

**LIBERAL ENVIRONMENTALISM AND THE
INTERNATIONAL LAW OF HAZARDOUS CHEMICALS**

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

The Faculty of Graduate Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

December 2007

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Abstract

This study looks at the role that liberal economic norms are playing in international environmental negotiations on hazardous chemicals (including wastes), and the implications of these norms for the protection of the environment and human health from the thousands of chemicals on the market. The key trait of liberal economic norms in relation to global environmental governance is their assumption that the liberalisation of trade and finance and economic growth are both consistent with and necessary for environmental protection. From this assumption follows, for instance, the idea that states should adopt the “least-trade restrictive” measures required to protect the environment and human health.

I argue that liberal economic norms are “hegemonic,” in a Gramscian sense, in chemicals-related international environmental negotiations. This means that a wide range of actors, including those that do not necessarily accept the liberal economic perspective, are upholding liberal economic norms in their statements and proposals if not out of conviction then out of a perceived need to be realistic or persuasive.

The most important implication of liberal economic hegemony is that it is widely assumed that human health and the environment can be effectively protected from the negative effects of hazardous chemicals even though the volume of chemicals and chemical-containing products being consumed is increasing at a spectacular rate. The issue of growing consumption of chemicals is therefore consistently framed as a problem of quality (hazardousness) rather than quantity. To understand consumption in this narrow sense is problematic, however, because there is considerable scientific uncertainty concerning the environmental and health effects of most of the chemicals on the market and because chemicals that pose minimal risks to the environment and human health might be very hazardous when they are being manufactured or upon becoming waste.

In order to address the problem of hazardous chemicals effectively, it is necessary to challenge the hegemony of liberal economic norms in international environmental negotiations. This can be done, I conclude, by deepening a number of fissures in the hegemony of the liberal economic perspective that can be detected in the context of chemicals-related instruments.

TABLE OF CONTENTS

| | |
|---|-----------|
| Abstract..... | ii |
| Table of Contents..... | iii |
| Acronyms..... | vii |
| Acknowledgments..... | ix |
| Introduction..... | 1 |
| Chapter One: Liberal Environmentalism and Global Environmental Governance..... | 15 |
| I. Introduction..... | 15 |
| II. Liberal Economic Norms as Hegemony..... | 18 |
| 1. Gramsci's understanding of hegemony..... | 18 |
| a) Historical bloc..... | 19 |
| 2. Hegemony and world order relations..... | 20 |
| a) Neo-liberal hegemony in the postwar period..... | 23 |
| b) The crisis of neo-liberal hegemony and the new historical bloc..... | 25 |
| 3. Hegemony as discourse..... | 31 |
| 4. Hegemony and international environmental negotiations..... | 34 |
| 5. Hegemony and the law..... | 38 |
| a) Law as process and rules..... | 42 |
| III. The Role of Agency and the Structuration of Social Systems..... | 43 |
| 1. International environmental negotiations as "social systems"..... | 47 |
| 2. Hegemony and structuration..... | 52 |
| IV. Methodological Issues..... | 56 |
| 1. Questionnaire..... | 58 |
| Chapter Two: The Basel Convention on Hazardous Wastes..... | 60 |
| I. Introduction..... | 60 |
| II. Antecedents..... | 62 |
| 1. What are hazardous wastes?..... | 62 |
| 2. The Cairo Guidelines..... | 64 |
| III. The Basel Convention..... | 70 |
| 1. The Basel negotiations..... | 70 |
| a) Scope: from transboundary movements to waste management..... | 75 |
| i) Final outcome..... | 78 |
| b) From prior consent to export bans..... | 80 |
| i) Final outcome..... | 86 |
| ii) The Ban amendment..... | 87 |
| c) Waste minimization..... | 100 |

| | |
|---|------------|
| d) The Partnership approach and the role of industry | 110 |
| i) The mobile phone partnership initiative (MPPI)..... | 113 |
| IV. Conclusion..... | 117 |
| Chapter Three: The Rotterdam Convention on Hazardous Chemicals..... | 121 |
| I. Introduction..... | 121 |
| II. Antecedents..... | 124 |
| 1. What are hazardous chemicals?..... | 124 |
| 2. Multilateral responses..... | 127 |
| a) The International Register of Potentially Toxic Chemicals..... | 127 |
| b) Regulatory efforts: From information exchange to PIC..... | 128 |
| i) The OECD's pre-emptive move..... | 133 |
| ii) UNEP's London Guidelines..... | 135 |
| iii) The FAO Code of Conduct on Pesticides..... | 142 |
| iv) UNEP, FAO and Prior Informed Consent..... | 145 |
| v) The London Guidelines (as amended in 1989)..... | 147 |
| vi) The Code of Conduct (as amended in 1989)..... | 148 |
| III. The Rotterdam Convention Negotiations..... | 150 |
| 1. Antecedents..... | 150 |
| 2. The mandate..... | 153 |
| 3. Scope (and the mandate of the INC)..... | 153 |
| a) INC discussions..... | 155 |
| b) The 1996 government-designated group of experts report..... | 160 |
| 4. Bans and phase-outs..... | 163 |
| 5. International trade and PIC..... | 165 |
| 6. The "PIC list" (Annex III)..... | 168 |
| a) Final outcome and recent developments..... | 171 |
| IV. The Rotterdam Convention..... | 173 |
| V. Conclusion..... | 176 |
| Chapter Four: The Stockholm Convention on Persistent Organic Pollutants..... | 182 |
| I. Introduction..... | 182 |
| II. Antecedents..... | 186 |
| 1. What are persistent organic pollutants?..... | 186 |
| 2. International responses..... | 189 |
| a) POPs as an international issue..... | 191 |
| i) UNECE's regional Protocol on POPs..... | 191 |
| ii) POPs as a global issue..... | 197 |
| 3. Towards a negotiating mandate: the IFCS report..... | 200 |

| | |
|--|------------|
| a) The IFCS proceedings and the global POPs treaty..... | 205 |
| b) The mandate..... | 206 |
| III. The Stockholm Convention Negotiations..... | 208 |
| 1. Scope of the convention..... | 209 |
| 2. Control measures..... | 210 |
| a) Intentionally produced POPs..... | 212 |
| b) Unintentionally produced POPs..... | 217 |
| i) Reduction vs. elimination..... | 218 |
| ii) Control measures..... | 220 |
| 3. The listing of new POPs..... | 226 |
| a) Scientific uncertainty and the identification of new POPs..... | 228 |
| b) Precaution and the listing of new POPs..... | 231 |
| IV. Conclusion..... | 238 |
| Chapter Five: The Strategic Approach to International Chemicals Management..... | 244 |
| I. Introduction..... | 244 |
| II. Antecedents..... | 247 |
| 1. The need for a strategic approach..... | 247 |
| 2. Preliminary thoughts about a strategic approach..... | 254 |
| 3. The mandate..... | 260 |
| a) The foundation of SAICM: the Bahia instruments..... | 261 |
| b) The IFCS “gaps analysis”..... | 264 |
| III. The SAICM Negotiations..... | 265 |
| 1. SAICM’s legal nature..... | 267 |
| 2. Scope..... | 272 |
| 3. The “overarching goal” of SAICM..... | 276 |
| 4. Production and consumption in SAICM..... | 279 |
| a) Cleaner production, safer alternatives and waste minimization..... | 281 |
| i) Cleaner production and safer alternatives..... | 281 |
| ii) Agriculture and non-chemical alternatives..... | 283 |
| iii) Waste minimization..... | 288 |
| 5. Phase-outs and bans..... | 292 |
| 6. Precaution and chemicals management..... | 299 |
| a) The precautionary approach/principle and SAICM..... | 299 |
| b) Precaution as a risk reduction objective..... | 304 |
| 7. International trade and SAICM..... | 309 |
| IV. Questionnaire: liberal environmentalism as “hegemony”..... | 315 |
| 1. Individuals vs. organizations..... | 323 |
| V. Conclusion..... | 324 |

Chapter Six: Conclusion.....329
Bibliography.....350

ACRONYMS

| | |
|---------------|---|
| AMAP | Arctic Monitoring Assessment Panel |
| BAN | Basel Action Network |
| BAT | Best available techniques |
| BCRCs | Basel Convention regional centres |
| CEE | Central and Eastern European countries (group of) |
| CEFIC | European Council of Federations of the Chemical Industry |
| CEG | Criteria expert group (on POPs) |
| CI | Consumers International (former IOCU) |
| CIEL | Center for International Environmental Law |
| CLTRAP | Convention on Long-Range Transboundary Air Pollution (of UNECE) |
| CMA | Chemical Manufacturers Association |
| COP | Conference of the Parties |
| CTE | Committee on Trade and Environment (of the WTO) |
| DNA | Designated National Authority (for PIC) |
| DTIE | Division of Technology, Industry and Economics (of UNEP) |
| EC | European Community |
| EHF | Environmental Health Fund |
| ELV | Emission limit values (for POPs emissions) |
| ENGO | Environmental non-governmental organisation |
| ESM | Environmentally-sound management (e.g., of hazardous wastes) |
| EU | European Union |
| FAO | Food and Agriculture Organization of the United Nations |
| GATT | General Agreement on Tariffs and Trade |
| GC | Governing Council (e.g., of UNEP) |
| GEF | Global Environment Facility |
| GIFAP | Groupement International des Associations de Fabricants de Produits Agrochimiques (now Croplife International) |
| GPA | Global Plan of Action (of SAICM) |
| GRULAC | Group of Latin American and Caribbean countries |
| G77 | Group of 77 (developing countries) |
| ICC | International Chamber of Commerce |
| ICCA | International Council of Chemical Associations |
| ICCM | International Conference on Chemicals Management |
| ICFTU | International Confederation of Free Trade Unions |
| ICMM | International Council on Mining and Metals |
| IFCS | Intergovernmental Forum on Chemical Safety |
| IGOs | Inter-governmental organizations |
| ILO | International Labour Organization of the United Nations |
| INC | Intergovernmental Negotiating Committee |
| IOCU | International Organisation of Consumers Unions (now CI) |
| IOMC | Inter-Organization Programme for the Sound Management of Chemicals |
| IPCS | International Programme on Chemical Safety |
| IPEN | International POPs Elimination Network |
| IPM | Integrated pest management |
| IRPTC | International Register of Potentially Toxic Chemicals (now UNEP Chemicals) |

| | |
|----------------|--|
| ISG | Inter-Sessional Group (of the IFCS) |
| IUCN | World Conservation Union |
| JUSCANZ | Japan, United States, Canada, Australia and New Zealand (group of countries) |
| MEA | Multilateral environmental agreement |
| MPPI | Mobile Phone Partnership Initiative (under the Basel Convention) |
| MPWG | Mobile Phone Working Group (of the MPPI) |
| NGO | Non-governmental organisation |
| OAU | Organization of African Unity |
| OECD | Organisation for Economic Co-operation and Development |
| OPS | Overarching policy strategy (of SAICM) |
| PAN | Pesticide Action Network |
| PIC | Prior Informed Consent |
| POPs | Persistent organic pollutants |
| POPRC | Persistent Organic Pollutants Review Committee |
| PrepCom | Preparatory Committee (of SAICM) |
| SAICM | Strategic Approach to International Chemicals Management |
| UNCED | United Nations Conference on Environment and Development |
| UNCHE | United Nations Conference on the Human Environment |
| UNDP | United Nations Development Programme |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| UNGA | United Nations General Assembly |
| UNIDO | United Nations Industrial Development Organization |
| WECF | Women in Europe for a Common Future |
| WHA | World Health Assembly |
| WHO | World Health Organization |
| WSSD | World Summit on Sustainable Development |
| WTO | World Trade Organization |
| WWF | Worldwide Fund for Nature (now simply WWF) |

Acknowledgments

First and foremost, I wish to express my deepest gratitude to my thesis supervisor, Professor Ruth Buchanan, for her direction and inspiration, which added considerably to my graduate experience. Her valuable ideas and suggestions are very much reflected on this dissertation. I am also very grateful to Professor Peter Dauvergne, from the Department of Political Science, for his always constructive and timely observations. His knowledge of global environmental politics and international relations theory enriched what I intended to be a multidisciplinary analysis. I am equally indebted to Professor Jennifer Clapp, who did me the honour of acting as external examiner and after a very careful reading of this dissertation provided me with insightful comments and suggestions for improvement. I also owe thanks to professors Karin Michelson and Shi-Ling Hsu, who were members of my supervisory committee, as well as professors Yves Tiberghien and Ian Townsend-Gault, who were members of the examining committee. Last but not least, I wish to express my sincere appreciation to Christian Pastore for the long hours that he dedicated to reading and editing my work and for his continuous and unconditional support.

Introduction

According to the United Nations Environment Programme (UNEP), there are around 70,000 different chemicals on the market today and approximately 1,500 new ones are introduced every year.¹ Aside from synthetic pesticides, fertilizers and chemicals used in industry, chemicals constitute or are present in thousands of products, ranging from ships, cars, computers and other electronic equipment to pharmaceuticals, food additives, household products (e.g., cleaning products and deodorizers), paints, dyes, textiles, cosmetics and, perhaps the most pervasive of all, plastics. The common presence of chemicals in our everyday lives has led some to talk about a real “chemicalization” of the world over the past fifty years.²

Chemicals have contributed to raising our standards of living, including through increased agricultural productivity, the manufacturing of pharmaceuticals and other medical supplies and the improvement of transportation, technology and entertainment. We pay a price for these benefits, however, as some chemicals pose serious risks to human health and the environment. Effects on human health include various types of cancer, reproductive disorders, birth defects, neurobehavioural disorders and impaired immune functions. Every year, many thousands of accidental poisonings result from the inappropriate use of highly toxic pesticide formulations or their use

¹ See UNEP, “Chemicals and Sustainable Development,” in “Capacity Building for Sustainable Development: An Overview of UNEP Environmental Capacity Development Activities” (December 2002) at 112 [Chemicals and Sustainable Development], online:

<http://www.unep.org/Pdf/Capacity_building.pdf>. Depending on the definition used, there are between 30,000 and 100,000 chemicals on the market. Thus, according to the European Commission, 100,106 chemicals were registered in the EU prior to 1981 and since then about 4,300 new chemicals have entered the market. See European Commission, Directorate General Communication, “Q and A on the New Chemicals Policy, REACH,” Memo 06/488, Brussels (13 December 2006), online: <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/488&format=HTML&aged=0&language=EN&guiLanguage=en>> and Royal Commission on Environmental Pollution, “Chemicals in Products: Safeguarding the Environment and Human Health,” 2003 [Royal Commission report], online: <http://ec.europa.eu/enterprise/reach/docs/consultation/public/585_public_royalc_uk.pdf> at 162.

² This term was used in 2001 by Klaus Töpfer, former Executive Director of UNEP. See UNEP, “Report on the Implementation of the Decisions adopted at the twenty-first session of the Governing Council: Report by the Executive Director,” UN Doc. UNEP/GCSS.VII/4, Cartagena, Colombia (14 November 2001). See also section 2 of Part II in Chapter 5.

in locations where protective equipment for workers is unavailable or impractical, primarily in developing countries.³ A number of chemicals persist in the environment and accumulate in the fatty tissue of living organisms, including humans, and can travel across the globe to reach places as remote as the Arctic. The environmental effects of some chemicals include the pollution of water, air and soil, the poisoning of wildlife, the depletion of the ozone layer, the loss of biodiversity and the disruption of fragile ecosystems such as the Arctic environment.⁴

The negative effects of chemicals described above are just those that we know of. A primary source of concern regarding chemicals is that we do not yet fully understand their long-term health and environmental effects and we do not have enough data on the environmental and health effects of most of the chemicals in use today.⁵ This is because most of those chemicals were put on the market prior to 1981 and were exempted from testing requirements for environmental and health effects.⁶ An equally troubling fact is that substances that are considered to pose minimal risks to human health or the environment during use (e.g., certain kinds of plastic) can pose serious environmental or

³ For details see section 1 of Part II in Chapter 3.

⁴ See “Chemicals and Sustainable Development,” *supra* note 1, *ibid.* and section 1 of Part II in Chapter 4.

⁵ See “Royal Commission report,” *supra* note 1 at 3 and John Thornton, “Beyond Risk: An Ecological Paradigm to Prevent Global Chemical Pollution” (2000) 6:3 *Int. J. Occup. Environ. Health* 316 at 322.

⁶ In the EU, for instance, legislation was adopted in 1979 that required stringent safety testing of all chemicals that were being brought to the market for the first time. However, the legislation created an exemption for all chemicals that were on the market prior to September 1981, with which about 70,000 chemicals registered prior to that date were exempt from safety testing. See Rachel Massey, “Surviving REACH: A Guide for Companies that Use Chemicals,” prepared for the International Chemical Secretariat (ChemSec), (March 2005), online: <www.chemsec.org/documents/Surviving_REACH.pdf>. To address this problem, in 2006 the European Parliament and the EU Council adopted a regulation on the Registration, Evaluation and Authorization of Chemicals known as “REACH.” Among other things, REACH requires chemicals manufacturers and importers to provide relevant environmental and health data on chemicals already on the market by specified dates and establishes a number of deadlines for the registration of those chemicals. The deadlines are based on volume considerations (on the assumption that chemicals manufactured in high volumes are likely to present a greater risk to humans and the environment) and on the properties of the chemicals in question, such that priority is given to substances of special concern, such as carcinogenic, mutagenic and toxic substances. For further details see EC, *Regulation 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*, [2006] O.J. L 396/1 and EU, Chemicals Agency, “Guidance on Registration” (June 2007) at 43, online: <http://reach.jrc.it/guidance_en.htm>.

health risks at the end of their life cycles, i.e., upon becoming waste, or when they are being manufactured.⁷

Although the two considerations noted above suggest that our increasing dependence and reliance on chemicals may be unwise, most of the chemicals discovered to date, and the products that contain them, are being freely manufactured, traded and used all over the world. States, international organizations and other actors have adopted a number of instruments to protect the environment and human health from certain chemicals but they constitute only a limited response to the challenge posed by chemicals; they have not to date materially affected the volume of global chemicals consumption and have not yet resulted in a strategy for dealing with the risk posed by our lack of knowledge and data on the health and environmental effects of the great majority of chemicals in use. This study looks at four of those instruments. Three of them are international treaties that together have been said to “provide an international framework governing the environmentally sound management of hazardous chemicals throughout their life-cycles”:⁸ the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, adopted in 1989; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, adopted in 1998; and the Stockholm Convention on Persistent Organic Pollutants, adopted in 2001. The fourth instrument examined is the Strategic Approach to International Chemicals Management (SAICM), a non-legally binding agreement that aims to give coherence to international activities and treaties dealing with hazardous chemicals, including the Basel, Rotterdam and Stockholm conventions. SAICM was adopted by an international conference in 2006.

⁷ The manufacture of chlorine-containing chemicals, including polyvinyl chloride (PVC) plastic and organochlorines, and the incineration of waste-containing plastics and paper, for instance, release toxic chemicals (persistent organic pollutants). For details see footnote 2 in Chapter 4.

⁸ UNEP, “The Hazardous Chemicals and Wastes Conventions,” UNEP, October 2002, online: <<http://www.basel.int/pub/threeConventions.pdf>>.

As a participant observer in several negotiating sessions on the abovementioned instruments over a period of four years, I was startled by the narrow scope of the debate and the monochromatic set of solutions that were being proposed and considered by participants, including representatives of environmental and other public interest non-governmental organizations, governments, international organizations dealing with environmental, health and agricultural issues and industry organizations. I found that actors from all camps attending the negotiations were articulating proposals and statements that presupposed, upheld and sometimes openly defended liberal economic norms and ideas, to the virtual exclusion of proposals that might have required an examination of those norms and ideas.

The defining trait of liberal economic norms, which are articulated in the norms and principles of international trade law, in particular the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) agreements, is their assumption that the liberalisation of trade and finance is not only consistent with, but also necessary for, environmental protection. Most notably, the liberal economic perspective dictates that governments should adopt the “least trade-restrictive” measures necessary to achieve a desired level of environmental or health protection and that market-based and other economic mechanisms should therefore be preferred to regulatory methods such as bans or phase-outs for achieving environmental protection. This does not mean that bans and phase-outs are never considered or adopted to protect health or the environment, but it does mean that whenever such measures are adopted they are limited to truly exceptional circumstances (e.g., when the chemicals in question cause harm on a truly “global” scale such as by depleting the ozone layer or by travelling long distances and accumulating in remote areas such as the Arctic) and are applied only to specific hazardous chemicals or uses posing specific risks confirmed through scientific risk assessments. In this way, the impact of trade-restrictive measures adopted in international environmental agreements is contained so

that the continued production, consumption and trading of the vast majority of chemicals is not materially affected.

What was interesting about the negotiations I was attending was not that the proposals based on liberal economic norms seemed to have a much greater chance of being seriously considered or reflected in agreed texts, but that the great majority of the statements made by participants presupposed or upheld those norms. Proposals premised upon something other than the maintenance of a liberal economic world order were not only failing to win acceptance, but also for all practical purposes were not even being voiced. Liberal economic norms were thus not only dominant in the negotiations I was attending, but also appeared to be “hegemonic.”

The concept of hegemony, which is elaborated in detail in Chapter 1 and draws on Antonio Gramsci’s understanding of the term and its application to world order relations by a number of international relations scholars, is used to describe a situation in which three key factors converge in a concrete historical and social context where decisions on a particular issue are being made. First, a wide range of actors draw on a given set of norms and ideas to formulate their arguments and proposals concerning the issue being addressed, while very few contest those norms. Second, the upholding of the norms by relatively weaker actors is not interpreted as being the result of mere coercion or imposition by relatively stronger actors, but rather as the product of a power relation in which consent prevails. Lastly, even those who do not see the norms as legitimate or desirable use them to articulate proposals because of a perceived need to be realistic or practical, on the assumption that alternatives to the prevailing norms will not be seriously considered.

