exchange and PIC procedures were not in themselves sufficient to ensure chemical safety in developing countries and that more efforts should be devoted to training and capacity building. Several suggestions were formulated by participants for improving the existing EU measures: providing more information in export notifications, especially information concerning the port of entry and identity of the importer, developing provisions for more effective control of shipments in cooperation with customs authorities, extending export notification requirements to all chemicals subject to PIC, including those which are not banned or severely restricted by the EU, etc. Participants also called on the EU to contribute actively to the development of a global, legally binding instrument on PIC.

In his closing statement, the representative of the Commission agreed that a revision of Regulation 2455/92 was necessary and announced that a proposal to this effect would be prepared as soon as possible. Indeed, amendments to Annex III of the Regulation, which lists the information to be provided to importing countries in export notifications, were adopted in July 1996 (EC 1996). More information must now be supplied in the notifications, including the identity of the importer. It seems rather unlikely, however, that any further revisions of the Regulation will be proposed before the conclusion of the UNEP/FAO negotiation process on a PIC convention.[15]

The role of the European Community in multilateral negotiations

GATT/WTO Negotiations on "Domestically Prohibited Goods"

The issue of international trade in banned and severely restricted products was first raised within the forum of the GATT by Nigeria and Sri Lanka in 1982.[16] As a result of this initiative, the 38th session of the Contracting Parties adopted a decision on "export of domestically prohibited goods" providing that "contracting parties shall, to the maximum extent feasible, notify GATT of any goods produced and exported by them but banned by their national authorities for sale on their domestic markets on grounds of human health and safety" (BISD 1983:19). This decision, taken before the adoption by the OECD, UNEP

[15] See the discussion below regarding the UNEP/FAO Intergovernmental Negotiations.

[16] On the establishment and early activities of the Working Group, see generally Sankey (1989).

and FAO of their specific recommendations on notification procedures for hazardous chemicals, was in fact the first international instrument requiring governments to provide information on banned products in international trade, but it should be noted that it was different in scope from those later recommendations, in that it applied only to products *banned* on *health or safety* grounds, and thus did not cover severely restricted products nor those banned for *environmental* reasons.

At the meeting of the GATT Trade Negotiations Committee at ministerial level, held in Montreal in December 1988, in the wake of the public outrage caused in the Third World by the uncovering of a series of projects to dump hazardous waste from Europe and North America in debt-ridden African countries, a group of developing countries headed by Nigeria and Cameroon undertook a renewed effort to put the issue of trade in hazardous substances, including wastes, on the agenda of the Uruguay Round (GATT 1989:4-5). This initiative encountered fierce opposition from industrialised countries, who considered that the problem was already being adequately addressed in the competent "technical" fora like UNEP, the FAO and OECD, and that GATT negotiations on the subject would duplicate the ongoing efforts of those organisations. Due to this opposition, the issue was not added to the Uruguay Round agenda, but, as a compromise, developed and developing GATT contracting parties agreed to step up consideration of the problem under the GATT's regular work programme, and more specifically to discuss *"complementary action that may be necessary in GATT*, having regard to the work that is being done by other international organisations" (GATT 1988a emphasis added).

Six months later, the GATT Council formally established a "Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances," which was instructed to "examine trade-related aspects that may not be adequately addressed" in other international agencies' work in this field "in the light of GATT obligations and principles." In its decision, the Council again stressed "the need to avoid duplicating the work of other international organisations" (BISD 1990:402-403).

It is in the GATT Working Group on Domestically Prohibited Goods that the European Commission, negotiating on behalf of the European Community and its member states, for the first time assumed an active role in the international regulatory debate on trade in hazardous products. As a matter of fact, it was forced to do so because of its institutional position within the GATT and the need for the Community to speak with a single voice in that forum.

Much of the negotiating effort in the Working Group was devoted to accommodating the parties' conflicting views as to the need for the development of general rules on hazardous exports within the framework of GATT as a complement to the special rules and procedures for specific categories of hazardous products elaborated by the different technical organisations. The key question was the determination of the proper scope of application of the proposed GATT rules and their relation to the existing sectoral schemes. In the view of the African and Asian contracting parties who put the issue on the GATT agenda, the rules to be developed within the GATT, providing for a general export ban or at least an export licensing system, were intended to override the less restrictive information exchange or even PIC procedures recommended by the specialised organisations. The industrialised countries, however, sought to preserve those procedures, which they considered quite adequate, and did not wish to see them superseded by more restrictive GATT rules.