Applying the notion of hegemony to chemicals-related international environmental negotiations, one can see that a wide range of actors involved in such negotiations, including representatives of environmental and other

public interest non-governmental organizations, international organizations dealing with environmental and health issues and both developed and less developed countries, are drawing on liberal economic norms to formulate their arguments and proposals, while very few participants are contesting those norms. It is also apparent that the upholding of liberal economic norms by relatively weaker actors is not the result of coercion or imposition. Instead, the reasons why representatives of environmental groups and some developing countries are openly embracing liberal economics in their arguments and submissions include the desire to achieve strategic goals, such as increased funding for chemical safety programmes through the use of market-based mechanisms, and the belief that further trade liberalisation and economic growth will eventually bring about environmental sustainability in all countries. Lastly, it is also evident that even those who do not see liberal economic norms as legitimate or desirable are using them to articulate their proposals because of a perceived need to be realistic, as if alternatives to the liberal economic perspective did not exist or could not be seriously debated.

I argue that liberal economic norms are markedly hegemonic in international environmental negotiations on hazardous chemicals and that this hegemony has important implications for the ability of states and other actors to use the instruments being constructed and re-constructed in those negotiations to protect human health and the environment from hazardous chemicals. Most notably, the hegemony of liberal economic norms reinforces the assumption that human health and the environment can be effectively protected from the negative effects of hazardous chemicals even though the production, consumption and trading of chemicals and chemical-containing products are all increasing. The issue of *quantity*, which should be considered as important as that of *quality*, is thereby circumvented or ignored. To affirm that chemical safety requires revisiting our consumerist Western life-styles is to suggest that the key tenets of economic liberalism, including the need for continued economic growth (i.e., increasing consumption), must also be reassessed.

Participants at international environmental negotiations on chemicals have therefore focused almost exclusively on the hazardousness of the chemicals on the market, eschewing the difficult question of whether the increasing *quantity* of chemicals being consumed worldwide is sustainable. In other words, because liberal economic norms are markedly framing the debate, it is widely assumed that the problem of increasing chemicals consumption is of a qualitative rather than a quantitative nature. As a result, the various solutions proposed to tackle consumption refer to changes in production (e.g., the widespread use of cleaner production methods and the promotion and use of “greener” chemicals and products), but do not seek to curb the overall quantity of chemicals being consumed in all countries.

I start from the premise that quantity is important, however, if only for the two reasons discussed at the beginning of this introduction, which have also been brought up by participants in chemicals-related negotiations. The first is that there remain considerable gaps in knowledge regarding the health and environmental effects of most chemicals on the market, which means that we have limited knowledge about the risks that we are facing and that it would therefore be wise to reduce our overall consumption⁹ of chemicals radically, in particular when they exhibit certain characteristics that raise cause for concern. The second is that chemicals with purportedly minimal or no hazardous properties during use can pose serious risks to human health or the environment at the end of their life cycles or release toxic chemicals when they are manufactured. This suggests that the number of chemicals that pose significant risks to the environment or human health is actually much greater than is currently assumed and that the ever-increasing consumption of

⁹ Following what some authors have called a “consumption angle,” consumption is understood here to encompass not only the purchasing decision of the final consumer but also the multiple resource-use decisions made by actors along a production chain, from resource extraction to final disposal (which uses sink capacity). Production is thus seen as consumption, as *depleting* both social and natural resources, rather than as merely “adding value.” See Thomas Princen, “Consumption and its Externalities: When Consumption Meets Ecology,” in Thomas Princen, Michael Maniates and Ken Conca, eds., *Confronting Consumption* (Cambridge, Mass.; Boston, England: MIT Press, 2002) at 23-42.

chemicals and the products that contain them should be considered a crucial part of the chemicals issue and should not simply be taken as a given.

The fact that both of the issues referred to above have been raised by participants in chemicals-related international environmental negotiations suggests that there are fissures in the hegemony of the liberal economic perspective and that the potential exists, however limited, for formulating and promoting counter-hegemonic norms and ideas in those negotiations. The concept of hegemony begs the question of how it comes into being, an explanation of the historical and social processes through which a perspective becomes hegemonic, and how it might be challenged. One of the key insights of neo-Gramscian studies of world order, which examine the historical and social processes through which liberal economic norms have come to prevail in the international social structure, is that hegemony is never fully achieved. Indeed it must be constantly constructed and reconstructed by those actors who positively want it, and it is always contested and contestable. Rather than an achieved condition, hegemony is seen as a terrain of social struggle where prevalent ideas must be continuously articulated and rearticulated at the various levels of the social structure.

I argue that the struggle to maintain the hegemony of the liberal economic perspective can be appreciated in the context of the negotiations studied here, and that there are fissures in that hegemony through which alternative solutions can be devised, including solutions that directly confront and question and problematize consumption. For instance, environmental NGOs and a few governments are advocating an interpretation of the so-called “precautionary principle” or “approach” that would seek to avoid, rather than simply “manage,” the risks posed by chemicals possessing certain properties when conclusive evidence regarding their effects on human health or the environment is lacking. While still framing the problem of hazardous chemicals in qualitative rather than quantitative terms, such an interpretation

of precaution could impose significant restrictions on the production and use of a potentially very large number of chemicals, posing a direct challenge to the liberal economic perspective.

As discussed above, four international instruments dealing with chemicals management are examined in this dissertation, including three international treaties, namely, the Basel, Rotterdam and Stockholm conventions. These three treaties were negotiated at different times and under different circumstances. As a result, they feature considerably different approaches to the problems they seek to address and include provisions that exhibit different degrees of adherence to liberal economic norms. In all three, however, those provisions that could be seen as posing a challenge to liberal economics are either sufficiently narrow in scope to ensure the continued production and consumption of most hazardous chemicals or are being interpreted in ways that make them conform to the liberal economic perspective. This is the case with the principle of waste minimization of the Basel Convention, which is being interpreted by representatives of industry, states and environmental groups alike as requiring nothing but changes in production (e.g., through increased recycling or the use of cleaner production methods), while no one is calling for a reduction in the quantity of consumption.

The fourth instrument studied is the Strategic Approach to International Chemicals Management (SAICM). SAICM is made up of three non-legally binding instruments: a high-level declaration, an overarching policy strategy and a global plan of action. Although it does not constitute binding law, SAICM seeks to provide coherence among international treaties dealing with hazardous chemicals, including the Basel, Rotterdam and Stockholm conventions, and constitutes the most recent and most comprehensive regulatory effort by states and other actors to protect the environment and human health from hazardous chemicals. In addition to pertaining to law, a number of features that are unique to the SAICM negotiating process make it

exceptionally instructive for the purposes of this study. Most notably, the negotiations that led to the adoption of SAICM engaged a much wider spectrum of interests and sectors than is typically involved in the negotiation of treaties and gave all participants, including environmental and other public interest non-governmental organizations, the opportunity to present proposals directly. Because of its greater degree of flexibility, openness and participation, the SAICM negotiating process reveals better than do the Basel, Rotterdam and Stockholm conventions the extent to which liberal economic norms have become hegemonic in chemicals-related international environmental negotiations.

This study is divided into six chapters. Chapter 1 elaborates the theoretical approach through which the abovementioned instruments are examined and addresses a number of methodological issues. Drawing on the writings of Antonio Gramsci and neo-Gramscian approaches to world order, the chapter explains why the notion of hegemony is useful in seeking to understand the role that liberal economic norms are playing in international environmental negotiations, as well as the counter-hegemonic possibilities that exist within those negotiations. The chapter argues that neo-Gramscian insights into world order serve to explain the processes and relations that are involved in the constitution of the current world order or “structure” in which international environmental negotiations are embedded. That structure, however, can only be held constant for the purpose of analysis, as it must be constantly produced and reproduced by agents in concrete social spaces in order to exist as a structure. Chapter 1 claims that neo-Gramscian studies of world order must be complemented with a more nuanced research methodology that accounts for the specific social processes that are international environmental negotiations. This is done by drawing on Anthony Giddens’ “structuration” approach, which offers a method for recognising the role of human beings in the constitution of specific social systems without sacrificing the interest in the long-term, large-scale processes that neo-Gramscian studies of world order

highlight. Chapter 1 also outlines a concept of law that, drawing on constitutive approaches to law, helps to clarify the role of law in the constitution of hegemonic norms and ideas.

Chapter 2 looks at the Basel Convention on hazardous wastes. It argues that a highly politicized environment led the negotiators of the Convention to adopt a potentially counter-hegemonic provision banning hazardous waste exports from rich to poor countries. Other provisions were framed in ways that were consistent with liberal economic norms, however, and the hegemony of liberal economic norms has become more pronounced over the course of the Convention's implementation. This can be seen in a decrease in the support for the ban, which some parties are seeking to circumvent, and in the fact that actors from all camps, including those who continue to support the ban, are interpreting the principle of waste minimization as requiring nothing but changes in production methods. It can also be seen in the widely welcomed increased participation by the private sector in the implementation and financing of the Convention in recent years, which is likely to reinforce the predominance of liberal economic norms in the way the Convention is applied and interpreted. Nevertheless, the continued support by environmental NGOs and a number of governments for the ban on hazardous waste exports from industrialized countries to developing countries attests that the liberal economic perspective is by no means uncontested in the context of the Basel Convention and that the potential exists to redefine waste minimization in ways that confront consumption conceived in quantitative terms.

The Rotterdam Convention on hazardous chemicals and pesticides is the subject of Chapter 3. The chapter argues that the acceptance of liberal economic norms in the Convention has been almost complete and that this is largely due to the fact that the Convention has a very limited scope. The treaty establishes a system of information exchange and prior informed consent (PIC) for certain hazardous chemicals traded internationally. It does

nothing, however, to ban or restrict trade in such chemicals, and even allows countries to export chemicals that they have banned for domestic use for health or environmental reasons. Tackling the problem of international trade in hazardous chemicals through information exchange and PIC rather than through bans is a clear example of how the liberal economic perspective is shaping international environmental law. As a result, much of Chapter 3 is devoted to the various discussions in which it was decided that international trade in hazardous chemicals banned in exporting countries should not be prohibited but subjected to information exchange and the prior consent of importing countries. The chapter claims that even a system firmly grounded on liberal economic principles could present a challenge to international trade in hazardous chemicals, however, and considers the efforts by a number of key actors to counter that threat.

Chapter 4 examines the Stockholm Convention on persistent organic pollutants. It contends that while the Convention contains a number of provisions that could be seen as having the potential to challenge the liberal economic perspective, that potential is not likely to be realised because of the very narrow field of application of those provisions. First, the Convention aims to eliminate the use and release of persistent organic pollutants (POPs), but only a few that are known to have clearly “global” effects. More importantly, it only requires the elimination of intentionally produced POPs, while significantly less stringent rules apply to those POPs that are produced unintentionally in a myriad of industrial processes and activities. This approach was chosen, it is claimed, because the elimination of these POPs would have required revisiting processes (and the products that result from them) for which no viable alternatives existed, an effort that was deemed unfeasible. The hegemony of liberal economic norms can be seen in the fact that even those actors who supported the goal of elimination suggested that achieving it required nothing but changes in production and failed to point out that it might also require imposing restrictions on certain industrial processes

(and on the consumption of the products that resulted from them). At the same time, the chapter argues that the conception of the precautionary approach advanced by these actors was potentially counter-hegemonic and, had it been adopted, would have entailed the need to reconsider those activities that released POPs unintentionally as well as the inclusion of a larger number of substances suspected to be POPs within the scope of the Stockholm Convention.

Chapter 5 examines the strategic approach to international chemicals management (SAICM). It maintains that liberal economic norms were hegemonic in the SAICM negotiations, both at the level of the organizations that participated in the negotiations and of the individuals who represented those organizations. The most important consequence of this hegemony, it is further claimed, is that the increasing amount of chemicals consumption was widely taken for granted. The chapter shows that although the SAICM negotiating process was quite open and flexible, very few proposals were presented that contradicted or undermined liberal economic norms, while actors from all camps explicitly grounded some of their proposals in liberal economics. Furthermore, even though many participants saw the rising consumption and production of chemicals as one of the main reasons why a strategic approach was needed, virtually no one suggested that there might be a need to contain that growth. The chapter contends that hegemonic discourses are not without contradictions, however, and shows that those who upheld international trade norms in SAICM also made proposals that could have demanded a significant reduction in the consumption of chemicals, had they been adopted. Specifically, some participants argued that SAICM should adopt a conception of precaution through which chemicals-related risks would be avoided rather than simply “managed.” This interpretation, it is claimed, could have imposed important limits on the production and consumption of a large number of chemicals, given the considerable degree of scientific

uncertainty regarding the health and environmental effects of most chemicals on the market.

The last chapter summarizes the central argument of the thesis and makes some concluding remarks that can be drawn from the negotiations studied in chapters two to five. It also reflects on the complexities associated with confronting consumption in international environmental negotiations, in particular the need to counter widely held assumptions associated with the liberal economic perspective, such as the notion that the use of hazardous chemicals in agriculture is essential to ensure food security or that continued economic growth and increased consumption in all countries are necessary to achieve environmental protection and avoid unemployment, as well as the need to contend with the structural forces that are promoting overconsumption in the current economic, political and legal structure.

Chapter 1

Liberal Environmentalism and Global Environmental Governance

I. Introduction

The pervasiveness of liberal economic norms in global environmental governance¹ has been documented by many scholars who, despite differences in their theoretical perspectives, roughly agree that at least since the early 1980s the framing of and responses to environmental problems in the international arena have appreciably followed the norms and ideas underlying a liberal economic world order.² As discussed in the introduction, the key characteristic of these norms, which Steven Bernstein calls the norms of “liberal environmentalism”, is that they assume that the liberalisation of trade and finance is not only consistent with but also necessary for environmental protection. Based on that assumption, they prescribe market-based and other economic mechanisms for achieving environmental protection, in preference to regulatory methods such as bans, phase-outs or quotas,³ and require the adoption of the “least-trade restrictive” measures in order to achieve a desired level of environmental or health protection. The requirement that the “least trade-restrictive” measures possible be adopted is a key principle of

¹ The term “environmental governance” is used here to describe the broad range of political, economic and social structures and processes that shape and constrain actors’ behaviour in relation to the environment. See David L. Levy and Peter J. Newell, *The Business of Global Environmental Governance* (Cambridge, Mass.: MIT Press, 2005) at 2-3. The term “global” is preferred to “international” to emphasize that states are not the only actors involved in the processes and structures of governance. Similarly, “governance” is preferred to “government” because the former sees government as a process rather than as an institution and breaks with the common-sense perception that only governments govern. See Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (London; N.Y.: Routledge, 1993) at 290.

² See, for instance, Steven Bernstein, *The Compromise of Liberal Environmentalism* (NY: Columbia U. Press, 2001); Marc Pallemaerts, “International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process” (1995-1996) 15 J. L. & Com. 623 at 633-634; Ken Conca “Environmental Change and the Deep Structure of World Politics,” in Ken Conca and Ronnie D. Lipschutz, eds., *The State and Social Power in Global Environmental Politics* (NY: Columbia U. Press, 1993) at 306-325; Ken Conca, “Consumption and Environment” (2001) 1:3 *Global Environmental Politics* at 53-71; Neil Middleton and Phil O’Keefe, *Rio Plus Ten: Politics, Poverty and the Environment* (London; Sterling, Va.: Pluto Press, 2003); Robert Falkner “Private Environmental Governance and International Relations: Exploring the Links” (2003) 3:2 *Global Environmental Politics* at 72-87; and Lucy H. Ford, “Challenging Global Environmental Governance” (2003) 3:2 *Global Environmental Politics* at 120-134.

³ See Bernstein, *ibid.* at 7.

international trade law and in practice it means that whenever trade-restrictive measures are adopted they are usually highly contained (the Stockholm Convention, for instance, regulates only a small number of chemicals) in order to limit their impact on the trading, production and consumption of hazardous chemicals and wastes; it also means that those measures that have a greater potential to defy the tenets of liberal economics (e.g., the principle of waste minimization in the Basel Convention) tend to be interpreted in the most restrictive way possible in order to limit their impact on economic activity.

As discussed in the introduction, the norms of liberal environmentalism, which are incorporated into the system of international trade law set up in the post-war period, are decisively shaping the discussions held at chemicals-related multilateral environmental negotiations and can therefore be said to play a “hegemonic” role in those negotiations. The notion of hegemony that I seek to develop for the purpose of looking at international environmental negotiations draws on Antonio Gramsci’s understanding of the term, as well as that of a number of international relations scholars who have further developed and applied Gramsci’s work to world order relations. Part II delineates the notion of hegemony and explains why it allows us to understand the role that liberal economic norms are playing in international environmental negotiations and to think of avenues through which the privileged position of liberal economic norms might be challenged. Part II also argues that, while they provide a fruitful explanation of the social and historical processes that are implicated in the constitution of the larger social “structure” in which international environmental negotiations are embedded, neo-Gramscian studies of world order are less productive in their analysis of the relationship between law and hegemony. To deal with this deficiency, an alternative concept of law is developed that helps to clarify the role of law in the production, reproduction and possible defiance of hegemonic narratives and ideologies.

Taking into account the insights of neo-Gramscian studies of world order, Part III suggests that a more nuanced research methodology is required to account for the role of human agents interacting in the specific social processes that are international environmental negotiations. This is because the world order or international social “structure” that neo-Gramscian studies describe can only be held constant for the purpose of analysis, as it must be continuously produced and reproduced by human beings interacting in particular social spaces in order to exist as a structure. This can be inferred from neo-Gramscian analyses themselves. While highlighting those features of world order relations that exhibit structural properties, neo-Gramscian scholars insist that the prevailing structures and ideologies are both social and historical, emphasizing the role of agents in the construction and reconstruction of, and the resistance to, hegemony. From this it follows that the large-scale processes that are implicated in the constitution of a liberal economic world order could not, in and of themselves, explain the prevalence of liberal economic norms (and international trade law in particular) in the specific social systems⁴ that are international environmental negotiations.

In order to account for the action of human beings in the negotiations studied in chapters 2 to 5, Part III draws on Anthony Giddens’ structuration approach, which holds that structures are at the same time the medium and the outcome of social acts. It argues that Giddens’ theoretical approach is compatible with neo-Gramscian approaches to world order and that the two perspectives can therefore be profitably combined. This is done, essentially, by taking the insights of neo-Gramscian studies of world order as “snapshots” of the rules and resources from which actors draw in the constitution of specific international environmental negotiations. The last part considers a number of methodological issues that the reader should bear in mind when looking at the case studies considered in chapters 2 to 5. Specifically, it outlines the different sources on which the analysis of the case studies is based and

⁴ For further details see section 1 of Part III below.

explains why a slightly different methodology was used in Chapter 5, which includes the results of a survey of a representative group of participants in the “strategic approach to international chemicals management” (SAICM). One of the justifications provided for this difference in method is that, because of a number of properties that make it somewhat unique, including greater participation by non-governmental organizations, the SAICM negotiating process should be expected to reveal, better than the treaties studied in chapters 2 to 4, the extent to which liberal economic norms are hegemonic in chemicals-related international environmental negotiations.

II. Liberal Economic Norms as Hegemony

1. Gramsci’s Understanding of Hegemony

The notion of hegemony that I seek to develop for the purpose of looking at international environmental negotiations draws on the writings of Antonio Gramsci, as well as the work of a number of international relations scholars who have applied Gramsci’s insights to world order relations. Hegemony, as understood by Gramsci, refers to a situation in which a class (or class faction) and its representatives exercise power over subordinate classes not through domination by means of force, but through consent by means of political and ideological leadership.⁵

Gramsci developed the concept of hegemony⁶ to describe the form of power exerted by dominant classes in the advanced capitalist countries of the West. In these countries, Gramsci found that the bourgeoisie exerted its power not only (or even primarily) through the coercive apparatus of the state, but also

⁵ See Stuart Hall, *Gramsci’s Political Thought: An Introduction* (London: Lawrence & Wishart, 1991) at 15 and 22.

⁶ The foundations of the concept of hegemony were laid by Lenin, who saw hegemony as a strategy by which the working class could, in alliance with the peasantry, act as the leading (i.e., hegemonic) force in the bourgeois-democratic revolution for the overthrow of the Tsarist autocracy. See Hall, *ibid.*, at 22-23. See also Robert Cox, “Gramsci, Hegemony and International Relations: An Essay in Method,” [Cox, “Gramsci and IR”] in Stephen Gill, ed., *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge U. Press, 1993) [Gill, “Gramsci and IR”] at 50.

through civil society,⁷ i.e., the sphere where capitalists, workers and other actors⁸ engaged in political and ideological struggles and the private organisations and institutions that embodied those struggles, such as political parties, trade unions and the mass media.⁹ What made this form of power “hegemonic” was that, by building a network of alliances that were based on the values and ideas that it had adopted, the dominant class had persuaded the main subordinate classes and social groups to accept those values and ideas.¹⁰

a) Historical Bloc

Countering economistic interpretations of Marxism, which hold that political developments are ultimately the expression of economic developments, Gramsci’s writings suggest that the outcome of any economic crisis is the result of political action and agency, emphasizing the role of actors in the building of, as well as the opposition to, hegemonic ideologies.¹¹ To build hegemony, a class or class faction must go beyond its narrow economic interests and incorporate the aspirations of other social forces, including those that do not have a class character, to form with them a broad social bloc in

⁷ See Cox, “Gramsci and IR,” *ibid.* at 51; and Mark Rupert, *Producing Hegemony* (Cambridge: Cambridge U. Press, 1995) [Rupert, “Hegemony”] at 27.

⁸ For Gramsci, there were popular and democratic demands that did not have a purely class character, i.e., that did not arise directly out of the relations of production. Some examples include the radical and popular struggles for civil liberties and movements of national liberation, women and those expressing the demands of ethnic minorities. A class could not achieve hegemony unless it found ways to represent and incorporate these popular and democratic struggles. See Antonio Gramsci, “The Modern Prince,” in Quintin Hoare and Geoffrey Smith, eds., *Selections from the Prison Notebooks* (NY: International Publishers, 1971) [Prison Notebooks] at 160-161 and Hall, *supra* note 5 at 24-25.

⁹ Although Gramsci did not succeed in finding a single, wholly satisfactory definition of “civil society” or the “state,” seeing the former as being a function of, but also as pre-existing and being constitutive of, the latter, civil society may be understood here as being differentiated from the state in that it does not entail the set of institutions that make up the state, which are separated from it in that they hold a monopoly on coercion. Civil society is the space in which the struggle for hegemony takes place, where it is reproduced and challenged, as well as the constellation of actors that engage in that struggle. See *ibid.* at 207-209 and 260-264; Hall, *supra* note 5 at 27 and 70; Enrico Augelli and Craig Murphy, “Gramsci and IR: A General Perspective and Example from Recent US Policy Toward the Third World,” in Gill, “Gramsci and IR,” *supra* note 6 at 128 and Robert W. Cox, “Civil Society at the Turn of the Millenium: Prospects for an Alternative Order,” (1999) 25 *Review of International Studies* 3 [Cox, “Civil Society”] at 4 and 10.

¹⁰ See “Prison Notebooks,” *supra* note 8 at 237-239 and 243 and Hall, *ibid.* at 18.

¹¹ See “Prison Notebooks,” *supra* note 8 at 163-166 and 184-185 and Hall, *supra* note 5 at 13-15.

which all feel represented.¹² The creation of this bloc or alliance, which Gramsci called a ‘historical bloc,’ involves not only economic concessions but also discursive frameworks that actively constitute perceptions of mutual interests.¹³ As Robert Cox points out, the movement toward hegemony means “passing from the specific interests of a group or class to the building of institutions and elaboration of ideologies. If they reflect a hegemony, these institutions and ideologies will be universal in form, i.e., they will not appear as those of a particular class, and will give some satisfaction to the subordinate groups while not undermining the leadership or vital interests of the hegemonic class.”¹⁴

2. Hegemony and World Order Relations

The special interest of the concept of hegemony and its application to world order relations by neo-Gramscian scholars for the purposes of this study lies primarily in the fact that it emphasizes the socially produced and historically mutable character of the current world order or “structure,”¹⁵ uncovering the multiple relations and processes that have made it possible.¹⁶ A number of authors have pointed to the theoretical difficulties of using Gramsci’s insights to account for world order relations, however, questioning in particular

¹² See “Prison Notebooks,” *ibid.* at 181-182; *supra* note 8; and Hall, *ibid.* at 24-25.

¹³ See “Prison Notebooks,” *ibid.* at 160; Hall, *ibid.* at 33; and Mark Rupert “Alienation, Capitalism and the Inter-State System: Towards a Marxian/Gramscian Critique” [Rupert, “Alienation”] in Gill, “Gramsci and IR,” *supra* note 6 at 80-81 and David L. Levy and Daniel Egan, “A Neo-Gramscian Approach to Corporate Political Strategy: Conflict and Accommodation in the Climate Change Negotiations” (2003) 40:4 *Journal of Management Studies* 803 at 806.

¹⁴ Cox, “Gramsci and IR,” *supra* note 6 at 57-58. See also “Prison Notebooks,” *ibid.* at 161.

¹⁵ Following Bernstein, the international social “structure” is understood here as entailing a set of institutionalized norms ordered in a hierarchy of prioritized values that coordinate and define international interactions, which can be held constant for the purpose of analysis because they legitimate practices consistent with their logic and marginalize practices that pose a challenge to them. The structure would consist of three major levels, which are hierarchically organised: norms of identity, which determine who the primary actors are (in contemporary politics, norms of state sovereignty); norms that specify the minimum conditions for the coexistence of sovereign states (i.e., the basic obligations owed to the society of states as a requirement for membership); and norms that constitute and regulate social relations by activity (which limit the autonomy of state action but rest on state authority). See Bernstein, *supra* note 2 at 185-187.

¹⁶ See Rupert, “Alienation,” *supra* note 13 at 69.

whether the conceptual categories that Gramsci used, such as hegemony and civil society, can be meaningfully “internationalized.”¹⁷ Students of Gramsci have responded that even though these critiques raise some interesting points, they are premised on a separation between the national and international spheres that Gramsci himself rejected.

Neo-Gramscian critiques abandon the premise that the basic reality of world politics is power struggle among autonomous states in a context of anarchy, pointing out that this reality is not natural or universal but historically specific and socially alterable and that taking it as an ontological fact has the effect of concealing its true nature.¹⁸ Instead of beginning with sovereign states, the world system or the capitalist market system as ontological points of departure,¹⁹ neo-Gramscian (and more generally historical materialist) approaches examine the social relations and specific historical processes that have brought both the modern state and capitalism to fruition.²⁰ The state is thus viewed as constructed and reconstructed in the nexus between global and domestic social relations, integral to which there are political, economic and ideological aspects,²¹ as well as legal ones.²²

Neo-Gramscian scholars concede that Gramsci gave a high priority to those aspects of social reality produced within the bounds of a national political community.²³ They also claim, however, that Gramsci’s concept of power (and

¹⁷ See Randall D. Germain and Michael Kenny “Engaging Gramsci: International Relations and the New Gramscians” (1998) 24 *Review of International Studies* at 2.

¹⁸ See Rupert, “Alienation,” *supra* note 13 at 83.

¹⁹ While neo-realism starts with states in a situation of anarchy as a point of departure, world-system theory sees the capitalist world economy as the only self-contained social system of the modern world, which encompasses all other social relations, including political entities such as classes and states. See Rupert, “Hegemony,” *supra* note 7 at 4 and 9; Stephen Gill, “Epistemology, Ontology and the ‘Italian School’” [Gill, “Epistemology”] in Gill, “Gramsci and IR,” *supra* note 6 at 23 and 41; and *infra* notes 77 and 78.

²⁰ See Rupert, “Hegemony,” *supra* note 7 at 39-40 and Gill, *ibid.* at 23.

²¹ See Rupert, *ibid.* at 41 (For a more detailed explanation of Gramsci’s ontology see section 4 of Part II below).

²² This chapter argues that neo-Gramscian approaches must be complemented with a constitutive approach to law, since the concept of law that is implicit in Gramsci’s writings fails to fully account for the role of law in constituting and reconstituting (as well as resisting) hegemony. See section 5 of Part II below.

²³ See Rupert, “Alienation,” *supra* note 13 at 85; and Cox, “Gramsci and IR,” *supra* note 6 at 58.

hegemony as a form of power) is not necessarily tied to historically specific social classes or groups but has wider applicability to relations of dominance and subordination, including those of world order. This does not mean that power has no connection to its social basis, but that the social basis need not correspond to the boundaries of a state.²⁴ Mark Rupert points out, for instance, that in the twenty-first century many of the civil society institutions and practices of Gramsci's time, including trade unions, churches, journalism and education, have transcended the boundaries of particular states and constitute important resources with which the powers of transnational capital can be contested (and reproduced).²⁵ From that perspective, he argues that Gramsci should be read "not as insisting on a strict institutional correspondence of state/civil society, but as directing us toward the relations of coercion/consent at play in various historical social forms, none of which are wholly understandable in abstraction from their relation to capitalism and its peculiar forms of social organization."²⁶

According to Gramsci himself, every relationship of hegemony is "necessarily an educative relationship [that] occurs not only within a nation, between the various forces of which the nation is composed, but in the international and world-wide field, between complexes of national and continental civilizations."²⁷ Rather than a one-way imposition of a dominant (global) culture upon a subordinate (local) culture, therefore, neo-Gramscian analyses emphasize that the building of hegemony entails an ongoing dialogue between the two.²⁸ In world order relations hegemony is seen not as a relation of domination by (a) powerful state(s) over other state(s) or actor(s), but as the organisation of consent by a social strata that creates—in a dialectical or negotiated form—a world social structure in which key actors feel that their

²⁴ See Cox, "Gramsci and IR," *ibid.* at 52 and "Prison Notebooks," *supra* note 8 at 170.

²⁵ See Mark Rupert, "(Re-)Engaging Gramsci: A Response to Germain and Kenny" (1998) 24 *Review of International Studies* (1998) 427 at 431-432.

²⁶ *Ibid.* at 433.

²⁷ See *ibid.* at 431-432 (quoting Antonio Gramsci).

²⁸ See *ibid.*

interests are (however imperfectly) represented, and perceive the structure as (at least somewhat) mutually beneficial. Robert Cox suggests that one can speak of a “hegemonic world order” in the following terms:

“A structure of values and understandings about the nature of order that permeates the world society, composed of states and non-state entities. In a hegemonic order these values and understandings appear to actors as the natural order of things. They are the intersubjective meanings that constitute the order itself. Such a structure of meanings is underpinned by a structure of power, in which most probably one state is dominant but that state’s dominance is not sufficient by itself to create hegemony. Hegemony derives from the ways of doing and thinking of the dominant social strata of the dominant state or states insofar as these ways of doing and thinking have inspired the emulation or acquired the acquiescence of the dominant social strata of other states. These social practices and the ideologies that explain and legitimize them constitute the foundation of the hegemonic order. Hegemony frames thought and thereby circumscribes action.”²⁹

a) Neo-liberal hegemony in the post-war period

Following the understanding of hegemony referred to above, a number of authors agree that the world economic order established in the aftermath of World War II was “hegemonic.” This characterization does not imply that the ideological underpinnings of the post-war world order effectively encompassed the whole world, but that the neo-liberal ideologies that were hegemonic in the core capitalist countries (most notably the United States and the United Kingdom) were effectively reflected in the institutional framework of globalizing capitalism that those countries established after the war.³⁰ According to these studies, an international historical bloc centred in the United States succeeded in internationalizing New Deal principles and associated forms of capital-intensive, mass-consumption accumulation and extended opportunities for foreign direct investment and exports, constructing

²⁹ Robert Cox, *Approaches to World Order* (Cambridge, Cambridge U. Press, 1996) at 517-518.

³⁰ See Stephen Gill, *Power and Resistance in the New World Order* (NY: Palgrave MacMillan, 2003) [Gill, “Power and Resistance”] at 110; Cox “Gramsci and IR,” *supra* note 6 at 60; and Mark Rupert, *Ideologies of Globalization: Contending Visions of a New World Order* (London; N.Y.: Routledge, 2000) [Rupert, “Ideologies”] at 154.

an economic, security and political structure for the non-communist world that was centred in the United States.³¹

This was possible because by the end of World War II the United States had emerged as a dominant western power and was able to take the lead, together with Great Britain, in shaping new institutions to provide a more stable framework for world trade and finance. In 1944, representatives of the United States and Great Britain met with the leaders of over forty other allied nations at the United Nations Monetary and Financial Conference in Bretton Woods, New Hampshire, and established two major institutions for international financial and monetary cooperation. The first was the International Bank for Reconstruction and Development (known as the World Bank, which now also comprises four additional institutions),³² created to provide loans to assist the reconstruction of Europe and Japan after the war, and the other was the International Monetary Fund (IMF), created to regulate currencies, promote stable exchange rates and provide liquidity for the freer flow of trade.³³ Three years later, the General Agreement on Tariffs and Trade (GATT) –predecessor of the World Trade Organization (WTO), established in 1995- was signed with the aim of preventing the continued use of discriminatory measures and retaliatory tariffs that many states had adopted during the great depression of the 1930s.³⁴

³¹ See Stephen Gill and David Law, “Global Hegemony and the Structural Power of Capital” in Gill, “Gramsci and IR,” *supra* note 6 at 96. For a judicious study about the origins of hegemonic neo-liberalism in the United States, and how a historical bloc among Wilsonian liberals, internationally oriented factions of the capitalist class (e.g., major banks and corporations engaged in mass production) and the official leadership of organised labour in the 1930s and 1940s succeeded in spreading US hegemony to the European states after World War II. See Rupert, “Hegemony,” *supra* note 7 at 42-46 and 58.

³² See World Bank, “Archives: History,” online: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20053333~menuPK:63762~pagePK:36726~piPK:36092~theSitePK:29506,00.html>> (last visited December 5, 2007).

³³ See Independent Commission on International Development Issues (chaired by Willy Brandt), *North-South: A Programme for Survival. Report of the Independent Commission on International Development Issues* (London: Pan Books, 1980) at 36 [Brandt report] at 36 and Canadian Economy Online, Government of Canada, “Bretton Woods Agreement: Developing a New International Monetary System,” (4 June 2007), online: <http://www.canadianeconomy.gc.ca/english/economy/1944Bretton_woods.html>.

³⁴ See Neil Middleton, Phil O’keefe & Sam Moyo, *The Tears of the Crocodile. From Rio to Reality in the Developing World* (London; Boulder, CO: Pluto Press, 1993) at 97.

Although it has been suggested that the dominant western powers that established this new institutional framework were determined to avoid protectionist policies abroad by creating a strong free trade system just as they were committed to intervention in their own home economies,³⁵ the economic norms that were enshrined in the Bretton Woods institutions and the GATT appeared as consensual arrangements rather than as the simple exploitation of a power position or the product of a hard bargain among rival interests.³⁶ They provided a “framework of ideological, political and economic stability necessary for growth to resume on a liberal capitalist basis and for existing welfare-nationalist states to be reconstructed in a neoliberal form.”³⁷ While the United States was the dominant power in the world social structure, its dominance was expressed in leadership, in the promotion of certain principles of conduct that promised to benefit all countries, under a neo-liberal vision of global peace and prosperity through a more open and interdependent world economy and a politics of productivity on an international scale³⁸ that by and large became acceptable to other actors.

b) The crisis of neo-liberal hegemony and the new historical bloc

Just as they agree that the postwar order was hegemonic, a number of neo-Gramscian analyses suggest that the hegemony of neo-liberal ideologies has been in crisis in the core capitalist countries, notably the United States, since at least the early 1970s.³⁹ Specifically, these studies see the absence of the “ideological cement” of anti-communism which brought together labour and capital in the United States and other advanced capitalist countries,⁴⁰ the

³⁵ As put by the Independent Commission on International Development, known as the Brandt Commission, it was “Keynes at home, and Adam Smith abroad.” See “Brandt report,” *supra* note 33 at 36.

³⁶ See Robert Cox, “Structural Issues of Global Governance: Implications for Europe” [Cox, “Structural Issues”], in Gill, “Gramsci and IR,” *supra* note 6 at 264.

³⁷ See Rupert, “Hegemony,” *supra* note 7 at 54.

³⁸ See *ibid.* at 46, 53 and 57.

³⁹ See *ibid.* at 192; Gill, “Power and Resistance,” *supra* note 30 at 88-92; and Cox, “Gramsci and IR,” *supra* note 6 at 60-61.

⁴⁰ In Rupert, “Ideologies,” *supra* note 30 at 26.

rising inequality between the rich and the poor and the decrease of wages with respect to production levels, as continuously undermining the historical bloc of state, organised labour and capital in the United States and other advanced capitalist countries.⁴¹ These circumstances have damaged the hegemony of neo-liberalism in many countries, requiring greater use of coercion and discipline to ensure the persistence of economic liberalism, in particular the international trade norms of the GATT/WTO system and related regional free trade agreements, in advanced capitalist countries and in the world economy.⁴² They have also opened up new possibilities for transnational and international resistance and alternative discourses and ideologies. Rupert documents, for instance, that in the public debates in the United States over the North American Free Trade Agreement (NAFTA) and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), a constellation of actors challenged liberal economic hegemony with progressive and potentially “counter-hegemonic” visions premised on participatory democracy and communal self-determination.⁴³

The compromise of neo-liberalism of the aftermath of the Second World War has been replaced by what Cox calls “hyper-liberalism,” a significantly but not fundamentally new form of liberalism.⁴⁴ The postwar neo-liberal state founded its legitimacy on consensual politics and made capital accumulation on a world scale appear to be compatible with a broad range of interests of subordinate groups. In contrast, the new form of liberalism, anticipated by the Reagan-Thatcher model in the face of the depression of the 1970s, focuses

⁴¹ See M. Scott Solomon and Mark Rupert, “Historical Materialism, Ideology, and the Politics of Globalizing Capitalism,” in Mark Rupert and Hazel Smith, eds., *Historical Materialism and Globalization* (London; NY: Routledge, 2002) at 288-291. Rupert shows, for instance, how the ideological basis of the politics of productivity, i.e., the identification of the interests of workers with productivity and the profitability of their employer, has become increasingly problematic in the United States as US-based multinational firms pursue global profits at the expense of American workers. See Rupert, “Hegemony,” *supra* note 7 at 192.

⁴² See Rupert, “Ideologies,” *supra* note 30 at 32; Gill and Law, *supra* note 31 at 122; and Cox, “Structural Issues,” *supra* note 36 at 264.

⁴³ For details see Rupert, “Ideologies,” *ibid.* at 63-78.

⁴⁴ See Cox, “Structural Issues,” *supra* note 36 at 267.

primarily on restoring the confidence of business in government⁴⁵ and favours the interests of large-scale, transnational capital more openly.⁴⁶

Although it requires a greater use of coercion, the new form of liberalism remains a hegemonic project and retains a basic continuity with the project of the postwar international historical bloc, i.e., an underlying commitment to a more open world economy.⁴⁷ Thus, neo-Gramscian studies convincingly argue that the restructuring of the postwar world order into a more liberalised and globalised world economy is to a large extent the work of an emergent “transnational historical bloc.” The material interests and ideologies of this bloc, they claim, are closely connected to the progressive transnationalization of liberalism in the global political economy and policies and governing frameworks that expand the role and protection of free enterprise and market forces while restricting democratic control and accountability.⁴⁸ The core of this emerging bloc is said to be constituted by the members of an emergent “transnational capitalist class,” which include elements of the Group of 7 (now G8) state apparatuses (and the institutions and organisations that they direct); transnational capitalists involved in manufacturing, finance and services and associated privileged workers and smaller firms, such as small and middle-sized businesses linked to them as contractors or suppliers; import-export enterprises, service companies and educational entrepreneurs;⁴⁹ and many leading politicians and civil servants in the most advanced capitalist countries and in some less developed countries.⁵⁰

Emphasizing the separation between the economic and the political fields that is characteristic of capitalism, the political vision of the emergent historical bloc is ideologically grounded in the orthodox theory of specialization and

⁴⁵ See *ibid.* at 266.

⁴⁶ See Gill and Law, *supra* note 31 at 104.

⁴⁷ See *ibid.*

⁴⁸ See Rupert, “Ideologies,” *supra* note 30 at 49 and 132 and Gill, “Power and Resistance,” *supra* note 30 at 71 and 86.

⁴⁹ See Gill, “Power and Resistance,” *ibid.* at 119.

⁵⁰ See *ibid.* at 86-87.

international trade, on which the GATT and WTO agreements are founded. The doctrine of free trade and specialization claims that free international trade will yield a net gain for the overall world economy, as the gains from exploiting comparative advantage will outweigh the losses of less efficient domestic industries and allow consumers to enjoy enhanced consumption possibilities. While contested on many grounds,⁵¹ the free trade doctrine exerts a powerful ideological drive within the current world order because it resonates well with the longstanding focus on individualism of the liberal worldview, which sees in the market (and in increased consumption possibilities) a site of empowerment that provides for equality of opportunity and maximizes local comparative advantages.⁵²

Perhaps the most tangible indication of the prominence of the orthodox theory of international trade and the liberal worldview in which it is embedded is that it constitutes the governing ideology of the world economy and its central institutions, i.e., the Bretton Woods institutions and the GATT/WTO, where it is being propagated by a constellation of actors in the nexus between the United States and the global political economy. This phenomenon has important ideological effects because the theory appears to have become part of many people's "common sense"⁵³ (notably in the case of elites and high-level decision-makers) in the United States and elsewhere.⁵⁴ As will be

⁵¹ See, for instance, Herman E. Daly, "Against Free Trade: Neo-Classical and Steady-State Perspectives" (prepared for the Conference on Trade and the Environment, Pacific Basin Research Center, John F. Kennedy School of Government, Harvard University, 1994), online: <<http://www.ap.harvard.edu/mainsite/papers/tne/daly/daly.pdf>>; Annie Taylor "The Trade and Environment Debate," in Annie Taylor and Caroline Thomas, eds., *Global Trade and Global Social Issues* (London; New York: Routledge, 1999) at 72-90; and Ralph Nader et al., *The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power* (San Francisco, CA; Berkeley, CA: Earth Island Press North Atlantic Books, 1993).

⁵² See Rupert, "Ideologies," *supra* note 30 at 50-54.

⁵³ For Gramsci, the main ideological struggle is over people's "common sense," i.e., the uncritical and largely unconscious way in which individuals perceive the world, which contains within itself aspects of resistance and disputation that can be explored and rearranged to challenge hegemonic narratives and ideas. See Hall, *supra* note 5 at 64-65.

⁵⁴ Rupert shows, for instance, the remarkable degree of unanimity (and support for international trade and the liberal view) in support of the NAFTA and the GATT-WTO among academic and professional economists, the mainstream press (e.g., the *Washington Post*, the *New York Times*, the *Wall Street Journal*,

discussed in the next four chapters, the orthodox theory of international trade is not only the basis of the system of international trade law but is also reflected in universally agreed environmental instruments such as Agenda 21 and the Johannesburg plan of implementation.

It is possible to talk about an emergent transnational “class” because, despite divergences among them, its members share a basic ideology or framework of thought, i.e., a commitment to a more open world economy. That ideology is reflected in the dominance of liberal economic ideas and policies within a range of governmental bureaucracies (e.g., foreign, finance and economics ministries) and international organisations and forums that foster dialogue and interaction between elites, including the Trilateral Commission, the Bretton Woods institutions, the WTO, the World Economic Forum and the Organisation for Economic Co-operation and Development (OECD).⁵⁵ This common framework of thought includes, for instance, the idea that economic growth depends on maintaining investor confidence and that governments must therefore sustain their credibility in the eyes of investors by providing an appropriate “business climate.”⁵⁶ When transposed to environmental governance, the assumption is that economic growth (i.e., increased consumption) will create the conditions that are necessary (albeit not sufficient)⁵⁷ to achieve environmental protection. These conditions include increased wealth, better technology and higher income and education levels, which will prompt increased awareness among citizens about environmental problems and a higher degree of political will to address them. This is

USA Today) and mainstream journals (e.g., *Foreign Affairs* and *Foreign Policy*) in the United States. See Rupert, “Ideologies,” *supra* note 30 at 54-64.

⁵⁵ See Gill, “Power and Resistance,” *supra* note 30 at 86-88 and *ibid.* at 133-134.

⁵⁶ See Stephen Gill, “The Constitution of Global Capitalism” (Paper presented at the International Studies Association Annual Convention, Los Angeles, 2000) [Gill, “Constitution”] at 4, online: <www.theglobalsite.ac.uk/press/010gill.pdf>.