The EC tried to bridge the gap between the industrialised and developing countries' positions by submitting to the Working Group, in early 1990, a draft "Understanding on Trade in Domestically Prohibited Goods and other Hazardous Substances" (GATT 1990), in which, in what now sounds almost like a direct rebuttal of the *Tuna-Dolphin* panel's interpretation of GATT art. XX a few years later, it explicitly "recognise[d] the need for governments, in formulating policy in respect of trade in goods...to pay the fullest attention possible to the protection of the environment, and of human, animal and plant health and life, *not only within their own countries but also in other countries*" (GATT 1990, para. 1 art. 2). This provision of the EC proposal, in an apparent attempt to find some common ground between North and South, echoed similar clauses in the proposals tabled by African and Asian countries (GATT 1988b, 1988c:3 para. ii) and inspired compromise wording in a draft decision elaborated by the Chairman of the Working Group, which served as a basis for further negotiations.

However, the Working Group was unable to reach consensus on this draft decision. At the time of expiry of its extended mandate, the Group had managed to reach consensus on the wording of a draft decision among all parties except the United States (GATT 1991), which continued to have reservations both as to the legal form and the content of the proposed instrument.[17] Due to this U.S.

[17] Although the official GATT documents do not identify the single contracting party that blocked the adoption of the draft decision, it is a matter of public knowledge that it is the United States. See O'Connor (1992:8), Ward (1994:278 fn 60).

opposition, the Group was unable to complete its work successfully and the proposed decision was never formally adopted.

At the conclusion of the Uruguay Round in 1994, the issue of exports of domestically prohibited goods was included in the terms of reference of the newly established GATT/WTO Committee on Trade and Environment (GATT 1994). However, it is the last of the seven items on the CTE's agenda and one which has not been given priority in the Committee's work programme in preparation of the WTO ministerial conference to be held in Singapore in December 1996. In the CTE, Nigeria reintroduced a draft decision on domestically prohibited goods (WTO 1996a), based on the GATT Working Group's unsuccessful 1991 draft. The EU, however, did not reiterate its 1990 proposal. The discussion in the CTE, largely a replication of the earlier debate in the GATT Working Group, has so far remained inconclusive. In its report to the Singapore meeting, the CTE merely noted that it "needs to continue to concentrate on *what* contribution *could* be made in this area by the WTO, bearing in mind the need for this work neither to duplicate nor to deflect attention from the work of other specialised inter-governmental fora" (WTO 1996b para. 202, emphasis added) and, "in the meantime," recommended further information-gathering efforts by the WTO Secretariat in cooperation with member states (WTO 1996b para. 203).

UNEP/FAO Intergovernmental Negotiating Committee

The prime locus of multilateral negotiations on the regulation of international trade in banned or severely restricted chemicals has again shifted to UNEP/FAO, as a result of the decision of the UNEP Governing Council in May 1995 to launch formal intergovernmental negotiations, in cooperation with FAO, for the purpose of elaborating an international legally binding instrument for the application of the PIC procedure. The first two meetings of the "Intergovernmental Negotiating Committee for an International Legally Bnding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade" (INC/PIC), convened jointly by UNEP and FAO, were held respectively in Brussels and in Nairobi in March and September 1996. During these meetings, the EU has effectively asserted itself as one of the chief actors in those negotiations, the Commission having obtained a mandate from the Council to negotiate on behalf of the Community and its member states, given the existence of internal EU legislation on PIC.

The decision by the UNEP Governing Council to start negotiations for the conclusion of a legally binding multilateral instrument on PIC was the result

of an excruciatingly slow consensus-building process which took six years and involved a variety of international fora: UNEP, FAO, UNCED, the UN Commission on Sustainable Development (CSD) and, most recently, the Intergovernmental Forum on Chemical Safety (IFCS) (Pallemaerts 1990-1994). Indeed, the "possible further need for a convention" in this field was first mentioned in a 1989 decision of the UNEP Governing Council,[18] but it proved impossible to reach agreement on actually starting negotiations before 1995.