⁵⁷ In general, those who subscribe to this point of view argue that more stringent environmental standards and better enforcement of environmental regulations are also required to ensure that economic growth will contribute to improving the environment. See Håkan Nordström and Scott Vaughan, “Trade and Environment,” World Trade Organization Special Studies 4 (WTO 1999), at 58, online: <http://www.wto.org/English/tratop_e/envir_e/environment.pdf> and *infra* note 58.

matched by the belief that promoting economic growth requires the adoption of policies that further liberalise trade and investment and reduce market-distorting government subsidies and policies.⁵⁸ Consistent with this framework of thought, economic globalisation (understood as further trade and finance liberalisation) is depicted as a process that can contribute to achieving sustainable development, poverty eradication *and* environmental sustainability, even as it is recognised that in fact it has fostered greater inequality and environmental degradation in many parts of the world.⁵⁹ The 2002 Johannesburg Declaration on Sustainable Development, for example, affirms that “the benefits and costs of [economic] globalization [are being] unevenly distributed.”⁶⁰ Even so, it suggests that the key to achieving sustainable development is to “work together to help one another gain access to financial resources, benefit from the opening of markets, ensure capacity-building, use modern technology to bring about development and

⁵⁸ See Jennifer Clapp and Peter Dauvergne, *Paths to a Green World: The Political Economy of the Global Environment* (Cambridge: the MIT Press, 2005) at 4-7 and 123-127; 132-134; 157-161; 189-190 and 216-243; Nordström and Vaughan, *ibid.*; Per G. Fredriksson, “Trade, Global Policy and the Environment,” World Bank Discussion Paper 402 (August 1999); and The World Bank, “Environment Matters at the World Bank: Annual Review 2004” (January 2004) [both World Bank reports are available online through “documents and reports” at <<http://www.worldbank.org/reference/>>].

⁵⁹ See *ibid.* This view is also reflected in a number of speeches and interventions by Klaus Töpfer, Executive Director of the United Nations Environment Programme (UNEP) from February 1998 to March 2006. At the first meeting of the Preparatory Committee of the World Summit on Sustainable Development (WSSD), for instance, Töpfer said that “recent evidence point[ed] to an antagonistic relationship between globalization and sustainable development, including a growing gap between rich and poor within and among countries[, and w]ays [had] therefore [to] be found to really engage the private sector and to ensure that the globalization process [was] harnessed and developed in a way that contribute[d] to sustainable development, poverty elimination and the future environmental sustainability of the planet.” “Statement of the Executive Director of UNEP, Dr. Klaus Töpfer, at the Preparatory Committee for the WSSD” (Stakeholder’s Forum Earth Summit 2002), online: <<http://www.earthsummit2002.org/es/2002/prep-comm-1/unep.htm>>. A similar statement was made by Töpfer at the 21st session of the UNEP Governing Council, when he claimed that “globalization provide[d] us with unprecedented opportunities in the great advances that ha[d] been made in science and technology, the globalization of financial markets and the liberalization of trade. It also present[ed] us with immense new systemic challenges posed by the unequal distribution of the benefits of globalization, of pervasive poverty, of global environmental degradation and resource depletion... [.] [T]he main challenge we face[d w]as the exclusion of the majority of humanity from sharing in the unprecedented wealth generated by globalization.” “Statement by Mr. Klaus Töpfer, Executive Director, UNEP at the 21st Session of UNEP’s Governing Council/Global Ministerial Environment Forum” (February 2001), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=195&ArticleID=2778&l=en>>.

⁶⁰ See “Johannesburg Declaration on Sustainable Development,” in United Nations, “Report of the World Summit on Sustainable Development,” UN Doc. A/CONF/199/20, Johannesburg, South Africa (26 August-4 September 2002), para. 14.

make sure that there is technology transfer, human resource development, education and training to banish underdevelopment forever.”⁶¹

The emergence of the transnational historical bloc pushing for a more open world economy has important implications for the present study because many of the bloc’s key members (e.g., the OECD, the WTO, the World Bank, industry organizations representing large agrochemical corporations and the International Chamber of Commerce) are commonly represented in multilateral environmental negotiations. As discussed in the following chapters, many of these actors openly and consistently advocated liberal economic norms (in particular international trade norms) during the negotiations of the Basel, Rotterdam and Stockholm conventions and the strategic approach to international chemicals management (SAICM).

3. Hegemony as discourse

Rather than inquiring whether the current world order can presently be characterised as “hegemonic,” it is most useful to think of hegemony as a particular kind of discourse and political project, with powerful material and ideological attributes and effects because of the way in which it is articulated and because of *who* articulates it. What is significant about economic liberalism is that it speaks a universal and all-encompassing language, that its propositions are being voiced at the highest levels of the political configuration and that it is being continuously produced and reproduced in and through the centres of power of the world economy, the most important of which is perhaps the well-established institutional and legal architecture of the GATT/WTO agreements. The symbolic and effective power of economic liberalism as a discourse in international environmental negotiations is evidenced by the fact that even those who do not see it as legitimate or desirable use it as the language with which they frame their arguments. Even

⁶¹ See *ibid.*, para. 18.

though that choice of language appears to be motivated by a perceived need to be pragmatic or strategic, it has the effect of reproducing and even legitimizing liberal economic norms, including the idea that human health and the environment can be effectively protected from the negative effects of chemicals even though the volume and variety of chemicals and the products that contain them or the production of which releases them are constantly increasing. This assumption, in turn, leads to the consideration and adoption of solutions to chemicals-related problems that focus exclusively on qualitative issues and fail to tackle consumption in terms of quantity.

To understand hegemony in terms of discourse and ideology does not mean that material conditions are being relegated to a lesser plane. For Gramsci, ideologies are, first and foremost, political and social programs and the concepts on which those programs are based.⁶² To build hegemony, a historical bloc must not only have power within civil society and the economy but also persuasive ideas and arguments.⁶³ This means that the ideologies involved in discourse can only be understood in relation to material circumstances, which include both social relations and the physical means of production. In other words, the predominant ideology both shapes and is shaped by material circumstances.⁶⁴ The shift from a neo-liberal form of state to a more plainly “liberal” state, for instance, is attributed to both the economic depression of the 1970s *and* the collective and conscious effort by various ideology-forming consensus-making agencies (e.g., the OECD and the Trilateral Commission) to revise the neo-liberal ideologies of the postwar and elaborate a new doctrine prescribing a more “narrow path” to growth through

⁶² See “Prison Notebooks,” *supra* note 8 at 321-343 and 376-377 and Enrico Augelli and Craig N. Murphy, *America’s Quest for Supremacy and the Third World: A Gramscian Analysis* (London: Pinter, 1988) at 15-16.

⁶³ See Gill and Law, *supra* note 31 at 94.

⁶⁴ See Cox, “Gramsci and IR,” *supra* note 6 at 56.

the encouragement of private investment and the containment of inflation as state priorities.⁶⁵

Similarly, neo-Gramscian scholars point to a connection between the recessionary conditions of the 1980s, which led different states to reduce barriers to the international mobility of capital in order to attract foreign investment (based on the idea that economic growth is fundamentally dependent on investment and innovation by private enterprise), the rise of a more integrated and global capital market and the development of ideologies that are more congruent with the interests of large-scale, internationally-mobile capital. An important element in this process has been the rising “structural” power of transnational capital, including its greater ability to spread liberal economic ideologies in the social structure.⁶⁶ Structural power⁶⁷ refers to the ability of transnational capital to make decisions on the basis of its own appraisal of the legal freedoms, production costs, labour relations and political stability of different countries. It entails the capacity of transnational capital to threaten unions with plant closures and relocations, thereby undercutting the ability of labour to make demands,⁶⁸ and to move huge sums of money from one country to another, which could result in a balance of payment crisis, a foreign exchange crisis and/or increased inflation in the “disciplined” state.⁶⁹ The increased power of capital relative to labour and the state has served to reinforce the idea that private property and accumulation are untouchable and that without the private sector economic growth would be endangered, giving increased leverage to the transnational

⁶⁵ See Cox, “Structural Issues,” *supra* note 36 at 266; Rupert, “Ideologies,” *supra* note 30 at 132; and Gill and Law, *supra* note 31 at 103-104.

⁶⁶ See Gill and Law, *ibid.* at 98-99 and 103-104.

⁶⁷ The structural power of capital may be contrasted with its “direct” power. The latter entails businesses’ financial resources, expertise, contacts within governments and control over much of the media, as well as the ability to influence governments through lobbying and market power over prices and/or wages. See *ibid.* at 99.

⁶⁸ Neo-Gramscian scholars also point out that the restructuring of production from Fordist to post-Fordist patterns of accumulation and large-scale unemployment have accentuated segmentations and divisions within the working class, weakening the ability of labour to oppose the restructuring of the state and the world economy in liberal economic terms. See Cox, “Structural Issues,” *supra* note 36 at 266-267.

⁶⁹ See Gill and Law, *supra* note 31 at 98-100 and 105-109.

historical bloc making for a more liberalised global economy via liberal economic norms and ideas.⁷⁰

Stressing that the building of hegemony entails a correspondence between material forces, institutions and ideologies,⁷¹ Stephen Gill argues that “a perspective becomes hegemonic when the theories and arguments it entails and the social forces it embodies come to prevail in setting the agenda for debate and policy in a given historical situation. This does not imply a lack of contestation: merely that for practical purposes, alternatives are not fully considered because they lack weight, plausibility, credibility or practical effectiveness.”⁷² From this standpoint, one can contend that economic liberalism is “hegemonic” in chemicals-related international environmental negotiations to the extent that alternatives to liberal economic ideologies are not considered or tend to be discarded from the outset, if they are voiced at all, even if those ideologies have not been internalised or accepted by the majority of actors interacting in the negotiations.

4. Hegemony and international environmental negotiations

There appear to be at least three powerful reasons for using the concept of hegemony to study the role of liberal economic norms in international environmental negotiations. First, hegemony serves to explain the prevalence of the liberal economic perspective in those negotiations not as the imposition of a type of discourse or ideology by a group of powerful actors over others, which would be deemed simplistic and plainly wrong by anyone attending these negotiations, but as a universal worldview that everyone could agree to because it purports to offer tools for achieving not only environmental protection but also other long-awaited goals such as economic development and poverty eradication. Without assuming that everyone has bought into

⁷⁰ See *ibid.* at 107-108.

⁷¹ See *ibid.* at 93-94.

⁷² Gill, “Power and Resistance,” *supra* note 30 at 169.

liberal economic norms and ideologies, hegemony would explain why a considerable number of players from all camps are using those norms to frame their arguments and proposals.

The second reason for using the concept of hegemony is that it requires an investigation of the possibilities that exist to formulate alternative ideologies alongside the ideologies that have achieved hegemony. Rather than seeing hegemony as an achieved condition, neo-Gramscian studies emphasize the contested nature of hegemonic narratives and ideologies, seeing hegemony as a terrain of social struggle where prevalent ideas must be constantly articulated and rearticulated at the various levels of the social structure.⁷³ This means that any analysis of hegemonic discourses must consider not only the norms and ideas that are said to be hegemonic, but also the counter-hegemonic possibilities that exist inside the spaces where hegemony prevails. For instance, even though several environmental non-governmental organizations are upholding liberal economic norms in their proposals, they are also making arguments that, if accepted, could pose a significant challenge to liberal economics. One example of this, which is discussed in chapters 4 and 5, is the position taken by these organizations and a few governments with regard to the “precautionary approach” or principle to dealing with chemicals in the face of scientific uncertainty.⁷⁴

The third (and most important) reason why a neo-Gramscian approach to world order relations is preferred to other methods of analysis is that it enables a radical critique of the instruments that are the subject of this dissertation. Neo-Gramscian approaches start from the premise that social scientific explanation is a part of the historical process and cannot stand outside it, rejecting the notion that there is a realm of social science free from ideological influence and able to reveal eternal truths, i.e., truths not bounded

⁷³ See Gill, “Epistemology,” *supra* note 19 at 41-43 and Cox, “Civil Society,” *supra* note 9 at 4-5 and 10.

⁷⁴ See chapters 4 and 5.

by history and culture.⁷⁵ They emphasize that, as historically situated beings, we have no perspective outside our own historical situation,⁷⁶ which makes neutral observation and the separation of facts and values unworkable. This means that any method of inquiry must be historically grounded and provide a way to challenge the “truths” that it presents.⁷⁷ This constitutes an important difference between neo-Gramscian approaches and positivist and empiricist methodologies such as public choice theory, which purport to describe the social world objectively while presupposing a particular conception of the world that is inevitably grounded in history and culture.⁷⁸

Unlike these conventional approaches, which take the capitalist market system and the state system as ontological points of departure, neo-Gramscian approaches radicalize ontology itself. Rather than seeing these ontological units as prior to and constitutive of the reality that we can comprehend, they understand them as “an ongoing social product, historically concrete and contestable.”⁷⁹ Both Marx and Gramsci deny that human beings can be conceived as atoms isolated from society or nature, or as having any trans-historical essence.⁸⁰ Instead, they see them as actively self-constitutive in the process of consciously reconstructing their *internal* relation with society and nature.⁸¹ Nature and society are seen as being continually

⁷⁵ See Augelli and Murphy, *supra* note 62 at 15.

⁷⁶ See Rupert “Alienation,” *supra* note 13 at 72.

⁷⁷ See Augelli and Murphy, *supra* note 62 at 15 (One of the reasons why a neo-Gramscian approach is preferred to other methods of analysis is that, by describing the social relations and historical processes that have made capitalism and the state system possible, it provides a framework with which to challenge those apparently natural and universal ‘truths.’).

⁷⁸ In addition to presupposing the capitalist market economy and the state system, public choice theory starts from the methodological individualist assumption that all choices are made by self-interested and rational individuals who weigh costs and benefits and choose those alternatives that will maximize their own net income or welfare potential. See Vincent Ostrom, “Public Choice Theory: A New Approach to Institutional Economics” (1975) 57:5 *Am. J. of Agric. Econ.* 844-850 and James M. Buchanan, “Public Choice: Politics Without Romance” (2003) 19:3 *Policy* 13-18. See also Augelli and Murphy, *supra* note 62 at 15 and 27-29.

⁷⁹ See Rupert “Alienation,” *supra* note 13 at 67 and “Prison Notebooks,” *supra* note 8 at 355-360.

⁸⁰ See Rupert, *ibid.* at 77 and “Prison Notebooks,” *ibid.* at 133-134.

⁸¹ An internal relation is one in which the inter-related entities of a dialectical process take their meaning from (or are constituted within) their relation and are unintelligible (or non-existent) outside of the context of that relation. See Rupert, *ibid.* at 90.

mediated in a process of objectification, i.e., in “the conscious creation of world objects through socially organised productive activity in which human beings, their social lives and their natural environment are together transformed.”⁸² Human nature, therefore, is understood as an open-ended capacity for self-production through objectification. As discussed above, this capacity is indeterminate in the abstract because, as historically situated beings, we can only know ourselves through the process of objectification in which human and social life are mediated and thus “have no perspective outside our own historical situation within that process.”⁸³

While the process of objectification is inherent to human nature, the ways in which productive activity is organised cannot be determined *a priori*, but *only historically*. This insight leads historical materialist scholars to explore the historical processes and social relations that are implicated in the birth of capitalism and the modern state and to argue explicitly that the social relations of capitalism are not natural or universal, but rather the product of the mediation of human relations and nature through productive activity.⁸⁴ In the same way, rather than seeing the globalisation of economic liberalism as either something entirely new or as merely the natural expansion of capitalism,⁸⁵ neo-Gramscian studies investigate the historical processes that have precipitated globalisation, highlighting the active role of powerful actors within and across states, as well as the role of ideology and multilateral institutions in promoting the transnationalization of production, finance and ideas.⁸⁶ By making explicit the historical processes and social relations that have made capitalism and globalisation possible, neo-Gramscian analyses provide a critical framework of analysis in which there is room to consider that capitalism and economic liberalism may be a root cause of environmental

⁸² Rupert, “Alienation,” *supra* note 13 at 68.

⁸³ See *ibid.* at 72.

⁸⁴ See *ibid.*

⁸⁵ See Solomon and Rupert, *supra* note 37 at 284.

⁸⁶ See Mitchell Bernard, “Ecology, Political Economy and the Counter-movement: Karl Polanyi and the Second Great Transformation,” in Stephen Gill and James H. Mittelman, eds., *Innovation and Transformation in International Studies* (Cambridge, UK: Cambridge U. Press, 1997) at 80.

degradation and the global ecological crisis.⁸⁷ In other words, they enable a framing of environmental problems that include, rather than presuppose, capitalism and economic liberalism. This entails, for instance, questioning the assumption that the protection of human health and the environment from significant adverse effects of chemicals is achievable while maintaining or increasing the current level of chemicals consumption.

5. Hegemony and the Law

While neo-Gramscian accounts of world order provide a fruitful account of the social processes that are implicated in the constitution of liberal economic hegemony, they are less prolific in their analysis of law and the relationship between law and hegemony. The source of this shortcoming can probably be traced back to the conception of law that is implicit in Gramsci's writings. While Gramsci understands law and the legal system as playing a crucial role in elaborating, sustaining and spreading certain ideologies,⁸⁸ he sees the struggle for hegemony as taking place primarily in the context of civil society, which is generally understood as consisting of the private organisations and institutions that are separate from state institutions in that they do not share in the monopoly on coercion enjoyed by the state.⁸⁹ Because he sees the law as closely associated with the state, Gramsci relegates it to a second plane in the production and reproduction of hegemony.⁹⁰

⁸⁷ Marc Williams, "International Political Economy and Global Environmental Change," in John Vogler and Mark Imber, eds., *The Environment and International Relations* (London; NY: Routledge, 1996) at 51. Giddens argues that while it has been rightly pointed out that in Marx nature appears as inert and merely passive and exploitation as a feature of human relations only, this does not prevent the expansion of the Marxist theory of praxis to encompass the exploitation of nature. Furthermore, he claims that some of Marx's early writings suggest that nature is more than the medium through which human history unfolds and that human beings and nature are interdependent, given that man is a part of nature. See Anthony Giddens, *A Contemporary Critique of Historical Materialism* (London: MacMillan Press, 1995) at 59-60.

⁸⁸ See "Prison Notebooks," *supra* note 8 at 246-247 and Hall, *supra* note 5 at 59-61.

⁸⁹ See *supra* note 9; Hall, *ibid.* at 27 and 70 and Augelli and Murphy, *supra* note 9 at 128.

⁹⁰ See "Prison Notebooks," *supra* note 8 at 246-247 and Hunt, *supra* note 1 at 75-79.

A similar deficiency can be found in neo-Gramscian accounts of world order, which to a large extent echo Marx's analysis of the mutual dependence between (state) law and capitalism. In that analysis, the law provides the juridical conditions of private property, contract and exchange upon which capitalism depends, while capitalism provides the accumulated wealth necessary to fund the state's monopoly on force and sustain the legal system.⁹¹ Following this view, the studies that are preoccupied with the role of law in the constitution of the current world order focus on the ways in which law provides a stable structure for global capitalism in the world economy (e.g., the GATT/WTO legal system), paying almost no attention to its contribution to the formation of hegemonic narratives and ideologies. Stephen Gill, for example, emphasizes the crucial role that legal and "quasi-legal" arrangements have played in the constitution of global capitalism, among other things by actively moulding the state so that it provides a more stable political environment for investors.⁹² The "new constitutionalism," as Gill calls it, establishes a deep-rooted institutional legal framework that makes change cumbersome and thus gives considerable stability to the liberal economic order and provides political anchorage for the power of capital in the long term.⁹³ The law also plays a "constitutive" role at the level of agents, since it calls into existence individuals and other entities (e.g., corporations) as legal subjects with certain attributes, powers and freedoms within the practice of law.⁹⁴

What is missing from Gill's analysis is the ideological role that the law plays in making capitalism and liberal economic norms legitimate through

⁹¹ See Rupert, "Alienation," *supra* note 13 at 73. Although historical materialist approaches grant that the early modern European state was not itself historically produced by capitalism (it emerged out of the tension between the parcellized sovereignties of feudal lords and centralizing monarchies), they claim that a truly territorially sovereign and unified national state did not come into fruition until capitalist property had displaced pre-capitalist modes of appropriation. For an analysis of this issue see Ellen Meiksins Wood, "Global Capital, National States," in Rupert and Smith, *supra* note 41 at 19-22 and Rupert, "Alienation," *supra* note 13 at 73.

⁹² See Gill, "Constitution," *supra* note 56 at 6 and 11.

⁹³ See *ibid.* at 3.

⁹⁴ See *ibid.* at 7.

hegemonic narratives, a role that is apparent in international environmental negotiations and that constitutive approaches to law help emphasize. According to these approaches, the law not only constitutes the subjects and norms necessary for capitalism to function, but can also be seen as a system of ideological-coercive domination (understanding domination not as synonymous with repression or coercion but as a necessary combination of coercion and consent)⁹⁵ that legitimates the capitalist social order (and the international trading system) and thus contributes to making liberal ideologies “hegemonic” in that order. The special significance of the law lies in its ability to give practical effect to the interests of the dominant class while at the same time providing a justification for those interests in terms of higher and allegedly universal interests of all classes,⁹⁶ such as the notion that specialization, comparative advantage and further trade liberalization will ultimately benefit *all* countries. In other words, the law can play a crucial role in constructing hegemony. The legitimation provided by the law involves not only the recognition and reinforcement of the social and economic relations of capitalism, but also the reification of law (the process through which it appears to be a power above and outside society), by which the social and political relations of capitalist society and an increasingly globalised world economic order are presented as natural and universal.⁹⁷

A constitutive approach to law affirms that, as a social phenomenon, the law cannot be understood in isolation from other social phenomena and processes, but only through its connectedness to those phenomena.⁹⁸ The law is thus seen as a social process and as forming part of the context in which social struggle

⁹⁵ Rather than seeing coercion and consent as antithetical or mutually exclusive, Alan Hunt argues, as Gramsci does in relation to the nature of power, that these two elements interact and reinforce each other in law. In other words law, like politics, is better understood as a *relation* involving both coercion and consent. See Hunt, *supra* note 1 at 50; Hall, *supra* note 5 at 28; and Cox, “Gramsci and IR,” *supra* note 6 at 52.

⁹⁶ See Hunt, *supra* note 1 at 32.

⁹⁷ See *ibid.* at 34-35.

⁹⁸ See *ibid.* at 303-304.

occurs, so that it is necessarily affected by, and involved in, that struggle.⁹⁹ This means that the law is not separated from the processes in which hegemony is implicated but is integral to them. For instance, state law in capitalist societies not only for aspects that reinforce the domination of the ruling class, but also grants an important set of rights, protections and powers to the non-ruling classes that make the capitalist order agreeable to them. Although many of these rights and protections were conferred as the result of class struggle, they have become woven into the fabric of bourgeois democracy and their mere existence plays a significant part in securing acceptance of, and allegiance to, the existing capitalist social order.¹⁰⁰ When seen in its social dimension, it becomes evident that the law can play a major role in building and maintaining (and on occasion possibly defying) hegemonic ideologies.¹⁰¹

A constitutive approach to law argues that governments are not the only ones that govern and that the study of law therefore requires investigating different modes of regulation or “governance.”¹⁰² At the same time, it recognises the centrality of state law (and international law in particular) in the current world order, given that the state and the inter-state system are the central political form of the capitalist world system and are likely to remain so for the foreseeable future.¹⁰³ The special significance of state law is that it is the only form of law that defines itself as “law” and seeks to subordinate other legal forms in order to construct a unified conception of the legal order.¹⁰⁴ From that perspective, one could argue that state law (including international law) is itself “hegemonic,” as it seeks to conquer all other legal forms and constantly seeks to achieve coherence for itself.¹⁰⁵ As discussed in Chapter 5,

⁹⁹ See *ibid.* at 33.

¹⁰⁰ See *ibid.* at 34-35.

¹⁰¹ A concrete example of this phenomenon is provided below (see section 5(a) of Part II below).

¹⁰² See Hunt, *supra* note 1 at 305.

¹⁰³ See Boaventura de Sousa Santos, *Toward A New Legal Common Sense: Law, Globalization And Emancipation* (London: Butterworths, 2002) at 94.

¹⁰⁴ See Hunt, *supra* note 1 at 11, 270, and 307-308.

¹⁰⁵ See *ibid.* at 11.

an example of this quest for coherence and consistency can be seen in the SAICM negotiating process, where it was repeatedly stressed that SAICM should not contradict or seek to modify existing legal obligations and principles, including liberal economic norms incorporated in legal (both environmental and economic) instruments. Similarly, Chapter 3 argues that one of the reasons why it was decided that the two instruments that preceded the Rotterdam Convention should not ban trade in hazardous chemicals was an insistence that they should be consistent with a recommendation that had been adopted by the OECD, which provided only for information exchange.

a) Law as process and rules

To emphasize that law is and entails a social process does not deny that law is also a *thing*, a set of rules that have material existence, however ephemeral or transitory.¹⁰⁶ As pointed out by Nicholas Onuf, legal rules are crucially implicated in the co-constitution of people and societies, of agents and structures, because they constantly define and re-define agents in terms of structures and structures in terms of agents. The very foundation of international law, for instance, depends on the constitution of a “society” from which the law draws its authority and which must itself be constituted through law (for example by referring to an “international community”). In other words, the law creates the society from which it draws its authority *at the very same time* that the society brings the law into existence.¹⁰⁷

The idea of law as “rules” involved in the mutual constitution of agents and structures has important implications for this study because it highlights the

¹⁰⁶ See Nicholas Onuf, “The Constitution of International Society” (1994) 5 E.J.I.L. 1 at 6.

¹⁰⁷ See Ruth Buchanan, “Reconceptualizing Law and Politics in the Transnational: Constitutional and Legal Pluralist Approaches” (2006) 57 Northern Ireland Law Quarterly 654; Peter Fitzpatrick “Gods Would be Needed ... American Empire and the Rule of (International) Law” (2003) 16 Leiden J. of Int’l L. 429 at 437-438, 444 and 449 and Ruth Buchanan and Sundhya Pahuja, “Law, Nation and (Imagined) International Communities,” in John C. Hawley and Revathi Krishnaswamy, eds., *The Postcolonial and the Global* (U. Minnesota Press, 2007).

equal status of agents (and social process) and structures (understood as rules) as ontological entities.¹⁰⁸ It emphasizes, for instance, that discourse, as a social process, depends on the very rules that discourse produces. Dealing with rules prompts people to talk about them and by virtue of such talk rules do exist, however variable or transitory. At the same time, the people doing the talking exist as agents who –according to the rules– are in a position to make choices afforded by rules. By making, following and talking about rules people constitute the multiple structures of society, and it is through rules that societies constitute people as agents with decision-making powers.¹⁰⁹

Another important implication of the idea that law is fundamentally (although not exclusively) about rules is that, while rules have no meaning apart from the practices and understandings of social actors and of the social world, they allow for a limited number of interpretations. For instance, despite an increasingly vigorous embrace of liberal environmentalism in the context of the Basel Convention, a decision adopted by the parties in 1995 to amend the Convention to ban hazardous waste exports from one group of countries to another continues to pose a challenge to liberal economics. Because the ban exists as a rule, those who would like to make it disappear have had to focus on strategic attempts to modify it, to prevent or delay its entry into force or to downgrade its political significance, but have not been able to deny that the ban exists *as a rule*. The Basel ban amendment reveals that the law can play a role not only in the reproduction of hegemony but also in the production of counter-hegemonic norms and ideas.

III. The Role of Agency and the Structuration of Social Systems

As discussed in the introduction of this chapter, neo-Gramscian studies help explain the prevalence of liberal economic norms in international

¹⁰⁸ The equal status of structures and agents is also one of the key features of the structuration approach used in the analysis of the case studies (See Part III below).

¹⁰⁹ See Onuf, *supra* note 106 at 6.

environmental negotiations because they emphasize the social processes and relations that are involved in the constitution of the liberal economic world order in which those negotiations are embedded. Those very studies, however, are premised on the notion that the world order or international social “structure” they describe is always the product of historical and situated human activities.¹¹⁰ As a result, they emphasize the role of actors in the production and reproduction of hegemonic and counter-hegemonic norms and ideas across time and space. From this it follows that the international social “structure” that neo-Gramscian studies describe can only be held constant for the purpose of analysis, and that a more nuanced research methodology is required to account for the role of agents interacting in the specific social processes that are international environmental negotiations.

Drawing on Marx’s insight that although “men make their own history ... they do not make it under circumstances of their own choosing, but under circumstances directly encountered, given and transmitted from the past,”¹¹¹ Anthony Giddens’ structuration approach offers a method with which to recognise the role of human beings in the constitution of social systems without sacrificing the interest in the long-term, large-scale processes that neo-Gramscian approaches expose. The structuration approach seeks to transcend the opposition between structure and agent by connecting the *production* of social interaction, which is always a contingent accomplishment of knowledgeable social actors, to the *reproduction* of social systems across time and space. Giddens provides an example by using language: when a speaker draws upon syntactical rules (which can be thought of as the “structural properties” of language) to produce a sentence, the very act of speaking that sentence contributes to the reproduction of the rules as enduring

¹¹⁰ See Gill, “Epistemology,” *supra* note 19 at 21-26.

¹¹¹ David McLellan, ed., *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977) at 300.

or “structural” properties of language. The rules, therefore, are both the medium and outcome of the actor’s spoken sentence.¹¹²

At the level of ontology, the structuration approach conceptualises agents and structures as mutually constitutive entities and thus as being *simultaneously* involved in the production of social phenomena. This means that social structures are the result of the intended and unintended consequences of human action, just as those actions presuppose or are mediated by an irreducible structural context (e.g., by norms that define actors as agents with certain roles and capacities). Like constitutive approaches to law, the structuration approach claims that agents are defined in terms of the internal relations with the structures that define them as such, while social structures exist only through the medium of the agents and practices that they constitute.¹¹³ Structuration distinguishes, however, between “system” and “structure.” While social systems are the situated activities of human agents reproduced across time and space, structures are only “recursively” implicated in their constitution. In other words, structures are the sets of rules and resources actors draw upon in their interactions,¹¹⁴ so they are said to exist only as “moments,” recursively involved in the production and reproduction of social systems.¹¹⁵ They are the “structuring properties” of social systems.¹¹⁶

According to the structuration approach, all social action consists of social practices, situated in time and space and organised in a skilled and knowledgeable fashion by human agents. The approach connects agent and structure through the notion of the “duality of structure,” according to which

¹¹² See Giddens, *supra* note 87 at 19 and 27.

¹¹³ See Alexander Wendt, “The Agent-Structure Problem in International Relations Theory” (1987) 41:3 *International Organization* 335 at 360-361. An internal relation is one in which the inter-related entities of a dialectical process take their meaning from (or are constituted within) their relation, and are unintelligible (or non-existent) outside of the context of that relation. See Rupert “Alienation,” *supra* note 13 at 90.

¹¹⁴ See John Mingers, “Can Social Systems be Autopoietic? Bhaskar’s and Giddens’ Social Theories” (2004) 34:4 *Journal for the Theory of Social Behaviour* 404 at 410.

¹¹⁵ See Giddens, *supra* note 87 at 25-26.

¹¹⁶ See Mingers, *supra* note 114 at 410.

structures are *simultaneously* the medium and the outcome of practices that constitute social systems.¹¹⁷ This means that while the structure organizes the practices that constitute a social system, since actors resort to the structural rules and resources in the production of interaction, it is precisely these interactions that reproduce (and possibly transform) the structure.¹¹⁸ In other words, the duality of structure operates in and through the “knowledgeability” of human agents.

The concept of knowledgeability¹¹⁹ entails not only knowledge but also unacknowledged conditions and unintended consequences. At the level of discursive consciousness, actors draw upon a collection of knowledge that often corresponds to the explanations they supply of the motives behind their actions or arguments. Consciousness is, however, not limited to discourse. An important insight of the structuration approach is that actors also deploy “practical consciousness,” a practical ability to act in a diversity of contexts in social life.¹²⁰

Practical consciousness is reflected primarily in the routinisation of practices, in the taken-for-granted organisation of day-to-day social life,¹²¹ which does not necessarily entail normative commitment but can be seen as forming a “‘grey area’ between knowledgeability and commitment.”¹²² In the context of international environmental negotiations, I take practical consciousness to mean the “feel for the game” or practical mastery of the logic of negotiations exhibited by participants, the set of skills and routinized practices that these

¹¹⁷ See Giddens, *supra* note 87 at 19 and 27.

¹¹⁸ See Mingers, *supra* note 114 at 410.

¹¹⁹ Knowledgeability can be equated with Bourdieu’s notion of “habitus,” defined as “a system of durable, transposable dispositions which functions as the generative basis of structured, objectively unified practices.” I prefer the concept of knowledgeability to the notion of habitus, however, because the latter entails personal aspects that do not appear to be of any significance in international environmental negotiations, such as body postures, personal taste and manners. See Richard Harker, Cheleen Mahar and Chris Wilkes, *An Introduction to the Work of Pierre Bourdieu: The Practice of Theory* (Houndmills, Basingstoke, Hampshire: Macmillan, 1990) at 10.

¹²⁰ See Giddens, *supra* note 87 at 19 and 28-29.

¹²¹ See *ibid.* at 151.

¹²² See *ibid.* at 65.

actors deploy in international proceedings of this kind.¹²³ An example of practical consciousness in this field is the reluctance of participants to discuss economic norms (e.g., principles of international trade law) in environmental forums, on the basis that environmental forums are not meant to be used as venues to negotiate such norms. This does not mean that key economic issues that impinge on environmental change are ignored in international environmental negotiations, but simply that they are not subject to negotiation in a field that actors do not consider to be “economic.” This attitude, in turn, reinforces the separation between the “economic” and “political” spheres of life that is characteristic of capitalism,¹²⁴ from which actors draw when they consciously avoid negotiating economic norms in environmental forums. The separation between the economic and political spheres is, therefore, both the *medium* and the *outcome* of actors’ activities (in particular their practical consciousness), and it contributes to reaffirming liberal economic norms in international environmental negotiations.

1. International Environmental Negotiations as “Social Systems”

Although the concepts deployed by the structuration theoretical approach must be examined in an empirical setting rather than as categorical boxes to which the case studies must conform,¹²⁵ it is useful to consider some key elements of the approach to explain how it could be used to investigate international environmental negotiations. This implies linking the more abstract structural principles identified by neo-Gramscian analyses that frame

¹²³ The term “game” is used by Bourdieu as a metaphor to explain how entering a game implies a conscious or unconscious acceptance of the explicit and/or implicit rules of the game on the part of players, who must possess a “practical mastery” of the logic of the game in order to be able to play. See Harker et al., *supra* note 119 at 7.

¹²⁴ For an analysis of the separation between the political and economic spheres of life as one of the defining traits of capitalism see Rupert, “Alienation,” *supra* note 13 at 70-73 and Wood, *supra* note 91 at 19.

¹²⁵ This is a point made by Harker *et al.* in relation to Bourdieu’s theory of praxis, which has significant similarities with Giddens’ structuration theory. See Harker et al, *supra* note 119 at 3. For the similarities between Bourdieu and Giddens see Wendt, *supra* note 113 at 335-370 and Keith Morrison, “Structuration Theory, Habitus and Complexity Theory: Elective Affinities or Old Wine in New Bottles?” (2005) 26:3 British Journal of Sociology of Education 311 at 311-326.

the debate in international environmental negotiations with the more concrete structured properties (as rules and resources recursively used by actors in the constitution of particular social systems) identified with the help of a structuration approach.

Following Giddens, and for the purpose of analysis, I will conceive of the SAICM process and the negotiations of the Basel, Rotterdam and Stockholm conventions as “social systems,” i.e., as groups or collectivities composed of interactions, regularized as social practices, the most persistent of which are institutions.¹²⁶ Each of these processes can be regarded as a social “system” because, while they are obviously interrelated, they are organised in a relatively autonomous fashion. Not only are they derived from and governed by individual rules of procedure, mandates and agendas, but they are also attended by actors who are constituted as “participants” or “delegates” in each individual process and identify themselves in those terms. For instance, even though many participants in the SAICM process also attended meetings relating to the Basel, Rotterdam or Stockholm conventions, bringing with them a particular understanding of the chemicals management issue (including the desire to ensure that SAICM would not contradict those agreements), they understood the distinctiveness of the SAICM process in terms of mandate, rules, agenda, objectives and participation.

In the structuration approach, the structures that are implicated in the constitution of social systems are analysed as rules and resources, on the premise that one can identify the “structural principles” or basic principles of organisation that are involved in a multiplicity of transformation/variation relations.¹²⁷ Given that international environmental negotiations are highly institutionalised and that most of the rules that have some relevance in each process are explicitly articulated in most (if not all) of the documents that are

¹²⁶ See Giddens, *supra* note 87 at 41-42.

¹²⁷ See *ibid.* at 26-27.

the focus of those negotiations, the analysis of how legal and other types of rules constitute the social systems in the case studies is relatively unproblematic. This is also because, throughout the proceedings, delegates usually make use of rules in an explicit way, from UN resolutions and declarations to the general principles that they consider relevant, including international trade principles.

The analysis of rules is useful to identify the distinctiveness of legal instruments, norms and principles in shaping social systems. Following a constitutive approach to law, however, one must be careful not to conceive of rules as separate from the politics of the negotiations (which are connected to the notion of “resources” in the theory of structuration), since the legal and political aspects of social relations are always interconnected, often in complicated ways. The decisions by the Governing Council of UNEP to develop a strategic approach to international chemicals management, for example, not only instigated the open-ended consultative process that created SAICM but also served to reaffirm that the Council had the political authority to adopt those decisions in the first place. In the same way, each decision taken by negotiators constituted as a “Conference of the Parties” to a particular convention not only creates new rules, but also serves to “constitute” the Conference as a political body that can make those decisions. The separation between law and politics must be understood as being merely conceptual, the point of which is to facilitate analysis.

As for the role of “resources” in the constitution of social systems, it is analysed within the context of power, which a structuration approach sees as integral to all social interactions and as entailing the transformative capacity of human action, the origin of that which can be liberating and productive as well as repressive and destructive.¹²⁸ Structuration sees power as generated in

¹²⁸ See *ibid.* at 51. This is consistent with Gramsci’s understanding of power (and the constitutive approach’s understanding of law) as a *relation* that entails a combination of coercion and consent.

and through the reproduction of structures of domination, which are the structured asymmetries of resources drawn upon and reproduced by actors in social relations. In other words, the power relations sustained in the regularised practices constituting social systems can be seen as reproduced relations of domination. Domination entails two basic types of resources: *authoritative* resources, which correspond to the influence that actors have over others, and *allocative* resources, which denote the influence that actors have over the material world they inhabit.¹²⁹ The emphasis on structured power asymmetries in the constitution of social systems (of which actors are partly aware but are also somewhat unconscious) draws attention to the fact that even though the relatively weak always have some ability to use resources against the relatively strong,¹³⁰ there are important disparities among the resources available to actors, which they tend to reproduce in and through their interactions. This aspect is crucial to understanding the constitution of international environmental negotiations as social systems for at least two reasons. First, it is obvious that the opinions, statements and actions of the various actors who participate in international environmental negotiations do not carry the same weight. Second, it is a common feature of such negotiations that important asymmetries are constituted at the level of rules, such as those conferring voting rights only on states.

Another implication of the analysis of resources is that it suggests the need to consider the historical context of power asymmetries in the negotiations that are the subject of this study, and in particular the “North-South dimension” of the chemicals issue. While presupposing a relatively clear ideological divide between the countries of the North and those of the South is problematic,¹³¹

¹²⁹ See *ibid.* at 4.

¹³⁰ In Giddens, *supra* note 87 at 62-63.

¹³¹ The difficulty with North-South approaches to international environmental law and politics is that they tend to presuppose, and seek to substantiate, an ideological divide between the countries of the North and those of the South, taking actors’ identities and interests as given. As a result, they fail to provide a productive account of many international environmental negotiations where such a divide is not apparent unless developing countries’ positions and statements are understood simply as the outcome of pressure exerted by more powerful actors from the North. Another factor that renders North-South approaches

North-South approaches offer important insights into the historical and ethical dimension of environmentalism and into the asymmetries of world order relations.¹³² They also offer insights into the historical and ethical dimension of the international environmental negotiations pertaining to chemicals because chemicals-related issues have been understood and framed, to a very large extent, in North-South terms.

The adoption of the Basel Convention on hazardous wastes, for instance, was largely a reaction to the moral outrage prompted by a series of international scandals involving the dumping in poor countries of hazardous wastes generated in rich developed countries,¹³³ while the public moral outcry at the transport of hazardous wastes to the developing world partly explains why an export ban was ultimately adopted by the Conference of the Parties to the Convention.¹³⁴ In addition to this normative aspect, the problem of hazardous wastes itself is constructed in North-South terms because it is seen essentially as the result of major asymmetries between developed and developing countries, including different levels of development and of hazardous waste generation, different costs of hazardous waste disposal, different capacities to manage and dispose of hazardous wastes and different abilities to enforce environmental norms. Because these asymmetries continue to be seen as a

unproductive is that, as pointed out by Robert Cox, the geographical distinction between North and South is becoming somewhat blurred, as “mass migrations from South to North combine with the re-emergence of ‘putting out’ production, sometimes of a ‘sweatshop’ variety, and the expansion of low-wage employment in services in the ‘developed’ countries of the North, to produce a phenomenon called the ‘peripheralisation of the core.’” Cox, “Structural Issues,” *supra* note 36 at 261.

¹³² See, for instance, Karin Mickelson, “South, North, International Environmental Law and International Environmental Lawyers” (2000) 11 Y.B. Int’l Env. L. 52 at 70; Carmen G. Gonzalez “Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade” (2001) 78 Denv. U.L. Rev. 979 at 983-993; Nassau Adams, *Worlds Apart. The North-South divide and the International System* (Atlantic Highlands, N.J.: Zed Books, 1993); Peter Calvert & Susan Calvert, *The South, the North and the Environment* (London; New York, N.Y.: Pinter, 1999); and William Zartman I. “Introduction: Explaining North-South Negotiations,” in William I. Zartman, ed., *Positive Sum: Improving North-South Negotiations* (New Brunswick, N.J.: Transaction Books, 1987) at 3.

¹³³ During the 1970s and 1980s, several scandals involving the dumping in the South of hazardous wastes shipped from the North were publicized. For details see Jennifer Clapp, *Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries* (Ithaca, N.Y.: Cornell University Press, 2001) at 31-36 and Christoph Hilz, *The International Toxic Waste Trade* (New York: Van Nostrand Reinhold, 1992) at 12-37.

¹³⁴ See section 1(b)(ii) of Part III in Chapter 2 (The Ban Amendment).

primary component of chemicals-related problems,¹³⁵ North-South studies can add to the theory of structuration in the analysis of structures as “resources.” A less obvious but equally important aspect of the North-South dimension of the chemicals issue is the need to take into account the differences that exist between and within countries, in particular their different levels of development, when considering possible avenues to tackle consumption. This means, for instance, that different countries might need to follow different paths to achieve “sustainable development.” This might entail, for instance, finding ways to allow poor countries to grow in a manner and to an extent consistent with the limits imposed by the environment (including by limiting population growth and by ensuring a more equitable distribution of wealth), while highly industrialized countries focus on growing in qualitative rather than quantitative terms (i.e., by ensuring that their economic throughput stabilizes rather than expands).¹³⁶

2. Hegemony and Structuration

While neo-Gramscian analyses of world order explain the large-scale historical processes that have made a liberal economic world order and the globalisation of capitalism possible, a structuration approach can enable a fertile account of how particular international environmental negotiations are constituted without undermining the importance of those large-scale processes. This makes the two approaches potentially complementary, since they operate at different levels of abstraction, both of which are valuable in

¹³⁵ One of the key issues discussed during the SAICM negotiating process was the need to “bridge” the “widening gap” between developed countries and less developed countries in their ability to ensure the safe management of chemicals. From this emerged a commitment by participants to “work towards the elimination of the gaps and discrepancies in the capacity to achieve sustainable chemicals management between developed countries on the one hand and developing countries and countries with economies in transition on the other.” International Conference on Chemicals Management (ICCM), “Dubai Declaration on International Chemicals Management,” para. 6, in SAICM “Report of the [ICCM] on the work of its first session,” UN Doc. SAICM/ICCM.1/7, Dubai, United Arab Emirates (8 March 2006), Annex I.

¹³⁶ This issue is considered in more detail in Chapter 6, which suggests the need to engage with the literature on ecological economics and reflects on the difficulties of actually tackling consumption in the current international social structure.

the study of how liberal economic norms are framing and shaping the responses to chemicals-related problems in the international arena.