While the INC/PIC was expressly given "a mandate to prepare an international legally binding instrument *for the application of the prior informed consent procedure* for certain hazardous chemicals in international trade" (UNEP 1995a emphasis added), the exact scope of the instrument to be negotiated remains controversial. An apparent consensus, which had emerged from the deliberations of a UNEP *ad hoc* working group of experts and task force in 1993 and 1994, to limit the scope of the future legally binding instrument to making mandatory the application of the PIC procedure, as currently laid down in the voluntary UNEP and FAO instruments (Pallemaerts 1993, 1994), was shattered during the 1994 meeting of the CSD, where, as the Chairman's summary of the high-level segment of that meeting notes, a "strong sentiment was expressed by participants" that the proposed instrument should not only make the PIC procedure legally binding, but "*subsequently ban* the export of domestically prohibited chemicals from countries that are members of the Organisation for Economic Cooperation and Development to other countries" (UN 1994:53 para. 11 emphasis added), by analogy with the 1994 decision of the Basel Convention contracting parties "to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States" (MoP 1994).

The same demand was forcefully reiterated at the 1995 Governing Council meeting by the Group of 77, led by Malaysia, which tabled an amendment to the draft Governing Council decision stipulating that the proposed international instrument should include provisions banning "the export of domestically prohibited chemicals, including pesticides" (UNEP 1995a).[19] In the ensuing negotiations, a compromise was finally reached on a "double-track" approach: while the mandate of the INC remained limited to the application of the PIC procedure, it was agreed that, in parallel with the activities of the committee, a group of experts would be convened, also in cooperation with FAO, to "consider...and recommend what *further measures* are

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[18] Decision 15/30, see Pallemaerts (1990).

[19] See also proposals submitted by the Group of 77 and China (UNEP 1995b).

needed to reduce the risks from a limited number of hazardous chemicals, *either within or beyond the scope of the existing prior informed consent procedure*" (UNEP 1995c, emphasis added). This group was instructed to report to the 19th session of the Governing Council, which would "give consideration to the need to develop further measures...including the possibility that the mandate of the intergovernmental negotiating committee...*be extended to provide a basis for such measures*" (UNEP 1995c, emphasis added).

Argument about the desirable scope of the PIC instrument mobilised most of the negotiators' attention during the first meeting of the INC. However, the debate took on a somewhat different form from what might have been expected based on the earlier discussions in the CSD and the UNEP Governing Council. There was no coordinated G77 position and none of the countries that had supported the call for an export ban on previous occasions argued that the legally binding instrument should contain provisions banning the export of domestically prohibited chemicals from OECD to non-OECD countries. Instead, the debate focused on the issue whether or not the instrument under negotiation should be a framework convention broader in scope than the current voluntary PIC scheme as laid down in the London Guidelines and FAO Code of Conduct, and, more specifically, on the desirability of including in the instrument provisions on export notification for banned or severely restricted chemicals, and a mechanism for adopting further control measures, including possible provisions for eventually phasing out or banning the *production*, rather than the export, of certain hazardous chemicals.

The call for extending the scope of the instrument beyond PIC this time did not come from the G77, but from European countries. In his opening speech at the Brussels meeting, the Belgian environment minister suggested that the legally binding instrument, in addition to the actual PIC provisions, should also provide a legal framework for the adoption of more drastic international action with respect to certain hazardous chemicals, including global production phase-out measures, as and when an international consensus on such measures emerged. He referred specifically to the measures currently under consideration in UNEP and the IFCS for phasing out certain persistent organic pollutants (POPs) and proposed that the instrument under negotiation in the INC/PIC should provide a legal basis for such measures (UNEP 1996a:5).

While not being quite as specific as to the nature of possible further measures, the EU, during the negotiations, took the position that the scope of the instrument should not be strictly limited to the PIC procedure but should be flexible to be able to accommodate future developments. It proposed that the legally binding PIC instrument, to this end, should contain a framework

provision providing a basis for the negotiation and adoption of additional protocols to the instrument at a later stage. This view was strongly opposed by the United States, Australia, Canada and some other OECD countries, who argued that the INC should strictly stick to its mandate and not attempt to elaborate any provisions going beyond the application of the PIC procedure.

At the expert meeting on "further measures", which was held in Copenhagen in April 1996, the Netherlands and Belgium jointly introduced a proposal for the development of an integrated international legal instrument for the application of the PIC procedure, the phasing out of POPs and any additional international measures to promote chemical safety. Since the Copenhagen meeting was not a negotiating session for the PIC instrument, there was no formal EU position which the Commission was mandated to present. Those EU member states that participated in the meeting acted in their own capacity. While no consensus could be reached on a formal recommendation to the Governing Council to consider the integrated approach as proposed by the Netherlands and Belgium, due primarily to opposition from the United States and Australia, the report of the meeting invited the Executive Director of UNEP to request the views of governments on such an approach and submit them to the 19th session of the Governing Council for consideration (UNEP 1996c:9).