Neo-Gramscian studies help to explain how the ascendancy of an emerging transnational historical bloc advocating privatization, the liberalisation of international trade, the rollback of the welfare state and industry self-regulation is setting the parameters within which individual issues are being negotiated.¹³⁷ They also emphasize the material and ideological implications of the pervasiveness of liberal economic norms in the international social structure. That pervasiveness means, for example, that states are likely to protect business interests not just because of their structural dependence on business for tax revenues, employment and investment, but also because they have internalized the goal of promoting “competitiveness,”¹³⁸ which they routinely see as a goal that must be pursued.

To say that liberal economic norms are pervasive in the international social structure in which international environmental negotiations are embedded, however, does not necessarily mean that they are also pervasive in those negotiations, or that they are pervasive in the same way. Nor does it mean that liberal economic norms unavoidably determine the outcome of international environmental negotiations. To investigate the particular choices made by actors in those negotiations requires a more elaborate approach that pays attention to the role of knowledgeable agents situated in concrete social systems, while also recognising the role of structures in constituting those systems (through the medium of knowledgeable actors). A structuration approach offers that prospect by linking agents and structures through the concept of the “duality of structure,” and by bringing back the time-space dimension of the constitution of social systems to the very centre of the analysis, stressing that social systems exists as systems only in and through

¹³⁷ See Levy and Egan, *supra* note 13 at 813.

¹³⁸ See *ibid.*

their reproduction over time. Its central proposition in this regard is that every moment of social reproduction entails the interpenetration of three temporalities, none of which supersedes the other: that of the immediate experience; that of the life-time of individual human beings; and that of Braudel's "longue durée," which implies the long-term sedimentation of social institutions. The significance of this intermingling of temporalities in every social interaction is that it reveals the inherent connection that exists between production (the contingent social acts and particular choices made by knowledgeable agents) and reproduction (the institutionalisation of certain practices that exhibit "structural" qualities as a result) in every interaction.¹³⁹

Running the risk of misinterpreting both approaches, it is my view that the neo-Gramscian and structuration approaches can be combined in a dialectical way in order to provide a richer account of the negotiations considered in the case studies. The possibility of making these two theoretical approaches speak to each other derives partly from the fact that, while entailing different methodologies and encompassing different levels of generality, they are not fundamentally incompatible. Even though the structuration approach can be seen as a response to historical materialism, which is presented as being deficient and even fundamentally flawed in many respects (in particular in relation to Marx's economics), Giddens draws to a large extent on Marx's writings and ideas to elaborate his own research methodology. Furthermore, he acknowledges that Marx's study of capitalism "retains a great deal of interest and importance"¹⁴⁰ and that his analysis of "the mechanisms of capitalist production remains the necessary core of any attempt to come to terms with the massive transformations that have swept through the world since the eighteenth century."¹⁴¹ Given that the primary focus of neo-Gramscian analyses of world order relations is the capitalist mode of development, there is no reason why structuration, as a research methodology,

¹³⁹ See Giddens, *supra* note 87 at 1-20 and Gill, "Epistemology," *supra* note 19 at 44.

¹⁴⁰ Giddens, *supra* note 87 at xvi.

¹⁴¹ *Ibid.* at 1.

could not benefit from some of its key insights, in particular those concerning the globalisation of capitalism. Similarly, even though neo-Gramscian approaches to an extent abstract from particular social interactions in the search for large-scale processes and events, they also acknowledge the crucial role of agency in the production and reproduction of structures (including relations of hegemony), and the necessarily historical and social character of the structures and processes they investigate. Even if neo-Gramscian studies ultimately emphasize structures over agents, they see structures as being always and necessarily the product of human action. This means that the neo-Gramscian and structuration approaches are not necessarily incompatible at the level of ontology. Neo-Gramscian analyses do not presuppose the equal status of agents and structures in the constitution of the social world as structuration does,¹⁴² but implicit in their account is the notion that structures are always the product of social relations and historic processes, which agents tend to reproduce but can also potentially transform.¹⁴³

The actual and potential commonalities between the neo-Gramscian and structuration approaches make them not only complementary but also potentially combinable. Neo-Gramscian approaches to world order provide context for the historical, long-term and large-scale processes that are involved in the constitution of a liberal economic world order, understanding that order as static for the purpose of analysis. For its part, a structuration approach provides a method with which to account for the knowledgeability of agents in particular social systems in time and space, while also acknowledging those large-scale processes as “rules” and “resources” from which actors draw in particular social systems. Bearing this in mind, the case studies pay close attention to those instances in which agents use liberal economic norms and ideas to organize or substantiate their arguments. In other words, liberal economic norms and ideas are seen as part of the

¹⁴² See Rupert, “Hegemony,” *supra* note 7 at 16.

¹⁴³ See *ibid.* and Gill, “Epistemology,” *supra* note 19 at 23.

“structuring principles” that are recursively employed by actors to create and recreate the social systems taken as case studies. In addition, the recurrent and widespread use by different actors (and a lack of contestation) of those norms is seen as a sign that they are “hegemonic” in those systems.

IV. Methodological Issues

The next four chapters examine four multilateral environmental instruments that were adopted by states between 1989 and 2006 to address a number of chemicals-related problems at the international level. The chapters investigate the antecedents of each instrument, the history of the negotiations that led to their adoption and the progression of a number of issues that are relevant to this study. Rather than provide a comprehensive account of the negotiations, the chapters focus on those instances in which liberal economic norms are either embraced or challenged, including the relationship between trade and environmental norms and policies, proposals and statements regarding production and consumption and statements that might entail a departure from economic liberalism.

The analysis of each instrument is based on secondary sources, official United Nations documents and reports, informal documents made available or distributed during meetings, notes taken during the various meetings that I attended as a participant observer and a number of interviews and exchanges with key participants. In addition to these resources, chapter five examines the responses of fifty-two individuals who attended the negotiations of the strategic approach to international chemicals management (SAICM) and agreed to answer a questionnaire with three open-ended questions concerning consumption and chemicals-related international environmental law and policy.

There are three reasons why a slightly different methodology is used in chapter five. The first is that, unlike the negotiations of the Basel, Rotterdam and Stockholm conventions, which I joined late as a participant observer, I had the opportunity to attend all the SAICM negotiating sessions. This gave me the chance to engage with participants throughout the process and made it possible for me to encourage them to participate in this project. The second reason is that some of the actors who participated in the SAICM process were also involved in the negotiations of the Basel, Rotterdam and Stockholm conventions. As a result, the personal views of SAICM participants would not only help reveal whether liberal economic norms are hegemonic in the context of SAICM but also, to some extent, whether hegemony exists in the context of the Basel, Rotterdam and Stockholm conventions, which SAICM's all-encompassing scope was intended to cover.

The third reason is that a number of unique features of the SAICM negotiating process made it more likely that participants would challenge liberal economic norms. First, the SAICM negotiations engaged not only many of the actors involved in the negotiations of the Basel, Rotterdam and Stockholm conventions, but also a much wider spectrum of sectors and interests. Embracing relatively more open, participatory and flexible rules of procedure, the SAICM process gave all participants the opportunity to actively take part in the substantive development of SAICM. Most notably, non-governmental participants were able to present proposals directly. Second, unlike the negotiations that led to the adoption of the Basel, Rotterdam and Stockholm conventions, the SAICM process was intended to address all key aspects of chemicals management at the international level and had no predetermined outcome. As a result, it not only opened the door for the discussion of broad chemicals management-related issues but also prompted participants to reflect on the adequacy of existing relevant instruments (including the Basel, Rotterdam and Stockholm conventions) and the overall direction of the international chemicals agenda, which could have led some to try to set

SAICM on a different path. Third, almost from the beginning of the process it was decided that SAICM should not constitute a legally binding instrument. In the minds of some participants, this meant that governments should have been prepared to be more flexible and to entertain relatively more ambitious goals for SAICM. Because of these special characteristics, the SAICM process should be expected to reveal more clearly than the Basel, Rotterdam and Stockholm conventions whether or not liberal economic norms are hegemonic in chemicals-related international environmental negotiations.

1. Questionnaire

As pointed out in Part I, an important indication of a perspective being “hegemonic” is that even those who do not adhere to the norms and ideas that are said to be hegemonic adopt them because of the perceived need to be persuasive or realistic. Since only the views of individuals would reveal the extent to which that perception exists, Chapter 5 moves beyond the level of organizations that participated in the SAICM negotiating process to look at the personal views of the individuals who represented them. There are at least three more reasons why such an investigation is both relevant and necessary. First, organizations are made up of individual human beings and it is individuals, some of whom attended the SAICM process as negotiators,¹⁴⁴ who shape the positions that organizations bring to international environmental negotiations. Second, it is a reality of such negotiations that, because it is not possible to predict in advance all the issues that are going to be discussed during a particular meeting, negotiators have some room to present arguments that might not be fully in line with the official positions of the bodies that they represent. This can be seen in informal consultations and contact group

¹⁴⁴ A clear example of this is a study on principles and approaches submitted by Switzerland. The study was co-authored by CIEL’s Glenn Wiser, who was actively involved in the contact group discussions on principles and approaches. Another example is a study on internalization of the cost of chemical safety programmes in relevant industries presented by IPEN and the African group. The study was authored by Jack Weinberg (Environmental Health Fund), who was also actively involved in the SAICM negotiations. See sections 6 and 7 of Part III in Chapter 5.

discussions, where actors not only express their views and ideas more candidly than they do in plenary sessions but might also decide to use their own judgment to reach compromises on contentious issues in ways that could be interpreted as breaching their mandates.¹⁴⁵ Lastly, since it is my contention that the personal views of many individuals influenced the proposals submitted during the SAICM negotiations, a lack of correspondence between those proposals and the views of the individuals who attended the negotiations would seriously undermine the assertion that liberal economic norms were hegemonic in those negotiations. If this were the case, the assertion that liberal economic norms are hegemonic in the context of the Basel, Rotterdam and Stockholm conventions would also be weakened, given that many participants in the SAICM negotiating process also attended the negotiations on the three conventions.

¹⁴⁵ During the third session of the SAICM Preparatory Committee, for instance, the representative of the European Union presented a “package deal” that had been negotiated by the EU, the United States, Canada, Australia, Japan, New Zealand and others. Before he introduced the deal he warned that he was “in breach of [his] mandate on a number of issues” (notes taken by the author during the meeting).

Chapter 2

The Basel Convention on Hazardous Wastes

I. Introduction

This chapter looks at the origins and evolution of the “Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal.”¹ It argues that while a highly politicized and morally loaded environment led to the adoption of an openly counter-hegemonic decision to ban hazardous waste exports from rich to poor countries, other seemingly counter-hegemonic norms were framed in ways consistent with liberal economics. Partly because public attention on the hazardous waste issue has receded considerably,² it is further argued, the influence of liberal economic norms over the Convention’s implementation has become more pronounced and, in some ways, “hegemonic.”

The hegemony of the liberal economic perspective in the Basel Convention can be seen in decreased support for the export ban and in various efforts of some parties to circumvent it, as well as in the fact that actors from all camps, including those who continue to support the ban unconditionally, are interpreting the principle of waste minimization as requiring nothing but changes in production methods. It can also be appreciated in the widely welcomed increased participation by the private sector in the implementation and financing of the Convention in recent years, which is likely to reinforce

¹ See *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, UN Doc. I.G.80/3 (22 March 1989), 28 I.L.M. 649 (entered into force 5 May 1992) [Basel Convention], online: <<http://www.basel.int/text/con-e.htm>>.

² One important exception is the issue of ship dismantling, which has attracted increased public attention over the course of the last few years. Also, a recent scandal involving the export of hazardous wastes to Ivory Coast has focused public awareness on the risks still involved in the export of hazardous wastes to developing countries, particularly in Africa. See Marine Link, “Heightened Scrutiny On Ship Scrapping” (14 July 2000), online: <<http://www.marinelink.com/Story/Heightened+Scrutiny+On+Ship+Scrapping-3610.html>> and Lydia Polgreen and Marlise Simons, “Global Sludge Ends in Tragedy for Ivory Coast” *The New York Times* (2 October 2006), online: <<http://www.nytimes.com/2006/10/02/world/africa/02ivory.html?pagewanted=1>>.

the predominance of liberal economic norms in the way the treaty is applied and interpreted. The chapter concludes that the most important implication of the prevalence of liberal economic norms in the context of the Basel Convention is that it decreases the likelihood that the treaty will be used to tackle the consumption side of the waste problem. The continued support for the export ban by environmental NGOs and many governments and the rejection of some of some actors of free trade in hazardous wastes, however, reveals a fissure in the hegemony of the liberal economic perspective that could be exploited by ENGOs to construct waste minimization in ways that directly confront consumption.

The chapter is divided into three parts. Part II looks at the circumstances that prompted the adoption of the Basel Convention in March 1989, including the nature of the hazardous waste problem and the scandals that motivated states to address it. Part III looks at the negotiations that led to the adoption of the Convention and the progression of a number of issues from the time of the early negotiations to the latest meeting of the conference of the parties. Rather than provide a comprehensive outline of the negotiations or of the treaty's provisions,³ the analysis focuses on two key matters that reveal how the norms of liberal environmentalism have both been embraced and resisted by actors shaping the Basel Convention, and how the greater pull and pervasiveness of liberal economic norms have affected the latter stages of the treaty's ongoing evolution. The last part draws some conclusions from the analysis and summarizes the argument of the chapter.

³ For a summary and explanation of the Basel Convention's key provisions see Katarina Kummer, "The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention" (1992) 41:3 *Intl. & Comp. L. Quarterly* 530 [Kummer, "Regulation of Wastes"]; Katarina Kummer, *International Management of Hazardous Wastes* (Oxford U. Press, 1995) [Kummer, "Waste Management"] at 38-86; and Alexandre Kiss, "The International Control of Transboundary Movement of Hazardous Waste" (1991) 26 *Tex. Int'l. L. J.* 521.

II. Antecedents

1. What are hazardous wastes?

Although there is no universally agreed definition of the term, hazardous wastes can be characterized as substances that require technologically advanced methods of disposal to render them harmless or less dangerous because of the threat they pose to human health and/or the environment.⁴ They are generated in manufacturing processes, the chemical industry and other industrial sectors and include acids, alkalis, solvents, medical waste, sludge, resins and heavy metals.⁵

While precise figures of the total amount of hazardous wastes being generated globally are hard to find, it is estimated that between 300 to 500 million tons of hazardous wastes are produced each year, most of them (80%-90%) generated in the industrialised countries of the Organisation for Economic Co-operation and Development (OECD).⁶ The majority of trade in hazardous wastes takes place among these countries⁷ and has been regulated since the mid-1980s.⁸ The focus of regulatory efforts to the hazardous waste problem at

⁴ See David Richard Boyd, "Canada vs. the OECD: An Environmental Comparison," Eco-Research Chair of Environmental Law and Policy, University of Victoria, 2001 at 20.

⁵ Long-term exposure to mercury, lead or cadmium, for instance, can damage the brain, the kidneys, the nervous system and foetal development. See *ibid*.

⁶ See Jonathan Krueger, "Prior Informed Consent and the Basel Convention: The Hazards of What Isn't Known" (1998) 7:2 J. of Env. & Dev. at 115-137 and UNEP-GRID-Arendal, "Vital Waste Graphics" (2002), online <http://vitalgraphics.net/waste/html_file/08-09_waste_generation.html>.

⁷ See *ibid*. Reasons for trade in hazardous wastes between industrialised countries include the existence of a disposal facility in a bordering country that can be reached more easily than a domestic facility; the existence of facilities that are meant to service generators from several countries; and the fact that some kinds of waste are generated in quantities that are too small to justify the construction of a disposal facility in the waste-generating country. For details see Susanne Rublack, "Controlling Transboundary Movements of Hazardous Waste: The Evolution of a Global Convention" (1989) 13 The Fletcher F. World Aff. 113 at 114-115 and David A. Trippier, "Waste Management and the Development of Standards" (1990) 14:3 Marine Policy 214 at 217.

⁸ See OECD, *Decision-Recommendation of the Council of 1 February 1984 on Transfrontier Movements of Hazardous Waste* [C(83)180(Final)] 23 I.L.M. 214 (1984), Annex, 1; EC, *Council Directive of 6 December 1984 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Wastes*, [1984] O.J. L 326/31 (amended by Council Directives 85/469/EEC, 86/279/EEC and 87/112/EEC); Hao-Nhien Q. Vu, "The Law of Treaties and the Export of Hazardous Waste" (1994) 12

the global level, however, has been the export of such wastes to less developed countries, given the limited capacity of these countries to deal with them in a way that protects human health and the environment.

In most industrialised countries, concerns about the effects of hazardous wastes on human health and the environment and a number of accidents⁹ that raised public awareness and concern about their improper disposal led governments to enact regulations dealing with their management and disposal by the late 1970s.¹⁰ These regulations, together with escalating public opposition to building new hazardous waste discarding facilities or expanding existing ones,¹¹ led to a dramatic increase in disposal costs in most

UCLA J. Envtl. L. & Pol'y 389; and Christoph Hilz, *The International Toxic Waste Trade* (New York: Van Nostrand Reinhold, 1992) at 116-117 [Note: At that time, 24 countries were part of the OECD. Mexico, Korea, Hungary, the Czech Republic and Poland became members during or after 1995, and the Slovak Republic joined in 2000. See OECD, "Ratification of the Convention on the OECD," online: <http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html>.

⁹ Two of the most cited chemical accidents are Seveso in Italy (1976) and Love Canal in the United States (1978). The first involved an explosion at a chemical plant owned by the subsidiary of a Swiss company, which released a thick toxic cloud containing dioxin into the atmosphere, affecting the town of Seveso the most. Forty-one drums of hazardous waste resulting from the accident disappeared and were eventually located in France (See Hilz, *supra* note 8 at 12-13 and Ved P. Nanda and Bruce C. Bailey, "Nature and Scope of the Problem," in Günther Handl & Robert E. Lutz, eds., *Transferring Hazardous Technology and Substances. The International Legal Challenge* (London: Graham & Trotman, 1989) at 3-6. The Love Canal accident occurred in 1978, when toxic compounds of a long closed waste landfill near Niagara Falls leaked through the soil into the backyards and basements of a hundred homes and a public school built on the banks of the canal (See Eckardt C. Beck, "The Love Canal Tragedy," *EPA Journal* (January 1979), online: <<http://www.epa.gov/history/topics/lovecanal/01.htm>>).

¹⁰ See, for instance, *Resource Conservation and Recovery Act*, 42 U.S.C. §§ 6901-6987 (1976); *Deposit of Poisonous Waste Act*, 1972 (U.K.) c. 21; *Control of Pollution Act*, 1974 (U.K.), c.40; Warrington Borough Council, "A History of Waste," online: <<http://www.warrington.gov.uk/services/waste/history/>>; *Waste Disposal Act*, 1972 (Federal Republic of Germany), Bundesgesetzblatt [BGB1.I] 1410; and EC, *Council Directive 78/319/EEC of March 20 on Toxic and Dangerous Waste*, [1978] 21 O.J. L 84/43.

¹¹ In some cases, such as with Germany and the Netherlands, geological conditions and high population density also make the new siting of hazardous wastes facilities difficult. See Alan C. Williams, "A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste" (1986) 14 B.C. Envtl. Aff. L. Rev. 165 at 220. According to an expert from the OECD, all OECD countries are experiencing difficulties ranging from moderate to extremely severe in trying to site new waste management facilities. See Harvey Yakowitz, "Waste management: What now? What next? An Overview of Policies and Practices in the OECD Area" (1993) 8:1-2 Resources, Conservation and Recycling 131 at 137-138 (Yakowitz worked in the Pollution Prevention and Control Division of the OECD Environment Directorate). See also Kate O'Neill, "Out of the Backyard: the Problems of Hazardous Waste Management at a Global Level" (1998) 7:2 J. of Env. & Dev. 138 (In the article, O'Neill documents the domestic hazardous waste management problems of Australia, France, Britain and Germany).

industrialised countries.¹² This situation created an incentive for hazardous waste generators to dump their waste illegally or to send it to less developed countries, where less stringent regulations and little public awareness about the risks posed by hazardous wastes made disposal considerably cheaper.¹³ Hazardous waste management and the need to ensure the environmentally sound disposal of such wastes in all countries thus became a global issue.¹⁴

2. The Cairo Guidelines

The first multilateral regulatory effort to address the environmental and health risks posed by hazardous wastes globally was triggered by a 1982 decision of the Governing Council of the United Nations Environment Programme (UNEP GC). In that decision, the UNEP GC decided that an ad hoc working group of experts should be established to elaborate “guidelines or principles” to ensure the safe handling of toxic and dangerous wastes that could lead to a global convention in the future.¹⁵

The ad hoc working group was created in 1984 and held meetings in Munich, Germany in February/March 1984, in Geneva, Switzerland in December 1984 and in Cairo, Egypt in December 1985. Experts from both developed and less

¹² Studies suggest, for instance, that land filling costs for disposing of hazardous wastes in the United States rose from U.S. \$15 per ton in 1980 to U.S. \$250 per ton in 1988, while the United Kingdom experienced an increase of 150% from 1985 to 1991. As for the costs of incineration, UNEP estimated that it increased on average U.S. \$ 500 in 1980 to U.S. \$ 1,500 per ton in 1989. See Jennifer Clapp, *Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries* (Ithaca: Cornell U. Press, 2001) [Clapp, “Toxic Exports”] at 22; Jim Puckett, “The Basel Ban: A Triumph over Business-as-Usual,” Basel Action Network, October 1997 [Puckett, “Basel Ban Victory”], online: <http://www.ban.org/main/about_Basel_Ban.html>; and Hiltz, *supra* note 8 at 45.

¹³ In the late 1980s, the cost of disposing of a ton of hazardous wastes in Africa ranged from as low as U.S. \$2.50 to U.S. \$50 (See Krueger, *supra* note 6). For a study of the various (legal and illegal) disposal options available to hazardous wastes generators in developed countries see Elaine Chester, “Toxic exports: Fair choice or cheap excuse?” *Environment Risk* (Jul/Aug 1993) at 19-22.

¹⁴ See Mostafa K. Tolba and Iwona Rummel-Bulska, *Global Environmental Diplomacy: Negotiating Environmental Agreements for the World: 1973-1992* (Cambridge, Mass.: MIT Press, 1998) at 97-100.

¹⁵ The basis for the group’s creation was the *Montevideo Programme for the Development and Periodic Review of Environmental Law*, adopted by the UNEP Governing Council through Decision 10/21 of 1982, which selected the transport, handling and disposal of toxic and dangerous wastes as one of UNEP’s key priority areas of work. See UNEP, “Final Report of the Ad Hoc Working Group of Experts on the

developed countries attended all sessions. Other participants of one or more sessions included representatives of the Commission of the European Communities, the OECD, the World Bank, the European Council of Chemical Manufacturers Associations, the International Chamber of Commerce (ICC), the Environment Liaison Centre and the International Union for the Conservation of Nature and Natural Resources.¹⁶

The group started its deliberations by considering two key documents that were prepared by UNEP with consultant assistance and were instrumental to its work. The first was a report that assessed the hazardous waste problem and made a number of recommendations for addressing it,¹⁷ the second was a compilation of fifty-one “draft guidelines on the environmentally sound management of hazardous wastes,” some of which were supplemented by commentaries.¹⁸

These documents are worthy of consideration because they addressed two key issues that revealed the extent to which UNEP was prepared to both resist and embrace liberal economic norms. The first such issue was that of hazardous waste minimization. While the assessment report emphasized the need to reduce the amount of hazardous wastes being generated, it stressed that “policy to limit the generation of hazardous waste ha[d] been slow in gaining acceptance” and that it “would be naïve to assume a worldwide decline in hazardous waste generation in the foreseeable future.”¹⁹ Consistent with a

Environmentally Sound Management of Hazardous Wastes,” UN Doc. UNEP/WG.122/3 (10 December 1985) [Working Group Guidelines Final report] at 1-2.

¹⁶ See UNEP, “Report of the Ad Hoc Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes on its first session,” UN Doc. UNEP/WG.95/5, Munich (26 April 1984) [Working Group Guidelines 1st session report] at 2; UNEP, “Report of the Ad Hoc Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes on its second session,” UN Doc. UNEP/WG.111/3, Geneva (January 1985) at 2; and “Working Group Guidelines Final report,” *ibid.* at 2-3.

¹⁷ UNEP, “Transfrontier Movements of Hazardous Wastes with Regard to Developing Countries,” UN Doc. UNEP/WG.95/2, Munich (15 November 1983) [Transfrontier Movements]. (This document was prepared by a consultant on behalf UNEP and the World Health Organization Regional Office for Europe).

¹⁸ See UNEP, “Draft Guidelines for the Environmentally Sound Management of Hazardous Wastes,” UN Doc. UNEP/WG.95/4, Munich [Draft Guidelines] (15 December 1983).

¹⁹ See “Transfrontier Movements,” *supra* note 17 at 8.

1978 directive of the European Communities that called on member states to “prevent,” recycle and re-use hazardous wastes,²⁰ UNEP suggested guidelines that required states to reduce the generation of hazardous wastes through the development and implementation of “low-waste” and “non-waste” technologies and the recycling and re-use of those hazardous wastes whose generation could not be avoided.²¹ Although the proposed guidelines put a greater emphasis on waste prevention than did the EC directive, they implied that waste minimization was only about improving production methods and recycling and did not require any reduction in the amount of consumption.

The second key issue addressed by UNEP was the export of hazardous wastes from developed to developing countries. Although UNEP framed this issue in controversial terms, which suggested a certain discomfort with the liberal economic reverence for free trade and economic efficiency,²² it also exhibited a reluctance to challenge international trade law. The assessment report presented three arguments against the export of hazardous wastes from developed to developing countries. First, it argued that, given the state of hazardous waste management in developing countries, “universal rules of good hazardous waste disposal w[ould] only very gradually result in changes which would make it safe to accept the concept of “waste exchanges” between industrialized and developing countries.”²³ Second, it stated that “this kind of “trade” would generally be regarded as some kind of neo-colonialist exploitation of developing countries,”²⁴ emphasizing the ethical dimension of the hazardous waste issue. Lastly, it concluded that even though North-South

²⁰ See EC, *Council Directive 78/319/EEC of 20 March 1978 on Toxic and Dangerous Waste*, [1978] O.J. L 84 at 43-48, Art. 4. The Directive asked member states to encourage “the prevention of toxic and dangerous waste, its processing and recycling, the extraction of raw materials and possibly of energy therefrom and any other process for the re-use of such waste.” See *ibid.*, Art. 4.

²¹ See “Draft Guidelines,” *supra* note 18 at 8-9.

²² Since 1961, the OECD has sought to “build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development.” OECD, “History,” online: <http://www.oecd.org/document/63/0,2340,en_2649_201185_1876671_1_1_1_1,00.html>. See also WTO, “Benefits: Efficiency,” online:

<http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b08_e.htm> (Last visited 5 August 2007).

²³ “Transfrontier Movements,” *supra* note 17 at 5.

hazardous waste trade might in some cases be favourable, provided that disposal was sound, it was “very unlikely that there w[ould] be a large number of such cases.” This was because waste generators would only export hazardous wastes to developing countries if the operation was “favourable in strictly economic terms,” while low-cost/low standard disposal of hazardous waste could not be beneficial to developing countries “either in economic or environmental terms” and was thus “entirely unacceptable.”²⁵

Although these three points suggested that an outright ban on North-to-South hazardous waste exports was desirable, UNEP did not advocate the adoption of such a ban, which would have been at odds with established principles of international trade law.²⁶ Instead, the assessment report concluded that hazardous waste exports should “only take place” if the importing country had the capacity to manage such wastes properly. Accordingly, it recommended that the guidelines to be developed by the group of experts should “ensure that hazardous waste exports to developing countries only take place after the exporting country ha[d] satisfied itself that the importing country ha[d] established a hazardous waste management system including adequate control mechanisms and disposal facilities.”²⁷

The draft guidelines reveal that UNEP was concerned about contradicting existing international trade norms. In that document, UNEP suggested that states should be required to ensure that exports of hazardous wastes were “kept to the absolute minimum compatible with a rational and efficient management of such wastes” and to “strive to integrate this principle with

²⁴ *Ibid.* at 11.

²⁵ *Ibid.*

²⁶ A provision banning the export of hazardous wastes from developed to developing countries could have been said to contradict the principle of non-discrimination and the principle that states should adopt the least trade-restrictive measures necessary to protect the environment or human health. See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1948) [GATT 1947], Arts. I, III and XX(b), online: <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> and UNEP-IISD, “Environment and Trade: A Handbook” (2000), online: <http://www.iisd.org/pdf/envirotrade_handbook.pdf> at 27-29.

²⁷ See “Transfrontier Movements,” *supra* note 17 at 14.

international economic agreements to which they may be parties.” The proposed guideline did not require states to ban hazardous waste exports. Even so, UNEP expressed the view that the goal of keeping hazardous waste exports to an “absolute minimum” constituted “a presumption against transfrontier disposal,” which “represent[ed] something of a barrier to trade which [might] not be compatible with principles of international commercial law.” For that reason, it argued, the guideline would need to be the subject of “individual consideration by States parties to [trade] agreements.”²⁸

UNEP also showed its care to stay in sync with liberal economic norms by failing to suggest the possible need for a ban on North-to-South hazardous waste exports and instead opting for a prior notification and consent system. This proposal was in harmony with a “decision-recommendation” on “transfrontier movements of hazardous wastes” that was being drafted by the OECD and was adopted shortly before the first session of the ad hoc working group of experts.²⁹ Consistent with the work of the OECD, the guidelines drafted by UNEP required states to ensure that prospective importing and transit states were fully informed of any proposed export of hazardous wastes and to prohibit any such export absent the consent of those states.³⁰

This “prior informed consent” (PIC) approach was reflected in the guidelines that were finally approved by the ad hoc working group of experts. So too was a view of waste minimization based not on the reduction of consumption but rather on the development and implementation of “low-waste technologies”

²⁸ “Draft Guidelines,” *supra* note 18 at 38 (draft guideline 44, with commentary).

²⁹ The decision asked OECD countries to strive to ensure that actors within their jurisdictions notified the authorities of exporting, importing and transit states with “adequate and timely information” about projected shipments of hazardous wastes. It also required them to take “all practicable steps” to ensure that no hazardous waste exports would be initiated if one of the countries concerned had decided “in conformity with its legislation to oppose the import or transit of the waste and ha[d] so informed the entities or authorities concerned in the exporting country.” See OECD, *Decision-Recommendation of 1 February 1984 on Transfrontier Movement of Hazardous Waste*, [C(83)180/Final] 23 I.L.M. 214 (1984), paras. 5 and 8, online: <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/>>.

³⁰ See “Draft Guidelines,” *supra* note 18, draft guideline 41.

and the recycling and re-use of hazardous wastes.³¹ This was perhaps unsurprising, as both approaches were consistent with the regulations adopted by the European Communities and the OECD mentioned above, which, from the working group's very first session, many experts had emphasized the need to "carefully consider" in the development of the guidelines.³²

The "Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes"³³ were finalised by the ad hoc working group of experts at its third meeting in 1985 and approved by the UNEP GC in 1987.³⁴ In addition to the provisions mentioned above concerning waste minimization and PIC,³⁵ the Guidelines addressed various issues regarding the management of hazardous wastes from their generation to their final disposal, including transfer of technology related to the environmentally sound management of hazardous wastes, authorization systems for hazardous wastes facilities, monitoring of such facilities and contingency plans.³⁶ They also included a "general principle," in line with UNEP's proposal, that states should ensure that transfrontier movements of hazardous wastes were "kept to a minimum compatible with the efficient and environmentally sound management of such wastes."³⁷

³¹ A reference to "non-waste technologies" was eliminated, most likely because it was not considered practicable. See UNEP, *Cairo Guidelines and Principles For the Environmentally Sound Management of Hazardous Wastes*, UN. Doc. UNEP/GC.14/17, Annex II [Cairo Guidelines], Guideline 7, para. (c).

³² Following these comments, the group of experts agreed to request the Secretariat to prepare a report with relevant texts or activities being developed by other international organizations. The Secretariat submitted its report during the group's third session. See "Working Group Guidelines 1st session report," *supra* note 16 at 3 and "Working Group Guidelines Final report," *supra* note 15, Annex I.

³³ See *ibid.*

³⁴ See UNEP GC Decision 14/30, "[ESM] of Hazardous Wastes" (17 June 1987).

³⁵ See "Cairo Guidelines," *supra* note 31, Guidelines 7 (Preventive measures) and 26 (Notification and consent procedure in respect to transfrontier movements of hazardous wastes).

³⁶ See *ibid.*, Guidelines 5, 14, 19 and 22.

³⁷ See *ibid.*, Pmb., para. 2.

III. The Basel Convention

1. The Basel Negotiations

New chemical accidents³⁸ and further evidence of unscrupulous transfers of hazardous wastes from industrialised countries to the developing world³⁹ led the UNEP GC to accept a proposal by Switzerland and Hungary to start negotiations for a global treaty on the issue.⁴⁰ By Decision 14/30, the same decision whereby the Cairo Guidelines were approved, the UNEP GC resolved that a group of experts should convene to prepare a global convention “on the control of transboundary movements of hazardous wastes” drawing on the conclusions of the group of experts who drafted the Cairo Guidelines and the relevant work of national, regional and international bodies.⁴¹ Pursuant to this decision, Mostafa K. Tolba of Egypt, Executive Director of UNEP, convened an *ad hoc* working group of legal and technical experts entrusted with the task of drafting the convention. The group began its deliberations in an organisational meeting in October 1987 and held six more sessions, the last one immediately before the conference of plenipotentiaries where the Basel Convention was finalised and adopted on March 22, 1989.⁴²

³⁸ In 1986, the efforts to put out a fire in a chemical storage warehouse of Sandoz, a major Swiss multinational in Basel, Switzerland, resulted in a huge discharge of toxic chemicals into the Rhine. Shortly after, it was discovered that Swiss chemical companies were responsible for other chemical spills into the river. See Nanda et al, *supra* note 9 at 16-19.

³⁹ According to an inventory by Greenpeace International, at least eleven developing countries received hazardous wastes between 1986 and 1988, while 38 developing countries were proposed for hazardous wastes imports. See Hilz, *supra* note 8 at 17-18.

⁴⁰ See Tolba and Rummel-Bulska, *supra* note 14 at 100. According to the representative of Austria, the main reason for the Swiss government’s involvement was that a number of Swiss companies were implicated in illegal transports of hazardous wastes to developing countries. See Willy Kempel, “Transboundary Movements of Hazardous Wastes,” in Gunnar Sjöstedt, ed., *International Environmental Negotiation* (Newbury Park, CA; London; New Delhi: Sage Publ., 1993) [Kempel, “Transboundary Movements”] at 50 and Willy Kempel, “The Negotiations of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal: A National Delegation Perspective” (1999) 4 *International Negotiation* 411 [Kempel, “Basel Negotiations”] at 414.

⁴¹ See UNEP GC, Decision 14/30, *supra* note 34, para. 12.

⁴² See UNEP, “Progress in the Control of Transboundary Movements of Hazardous Wastes,” UN Doc. UNEP/GC.15/9/Add.7 (3 May 1989) at 3.

In addition to government representatives of both developed and less developed countries,⁴³ participants included representatives of the OECD, the Commission of the European Communities, the United Nations Economic Commission for Europe, the United Nations Conference on Trade and Development, the World Health Organization, the United Nations Industrial Development Organization, the United Nations Development Programme, the General Agreement on Tariffs and Trade (GATT), the World Bank, the International Chamber of Commerce (ICC), the Chemical Manufacturers Association, USA Waste Management International, the European Council of Federations of the Chemical Industry, European Free Trade Associations, Greenpeace International, African NGOs Environment Network, the International Council of Environmental Law, the Natural Resources Defence Council, the United Nations Commission on International Trade Law and the Organization of African Unity (OAU).⁴⁴

The group of experts started its deliberations by considering a draft of the convention that had been prepared by the UNEP Secretariat.⁴⁵ The proposed convention focused on the issue of transboundary movements of hazardous wastes, as instructed by UNEP GC Decision 14/30. Following the PIC-related provisions of the Cairo Guidelines, a 1984 EC Directive on transfrontier shipment of hazardous wastes and a draft OECD agreement on transfrontier movements of hazardous wastes,⁴⁶ it provided for the establishment of a PIC

⁴³ I use the term "less developed countries" to refer to both developing countries and countries with economies in transition.

⁴⁴ See UNEP, reports of the first to fifth meetings of the "Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes," *infra* notes 64, 65, 76, 53 and 108 at 2-3.

⁴⁵ The draft incorporated a number of comments made on an earlier draft during the organizational meeting. See UNEP, "First Revised Draft Convention on the Control of Transboundary Movements of Hazardous Wastes," UN Doc. UNEP/WG.182/2, Geneva (7 December 1987) [First Revised Draft Convention] at 2.

⁴⁶ See EC, Council Directive 84/631/EEC of 6 December 1984 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Wastes, [1984] O.J. L 326/31 and OECD, Council Resolution [C(85)100] on International Cooperation Concerning Transfrontier Movements of Hazardous Wastes (20 June 1985), which called for the establishment of an international system for the effective control of transfrontier movements of hazardous wastes.

system whereby exports of hazardous wastes would be controlled.⁴⁷ The only obligation that referred to the wider issue of waste management was an article on “international cooperation” that asked parties to cooperate in the transfer of technology related to sound waste management and in the development and implementation of “low-waste technologies” with a view to reducing hazardous waste generation.⁴⁸

While the proposed text did not generate much controversy at the beginning of the negotiations,⁴⁹ the PIC approach and the narrow scope anticipated for the convention came under attack as the process unfolded and became increasingly politicized. In the second half of 1988, a new series of scandals concerning actual or planned hazardous waste shipments from the United States and Western Europe to developing countries in Africa and elsewhere became known, causing a wave of protests from journalists, statesmen and international organisations.⁵⁰ As a result, the negotiations were infused with North-South overtones and became more prominent and politicized, putting negotiators—in particular the representatives of OECD countries—under mounting public scrutiny and pressure.⁵¹

⁴⁷ See “First Revised Draft Convention,” *supra* note 45, Arts. VI-X.

⁴⁸ See *ibid.*, Art. XI (international cooperation).

⁴⁹ Interview conducted with a developed country representative who participated in the negotiations (26 April 2006). Willy Kempel, the negotiator for Austria, expresses a similar opinion in Kempel, “Basel Negotiations,” *supra* note 40 at 417.

⁵⁰ See Rublack, *supra* note 7 at 114. 1988 reports about the dumping of hazardous waste in Haiti, Guinea, Nigeria and Lebanon and about contractual agreements between European firms and a number of African governments concerning waste exports led African politicians and pressmen to speak of “toxic terrorism,” “garbage imperialism,” “neo-colonialism” and an “affront to the dignity of Africa” (In Rublack, *ibid.*). For further details on hazardous waste export incidents see Hilz, *supra* note 8 at 12-37; Michelle M. Vilcheck, “The Controls on the Transfrontier Movement of Hazardous Waste From Developed to Developing Nations: The Goal of a Level Playing Field” (1991) 11 J. Intl. L. Bus. 643 at 643-673; and Zada Lipman, “Trade in Hazardous Waste: Environmental Justice Versus Economic Growth,” Macquarie University, Australia (undated), online: <<http://www.ban.org/Library/lipman.html>>.

⁵¹ See Kempel, “Transboundary Movements,” *supra* note 40 at 52-56. According to the negotiator for Austria, public opinion did not allow industrialized countries to take strong positions on issues such as notification procedures, disposal and recycling, as such positions were immediately portrayed to the public as a violation of the justified interests of developing countries or as a cover-up for continuing illegal hazardous waste dumping. See Kempel, *ibid.* at 62.

The new wave of hazardous waste-related scandals had three important, interrelated effects on the process and outcome of the negotiations. First, there was a shift in the power balance between industry and environmental NGOs. While the new scandals curtailed the influence of industry NGOs and made it difficult for state representatives to openly ally with them,⁵² the public moral reaction against the transport of hazardous wastes to poor countries⁵³ enhanced the position of environmental NGOs (ENGOS).⁵⁴ Most notably, ENGOS gained support for several of their proposals, which were reflected in the Basel Convention or in subsequent decisions of the parties.⁵⁵

Second, developing countries saw their position improve as potential victims of hazardous waste transfers and, as potential victims, they started to support ENGO proposals to ban rather than merely restrict trade in hazardous wastes, especially between developed and developing countries.⁵⁶ They also began demanding that the scope of the convention be expanded to encompass waste-management-related issues, including disposal standards and hazardous wastes destined for recycling.⁵⁷ Given the pressure to which they were subjected, OECD countries, which had hoped for a convention along the lines of the OECD draft instrument,⁵⁸ were persuaded that they should respond positively to the demands of developing countries.⁵⁹

⁵² See Kempel, "Basel Negotiations," *supra* note 40 at 412 and 414-416.

⁵³ See *ibid.* at 414. At the fourth session of the *ad hoc* working group, the representative of Luxembourg, the country hosting the session, called on experts to work hard to "end waste colonialism." In UNEP, "Report of the fourth session of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes," Luxembourg, UN Doc. UNEP/WG/190/4 (13 February 1989) at 2-3.

⁵⁴ Most notably, ENGOS formed partnerships with developing country representatives and prepared briefs for some of their delegations. See Kempel, "Basel Negotiations," *supra* note 40 at 414-415, Kempel, "Transboundary Movements," *supra* note 40 at 52-54; Clapp, "Toxic Exports," *supra* note 12 at 42-43; and Tolba and Rummel-Bulska, *supra* note 14 at 103. ENGO representatives were also able to sit in closed meetings of the Group of 77, the coalition of developing countries (Interview conducted with an ENGO representative who attended the negotiations, April 30, 2006).

⁵⁵ ENGO proposals included obligations in relation to the minimization of waste generation and a ban on North-to-South exports of hazardous wastes. See sections 1(c) and 1(b) of Part III below.

⁵⁶ See *ibid.*

⁵⁷ See Kempel, "Basel Negotiations," *supra* note 40 at 417-418.

⁵⁸ According to the negotiator for Austria, the initial position of OECD countries was that the scope of the convention should be limited to regulating transboundary movements of hazardous wastes; transports of hazardous wastes destined for recycling, which were seen as "raw materials," should be excluded from the

The third consequence of the new wave of hazardous waste-related scandals was that UNEP became vigorously engaged in the negotiations.⁶⁰ The perception that the draft global convention did not focus enough on the problems facing developing countries led the Executive Director to get personally involved in the process and, in the words of Tolba himself, to assume “an active position, taking stands on the issues on behalf of the environment and of the poorer and weaker countries.”⁶¹ Tolba played a decisive role in the outcome of the negotiations by presenting concrete proposals, approaching major players to discuss their positions, convening informal sessions with key delegates and providing statements to the media.⁶² Perhaps the most important effect of Tolba’s involvement is that, by presenting proposals that went beyond the export of hazardous wastes and that therefore implied a very generous interpretation of the negotiators’ mandate, UNEP contributed to expanding the convention’s scope considerably.

Rather than provide a comprehensive analysis of the Basel negotiations, which were long and complex and included disagreements among experts on a wide range of issues,⁶³ the next section considers a number of issues that reveal how liberal economic norms have both been embraced and resisted by the various actors shaping the Basel Convention. The analysis focuses on the progression of two key matters from the time of the initial negotiations to the most recent meeting of the treaty’s conference of the parties, showing the

convention; and state responsibility should be limited to breaches of the prior informed consent procedure and not extended to accidents or illegal trafficking. See *ibid.* at 416-417 and *infra* note 65.

⁵⁹ See Kempel, “Transboundary Movements,” *supra* note 40 at 58-60 and 62.

⁶⁰ See Rublack, *supra* note 7 at 125, Kempel, “Basel Negotiations,” *supra* note 40 at 418-419 and “Transboundary Movements,” *supra* note 40 at 51-54.

⁶¹ In Tolba and Rummel-Bulska, *supra* note 14 at 107.

⁶² See *ibid.* and Kempel, “Transboundary Movements,” *supra* note 40 at 52-54.