The controversy over the scope of the PIC instrument was not resolved during the second session of the INC/PIC in Nairobi. The EU reiterated and further formalised its position by proposing that the objective and scope of the instrument be formulated in general terms and that provision be made for the possible adoption of protocols containing additional measures to achieve this objective. The United States and like-minded OECD countries continued to oppose any extension of the objective and scope of the instrument beyond PIC. The G77, which had not taken any clear position on this issue during the first meeting, remained hesitant to enter into the fray and did not directly address the EU proposal. It did, however, indicate that the PIC procedure *per se* was insufficient and that the instrument should therefore include a reference to the more general objective of promoting the environmentally sound management of chemicals, especially in developing countries, in accordance with the principle of "common but differentiated responsibility" (UNEP 1996b). Thus formulated, the objective of the instrument would justify the inclusion of detailed provisions on capacity-building and technical assistance, which seems to be the primary goal of the G77. However, the concept of "environmentally sound management of chemicals" is sufficiently broad to be able to encompass also other measures additional to the PIC procedure, as envisaged by the EU. While there seems to be room for compromise between the EU and G77 positions, it remains to be seen whether common ground can be found with all OECD countries.

Leaving aside the fundamental political controversy with respect to the scope of the PIC convention, the work of the INC/PIC so far in translating the existing voluntary instruments into legally binding treaty provisions has shown that, even within the narrow confines of these instruments, a number of contentious points remain to be solved. One controversial question is that of export notification. All developing countries that spoke on the issue, as well as the EU, strongly supported the inclusion of export notification provisions in the PIC convention, while the United States, Australia, Canada, and Japan argued that such provisions, though included in the existing voluntary UNEP and FAO instruments, were "not appropriate for discussion in this forum" (UNEP 1996a:7 para. 29) because they are not part of the PIC procedure *stricto sensu*. Export notification mechanisms were also criticised for being potentially trade-restrictive.

The U.S. position on this issue is somewhat puzzling, since export notification requirements for pesticides not registered for use in the United States and for certain other toxic chemicals subject to regulatory restrictions have been in force under U.S. domestic law since the late 1970s.[20] Apparently, the United States does not want to assume any international obligations in this field unless it can be assured that other exporting parties will be subject to equally onerous notification requirements. The U.S. feels that export notification, as currently practised, places a disproportionate burden on U.S. exporters, since the EU requires export notification only for those chemicals banned or severely restricted *under EU law*, while a large number of hazardous chemicals subject to bans or restrictions in individual EU member states are not covered by any export notification requirements.

The EU, for its part, has shown a similar concern about ensuring a "level playing field" in another area of the negotiations. While, under the EU's 1992 Regulation, as pointed out above, exporters are legally required to comply with PIC decisions of importing countries participating in the voluntary UNEP/FAO PIC procedure (ECM 1992 art. 5(4)), there is no similar legislation in other OECD member states. Thus, the EU has not only a political, but also a direct trade interest in making sure that the PIC convention requires all exporting parties to impose the same compliance obligation on exporters under their jurisdiction. Countries which view the PIC procedure as essentially an information exchange mechanism, and consider that the enforcement of PIC decisions is the sole responsibility of importing countries, are reluctant to

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[20] Toxic Substances Control Act (TSCA), s. 12(b), 15 U.S.C. § 2611(b); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), s. 17(a), 7 U.S.C. § 136o(a).

commit themselves to any form of export control. This is apparently why the United States, at the first meeting of the INC, opposed the inclusion in the PIC convention of a provision requiring exporting parties to take appropriate enforcement measures. At the end of the second meeting, however, the EU's view seemed to prevail, as a consensus appeared to be emerging on draft language committing each exporting party to "take appropriate legislative and/or administrative measures to ensure compliance by exporters of prior informed consent chemicals in its territory" (UNEP 1996b:19 art. 10c).

A range of other, more technical issues remain to be solved, particularly as regards the criteria and procedure for the inclusion of chemicals in the PIC procedure. As the voluntary procedure is being transformed into a legally binding one, there is a need to further elaborate and formalise both the substantive and procedural provisions governing the listing of PIC chemicals. In this process, there is a strong tendency, encouraged by some chemical-exporting countries, to raise the threshold for the inclusion of chemicals by increasing the number of procedural steps and the amount of data to be provided, introducing additional substantive and formal criteria and maximising the room for discretionary review of national regulatory decisions which may qualify a chemical for PIC listing (UNEP 1996b, Annex I, art. 6-8. Annex Y).

At the 19th session of the UNEP Governing Council that took place in Nairobi from 27 January to 6 February 1997, there was considerable debate on the relationship between the PIC negotiating process and other chemical safety issues currently on the international agenda. Acting on behalf of the EU, the Dutch presidency tabled a draft decision on chemicals management in which it proposed to initiate "an expeditious assessment process on the advantages and disadvantages of a framework convention on chemicals based on chapter 19 of Agenda 21." The EU draft decision also called for an early conclusion of the negotiations on the PIC instrument and for the establishment of an intergovernmental negotiating committee to develop an international legally binding instrument on POPs, and urged that both the PIC and POPs conventions should have "the necessary flexibility to allow for easy adaptation in view of future developments relating to the different instruments on the safe and environmentally sound management of chemicals" (UNEP 1997a). After protracted negotiations, the Governing Council reached a compromise on a package of four distinct but related decisions on chemicals management issues.

The EU failed in its bid to have the Governing Council direct the INC/PIC to incorporate "the necessary flexibility" in the PIC instrument. Instead, the Governing Council "confirm[ed] the present mandate" of the INC, while at the same time "recogniz[ing] that *additional elements* relating to the

prior informed consent procedure are under consideration" in the Committee (UNEP 1997b), thus avoiding any direct reference to the notion of "further measures" as referred to in its earlier decision 18/12 and in the report of the Copenhagen expert meeting. However, the Governing Council adopted a separate decision on "further measures to reduce the risks from a limited number of hazardous chemicals," in which it endorsed most of the recommendations of the Copenhagen meeting, while merely *noting* those concerning "possible bans or phase-outs," but nevertheless inviting the IFCS to "consider taking action, as appropriate, to implement them and to report on such action" to the 1999 session of the Governing Council (UNEP 1997c).

The same session will also consider a report to be drawn up by UNEP's Executive Director, "outlining options of both a legal and administrative nature for enhanced coherence and efficiency among international activities related to chemicals" (UNEP 1997d) including the PIC convention, which is to be adopted and opened for signature at a diplomatic conference to be convened in late 1997, and the POPs instrument, which is to be developed by a new INC which will start its work in early 1998 (UNEP 1997e). One of the "options" to be examined in the Executive Director's report, though not explicitly mentioned, will obviously be the EU's proposal for a framework convention, but the Governing Council will only be able to review these options at a time when the PIC convention will already have been signed and when the negotiations on a separate POPs convention will be well under way.

Conclusions

For many years, EU policy on export of chemicals was guided by purely economic considerations, with minimal regard for the environmental implications within importing states. EU legislation applied only to the internal market and contained no restrictions on the export of hazardous chemicals. The rise of environmental concern within the EU--particularly the unilateral actions taken by a few of the "greener" member states--created pressure to reform EU legislation in a manner which reconciled environmental concerns with sensitivity for the EU's competitiveness in global chemical export markets. Although the Commission proposed in the mid-1980s that the EC should take the lead in regulating international trade in banned and severely restricted chemicals, the Council balanced environmental with economic concerns by seeking international harmonisation rather than pushing ahead with tough unilateral export restrictions.

Internal regulation has resulted in a united EU external negotiating position versus other OECD states who are seeking to maintain their preferred policy approaches, which confer competitive advantages in export markets. Having unilaterally made the prior informed consent procedure legally binding for EU exporters, the EU now has an obvious interest in the adoption of a multilateral legal instrument making this procedure mandatory for all exporting states. In the current international negotiations, the EU is pressing for a convention which will not only achieve that objective, but also provide a flexible legal framework for further international cooperative action to control hazardous chemicals, beyond the PIC procedure. So far, the EU has demonstrated a remarkable level of internal cohesion and effectively articulated its common position in these negotiations. It is unlikely, however, that the EU will be able to achieve all its negotiating objectives in the face of strong opposition from other OECD countries and G77 scepticism. The outcome of these negotiations will be indicative of the success of the EU's ambitious effort to lead the development of international law in the field of chemical safety.

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