⁶³ Some of these issues were: the inclusion of municipal wastes in the convention (see *infra* note 64); the responsibility of exporting states in case of illegal traffic; the rights of transit countries (in particular, whether written consent by such states should be required before an export could proceed); and the definition of “territory” under the wastes global convention. See Vilcheck, *supra* note 50 at 657-658; Kempel, “Basel Negotiations,” *supra* note 40 at 416-418; Kummer, “Waste Management,” *supra* note 3 at 40-47 and Clapp, “Toxic Exports,” *supra* note 12 at 38-44.

greater pervasiveness of liberal economic principles and assumptions in the more recent stages of the Convention's life.

a) Scope: From Transboundary Movements to Waste Management

Besides the vital issue of defining which wastes would be covered by the future convention,⁶⁴ negotiators had to consider whether the new treaty would be limited to addressing transboundary movements of hazardous wastes or also cover waste-management-related obligations. Following a literal interpretation of their mandate, most negotiators from industrialised countries wanted the convention to be limited to controlling exports of hazardous wastes, in line with the draft OECD agreement.⁶⁵ Their view was that a convention of limited scope would allow for a more efficient administration

⁶⁴ Two key disagreements emerged in relation to this issue: one was whether household waste and incinerator ash should be included in the definition of "hazardous waste," given that some countries did not draw a distinction between wastes such as ordinary garbage, incinerator ash and hazardous waste; the other was whether wastes defined as "hazardous" in the national laws of the exporting, importing and transit states should be subject to the convention. See UNEP, "Report of the first Session of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of Transboundary Movements of Hazardous Wastes," UN Doc. UNEP/WG.182/3, Geneva (5 February 1988) [Working Group Convention 1st session report] at 9; Katharina Kummer, "The Basel Convention: Ten Years On" (1998) 7:3 R.E.C.I.E.L. 227 [Kummer, "Ten Years Basel"] at 228; Katarina Kummer, "Regulation of Wastes," *supra* note 3 at 543-544; and Vilcheck, *supra* note 50. In relation to the first issue, a compromise was reached to qualify household wastes and residues arising from their incineration as "other wastes," which would be listed in an annex (Annex II) and would be covered by the convention when subject to transboundary movements. As for the second issue, delegates agreed to include wastes defined as hazardous by the country of transit in the definition of hazardous wastes. Thus, the Basel Convention defines as hazardous wastes: (a) wastes defined as "hazardous" by the domestic legislation of the party of import, export or transit; and (b) wastes belonging to a core list including a number of hazardous waste streams and substances that wastes must be constituted of to be considered hazardous (Annex I), unless they do not present any of the hazardous characteristics contained in another list (Annex III). See Basel Convention, *supra* note 1, Arts. 1, 4, 6 and 8-9 and Annexes I, II and III.

⁶⁵ Interview conducted with a developed country representative who participated in the negotiations (26 April 2006). See also Kempel, "Basel Negotiations," *supra* note 40 at 417 and UNEP, "Report of the second session of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes," UN Doc. UNEP.WG.186/3, Caracas (20 June 1988) [Working Group Convention 2nd session report] at 6. The international agreement on hazardous waste trade with non-OECD countries was expected to request OECD countries to: (a) control and monitor exports to their final destination; (b) apply equally stringent controls on transfrontier movements of hazardous wastes to member and non-member countries; (c) require prior consent of importing countries and prior notification to transit countries before allowing an export to proceed; and (d) prohibit movements unless the wastes were directed to an adequate disposal facility in the prospective non-OECD importing country. See OECD, *Council Decision-Recommendation of 5 June 1986 on Exports of Hazardous Wastes from the OECD Area* [C(86)64/Final] 25 I.L.M. 1010 (1986) (Australia

of hazardous waste transports across borders, and that transports of hazardous wastes destined for recycling should be excluded from the convention, as they were not wastes but “raw materials.”⁶⁶

Claiming that their problems related not only to transboundary movements but also to other aspects of waste management,⁶⁷ developing countries wanted a more comprehensive agreement that would also address the issue of hazardous wastes disposal, including recycling operations, which were also a problem in those countries.⁶⁸ They also called for obligations on the part of developed countries to transfer appropriate technologies and provide assistance to developing countries. This, they claimed, would enable developing countries to handle and dispose of hazardous wastes in a safe manner and to review the notifications received under the convention to verify that the shipments imported corresponded to the materials described in the notifications.⁶⁹ A similar position was adopted by UNEP. In a note submitted to the working group at its third session, Executive Director Tolba said that the main issue facing the group was not the transport of hazardous wastes *per se* but rather

abstained) and Rublack, *supra* note 7 at 120-121.

⁶⁶ See Kempel, “Basel Negotiations,” *supra* note 40 at 416-417 and Kempel, “Transboundary Movements,” *supra* note 40 at 58.

⁶⁷ As early as the organizational meeting, several experts referred to the problems of developing countries with regard to hazardous waste management and called for obligations concerning the provision of technical assistance to developing countries in handling and disposing of hazardous wastes. See UNEP, “Report of the Organizational Meeting of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes,” UN Doc. UNEP.WG.180/3, Budapest (30 October 1987) [Working Group Convention Organizational meeting report] at 4-5 and 10-11.

⁶⁸ The expert from Egypt, for instance, proposed defining disposal operations as “operations which may lead to resource recovery, recycling, reclamation, direct use, dumping, elimination by incineration or other methods of disposal.” See UNEP, “Working Group Convention 1st session report,” *supra* note 64 at 10.

⁶⁹ See Tolba and Rummel-Bulska, *supra* note 14 at 105. Nigeria, for example, proposed an article on technical assistance to developing countries to: create awareness on the long-term effects of hazardous wastes; assess and manage wastes properly; and develop facilities to sample substances and verify that they corresponded to notifications received (See UNEP, “Analysis of Government Responses to the Executive Director’s Notes on the Hazardous Waste Convention,” UN Doc. UNEP/WG.189/INF.1, Geneva (12 October 1988) [Analysis of Responses] at 16). Similarly, Argentina called for technical and scientific assistance so that developing countries could evaluate the nature of the substances transported and ensure their sound management and disposal, as well as financial assistance to comply with the convention (See UNEP, “Additional Government Responses to the Executive Director’s Notes on the Hazardous Wastes Convention,” UN Doc. UNEP/WG.189/INF.1/Add.2, Geneva (10 November 1988) [Additional Responses] at 1).

its end purpose. As a result, he claimed that cooperation in the sound disposal of hazardous wastes was the “most serious element under consideration.”⁷⁰

While many industrialised countries agreed with Tolba that the key problem was not the transport but the sound disposal of hazardous wastes,⁷¹ they generally saw disposal standards as relevant only to the extent that they helped determine whether or not an export should take place. Their attitude was that disposal was a domestic issue that went beyond the scope of the negotiations,⁷² and that if developing countries felt that they were incapable of ensuring sound disposal all they had to do was abstain from receiving the wastes.⁷³ In line with this position was the argument that international cooperation for hazardous wastes’ disposal and handling, albeit important, probably went beyond the scope of the future convention.⁷⁴

Those who wanted the new treaty to deal with more than transport did not relent, however, and the higher standing of the hazardous waste issue after the publicity attending the new wave of export scandals in mid-1988 gave them political leverage to influence the outcome of the negotiations. Thus, in the spring of 1988 a number of developing countries, briefed by ENGOs, introduced new provisions in the draft convention concerning disposal standards and the minimization of hazardous waste generation.⁷⁵ Tolba

⁷⁰ UNEP, “Further Development of a Global Convention on the Control of Transboundary Movements of Hazardous Wastes,” Note by the Executive Director of UNEP (2 August 1988) [Further Development].

⁷¹ This view was expressed, for instance, by the Commission of the European Communities (See UNEP, “Additional Responses to the Executive Director’s Notes on the Hazardous Wastes Convention,” UN Doc. UNEP/WG.189/Inf.1/Add.3 (undated) [Additional Responses 2] at 1).

⁷² This was the position taken by the OECD. See UNEP, “Analysis of Government Responses to the Executive Director’s Notes on Hazardous Waste Convention,” UN Doc. UNEP/WG.189/Inf.1/Add.1 (7 November 1988) at 3.

⁷³ This idea was expressed, for instance, by the United Kingdom and Canada. See “Analysis of Responses,” *supra* note 69 at 10-11.

⁷⁴ See “Working Group Convention Organizational meeting report,” *supra* note 67 at 19-20 and “Analysis of Responses,” *ibid.* at 15-17. This was not the position of all industrialized countries. Finland, for instance, said that it was prepared to offer financial support and know-how to solve practical problems connected with the sound management of hazardous wastes in developing countries. See “Additional Responses,” *ibid.* (See Finland’s comments).

⁷⁵ Specifically, these countries called for provisions that allowed transboundary movements of hazardous wastes to take place only if disposal standards in the importing country were at least as stringent as those of

defended both ideas at the third negotiating session, which he opened by declaring that the global wastes convention should, among other things, lead to a “major reduction” in the generation of hazardous waste and ensure that transboundary movements of hazardous waste were only allowed when it was “equally or more environmentally sound” to dispose of such waste “far rather than close to where it [wa]s generated.”⁷⁶ Tolba also urged delegates to consider criteria for managing hazardous wastes and a provision on financial arrangements, including the establishment of an international fund to create centres for research and technology transfer, especially in developing countries.⁷⁷ He further suggested changing the treaty’s title to “convention on the management of hazardous wastes and the control of their transboundary movements.”⁷⁸ Although this wording was not retained, the words “and their disposal” were added to the convention’s title.

i) Final Outcome

Most OECD countries had hoped for a convention of a narrow scope that, in line with the OECD draft agreement and international trade principles, would simply set up a PIC system to control transfrontier movements of hazardous wastes. The mounting political pressure to which OECD countries were subjected, however, led them to accept the inclusion of provisions concerning

the exporting country. See Kempel, “Transboundary Movements,” *supra* note 40 at 54 and “Basel Negotiations,” *supra* note 40 at 418. Not all OECD countries opposed references to disposal standards. Sweden, for instance, suggested that transboundary movements of hazardous wastes should “only be permitted” when the disposal was “at least equivalent to the standard in the country of origin.” See “Analysis of Responses,” *supra* note 69 at 2.

⁷⁶ The proposal to establish an international fund to create centres for technical and legal assistance was initially put forth by Colombia. See “Working Group Convention 2nd session report,” *supra* note 65 at 16 and UNEP, “Report of the third session of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes,” UN Doc. UNEP.WG.189/3, Geneva (16 November 1988) [Working Group Convention 3rd session report] at 2.

⁷⁷ UNEP, “Points Identified by the Executive Director for Further Consideration at the Informal Negotiations on Hazardous Wastes,” 4-6 January 1989, Palais des Nations, Geneva, doc. ELMU/4947c, Na. 88-6507 at 10-11 (Emphasis added). These proposals were subsequently presented at the fourth session. See Tolba and Rummel-Bulska, *supra* note 14 at 109.

⁷⁸ UNEP, “Proposals by the Executive Director for Consideration by the Ad Hoc Working Group at its fourth session,” UN Doc. UNEP/WG.190/3 (16 January 1989) at 2.

hazardous waste management. These included concrete obligations concerning waste minimization⁷⁹ and the environmentally sound management of hazardous wastes,⁸⁰ both of which were advocated by ENGOs and developing countries.⁸¹ It was also agreed that regional or sub-regional centres for training and technology transfer would be created in the future but that funding mechanisms of a “voluntary nature” would support the centres.⁸²

Similarly, despite the initial reluctance of industrialized countries to control trade in recyclables,⁸³ it was finally agreed that the Convention would cover not only hazardous wastes destined for final disposal but also those intended for recovery and recycling operations.⁸⁴ As discussed in the next section, a

⁷⁹ While the first revised draft of the convention made references to waste minimization only in the preamble and in an article on international cooperation in the development of low-waste technologies with a view to reducing waste generation, the Basel Convention also requests parties to take “appropriate measures” to ensure that the generation of hazardous wastes within their territories is “reduced to a minimum, taking into account social, technological and economic aspects.” See UNEP, “First Revised Draft Convention,” *supra* note 45, Pmbl., para. 5, and Art. XI(2)(d) and Basel Convention, *supra* note 1, Art. 4.2(a).

⁸⁰ See Basel Convention, *supra* note 1, Arts. 4(2)(a) and 4(8). The Basel Convention requires parties to ensure the environmentally sound management (ESM) of the hazardous wastes they export according to technical guidelines agreed by the conference of the parties (COP). At its first meeting, the COP approved technical guidelines for the ESM of the wastes subject to the Convention on a provisional basis. Since then, parties have approved various technical guidelines for the ESM of specific waste streams, including certain POPs and pesticide wastes. See Basel Convention Secretariat, “Draft Technical Guidelines,” online: <<http://www.basel.int/techmatters/techguid/frsetmain.php>> and Decision I/19, “Technical Guidelines for the [ESM] of Wastes Subject to the Basel Convention,” in UNEP, “Report of the first meeting of the [COP] to the Basel Convention,” UN Doc. UNEP/CHW.1/24, Piriapolis, Uruguay (5 December 1992) [COP-1 report] at 34-36.

⁸¹ According to the negotiator for Austria, industrialized countries were generally reluctant to incorporate obligations dealing with the minimization of the generation of wastes and with limiting hazardous wastes exports to cases of necessity. They only accepted these provisions at a later stage, given their support by public opinion and given the fact that industry representatives started to show some acceptance of these principles. See Kempel, “Transboundary Movements,” *supra* note 40 at 57.

⁸² See Basel Convention, *supra* note 1, Art. 14(a). At their first meeting, parties decided to establish a technical cooperation trust fund to assist developing countries and other countries in need of technical assistance in the implementation of the Basel Convention (see COP Decision I/7, in “COP-1 report,” *supra* note 80 at 19-20). Fourteen centres have been created to date to strengthen the capacity of developing countries and countries in transition to implement the Basel Convention. For further details see Paula Barrios, “The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?” (2004) 16:4 *Geo. Int'l. Env'tl. L. Rev.* 679 at 746-748 and Basel Convention Secretariat, “The Basel Convention Regional and Coordinating Centres at a Glance,” online: <<http://www.basel.int/centers/description/BCRCataGlance.pdf>> (last visited 6 October 2007).

⁸³ See *supra* note 58 and Kempel, “Transboundary Movements,” *supra* note 40 at 58.

⁸⁴ The Basel Convention defines “disposal” as any operation specified in an annex (Annex IV). The annex contains two lists. The first contains operations that do not lead to the possibility of recovery and similar

morally and politically charged debate that grew from the post-1988 negotiations also led to the adoption in 1995 of a decision by the parties to ban hazardous waste exports from developed to developing countries.

b) From Prior Informed Consent to Export Bans

The question of whether the Basel Convention should ban international trade in hazardous wastes (either partially or totally) or merely control such trade was perhaps the single most controversial issue during the last stages of the Basel negotiations and continues to be so today, even after the adoption of a decision that settled the matter in 1995.⁸⁵ While some commentators claim that most developing countries, in particular from Africa, called for a total ban on all hazardous wastes exports from the outset of the Basel Convention negotiations,⁸⁶ developing countries' support of a North-South ban actually came at the very last stages of the process and was fully consolidated only after the adoption of the Convention.

The first call for a ban was made during the second negotiating session, when Greenpeace International said that a worldwide ban on all exports of hazardous wastes was the "only way" to guarantee the protection of the global environment.⁸⁷ At that time, only one developing country, Jamaica, suggested that the draft convention focused too much attention on regulating, rather than prohibiting, hazardous waste movements.⁸⁸ In contrast, neither the African

activities while the second contains operations that may lead to such activities. See Basel Convention, *supra* note 1, Art. 2(4) and Annex IV.

⁸⁵ See section 1(b)(ii) of Part III below (The Ban Amendment).

⁸⁶ See, for instance, Kummer, "Regulation of Wastes," *supra* note 3 at 535-536, "Waste Management," *supra* note 3 at 43 and "Ten Years Basel," *supra* note 64 at 227; Pamela S. Chasek, *Earth Negotiations. Analyzing Thirty Years of Environmental Diplomacy* (Tokyo; N.Y.: UN U. Press, 2000) at 111-112; and Greenpeace International, Jim Valette and Heather Spalding, eds., *The International Trade in Wastes: A Greenpeace Inventory* (Washington DC, 1990) at 12.

⁸⁷ See "Working Group Convention 2nd session report," *supra* note 65 at 9.

⁸⁸ Jamaica also said that the export of hazardous waste from developed to developing countries was a transfer of pollution and that the convention should not provide a means to permit it. See *ibid.* at 5.

Group nor the Group of 77 (G77)⁸⁹ made any references in their interventions to the possibility of banning hazardous wastes trade either totally or partially.⁹⁰ This was so despite the fact that earlier that year, in May 1988, the Council of Ministers of the Organization of African Unity (OAU) had adopted a resolution declaring the dumping of nuclear and industrial wastes in Africa “a crime against Africa and the African people,” condemning all enterprises involved in these practices and calling upon African countries to put an end to ongoing or planned hazardous waste-dumping transactions. Although the resolution invited OAU member states to participate in the negotiations of the global wastes convention, it provided no explicit OAU position to be taken at the negotiations.⁹¹

A change in attitude by some actors, however, started to become noticeable only two months after the second negotiating session. One such actor was the Executive Director of UNEP. In a note sent to governments in preparation for the third session, Tolba said that the hazardous wastes problem was “creating friction and embarrassment among governments.”⁹² He therefore suggested the inclusion of a paragraph in the convention’s preamble stating that “the most effective way of protecting human and environmental health from hazards posed by toxic wastes [was] the complete banning of the movement of such

⁸⁹ The Group of 77 (G77) is the largest developing country coalition in the United Nations. It was established on 15 June 1964 by 77 developing countries signatories of the “Joint Declaration of the Seventy-Seven Countries,” issued at the first session of the United Nations Conference on Trade and Development (UNCTAD). Although its membership has increased to 132 countries, the original name was retained because of its historic significance. See G77, “What is the Group of 77?” (last visited 6 October 2007), online: <<http://www.g77.org/main/main.htm>>.

⁹⁰ The African Group expressed its concern about the definition of hazardous wastes, given that in many cases wastes not defined as hazardous in the country of origin proved to be hazardous in developing countries, and about the rising generation of hazardous wastes in developing countries. The G77 stressed the need to: consider the interests of transit countries; have a functional secretariat; engage the state of export and not only the exporter and producer in the transboundary movement of hazardous wastes; consider the territorial waters of the countries concerned as part of their territory; and ensure co-operation among governments to prevent illegal traffic. Malaysia called for “reasonable and fair rules on transport and management,” claiming that developing countries could also be involved in hazardous wastes exports. See “Working Group Convention 2nd Session Report,” *supra* note 65 at 5-6 and 8-9.

⁹¹ See OAU, Council of Ministers, *Resolution on Dumping of Nuclear and Industrial Waste in Africa*, CM/Res. 1153 (XLVIII) (23 May 1988) I.L.M. 567 (1989), online: <http://www.chr.up.ac.za/hr_docs/african/docs/cm/cm63.doc>.

⁹² See “Further Development,” *supra* note 70 at 1.

wastes away from their origin.”⁹³ Tolba also advised negotiators to consider allowing the transboundary movement of hazardous wastes only under “compelling conditions” and “regardless of economic benefits.” He further stressed the need for a continuous reduction of the amount of hazardous wastes exported to other countries, in particular developing countries, with the aim of “eliminating the export of wastes completely.”⁹⁴ Tolba’s remarks suggested that countries should dispose of their own waste regardless of whether or not this was the most economically efficient solution, a view that openly contradicted liberal economics.

In response to Tolba’s remarks, only a few developing countries backed the idea of a full export ban,⁹⁵ while four less developed countries,⁹⁶ the EC and a few OECD countries explicitly rejected it.⁹⁷ Some actors also took the opportunity to submit their views on the possibility of adopting a partial ban, i.e., a ban on hazardous waste exports from industrialised countries to developing countries. While the Netherlands expressed its support for such a ban,⁹⁸ the EC did not, arguing that what was relevant was not the importing country’s degree of development but rather its technical capacity to dispose of the wastes in an environmentally sound manner.⁹⁹ More openly concerned with

⁹³ See *ibid.*

⁹⁴ See *ibid.* at 3.

⁹⁵ These countries are Comoros, Ghana, Thailand, Vanuatu, Botswana, the Gambia and Kenya. See “Analysis of Responses,” *supra* note 69 at 3-5 and “Additional Responses,” *supra* note 69. While calling for a total ban, Kenya also said that the importing country should have the final say on whether a hazardous waste purportedly being imported for recycling or for extraction of useful products genuinely fell under that classification and, if so, whether the returns were “worthy of the risks.” (“Analysis of Responses,” *supra* note 69 at 3). While not explicitly supporting the inclusion of a full ban in the convention, Nigeria said that the treaty “should aim at the long-term elimination of transboundary movements of hazardous wastes, and the preamble should reflect this.” (*Ibid.* at 4).

⁹⁶ These countries are Saudi Arabia, Malaysia, Hungary and Poland. The first two argued that a full ban was not necessarily the most effective way to protect human health and the environment, since the point of origin might not be able technically/economically to dispose of the waste. Hungary said that the convention should control transport for “economic reasons” while insisting on environmentally sound disposal, while Poland claimed that a full ban might not be practicable. See “Analysis of Responses,” *supra* note 69 at 3-4.

⁹⁷ These countries are France, Sweden, Switzerland and the United States, as well as the EC. See “Analysis of Responses,” *ibid.* and “Additional Responses 2,” *supra* note 71.

⁹⁸ See “Analysis of Responses,” *supra* note 69 at 4.

⁹⁹ The EC also stated that it did not believe that a ban on exports to developing countries would be effective because it was “not clear how such a ban could be enforced.” See “Additional Responses 2,” *supra* note 71.

trade, the United Kingdom opposed the ban on the basis that it could be “resented” by developing countries that had “legitimate trading interests which [might] be adversely affected.”¹⁰⁰

Insisting on his previous remarks, Tolba opened the third session of the working group, held in November 1988, by stressing that the aim of the wastes convention should be to prompt a “major reduction in the generation of hazardous wastes” and thus “eliminate the need for their movement.”¹⁰¹ Nigeria, which had not attended the previous sessions, expressed its regret over the fact that the draft convention focused on the regulation rather than on the prohibition of hazardous wastes exports. Instead of advocating an export ban, however, the Nigerian representative proposed the incorporation of an article prohibiting the movement of hazardous wastes to or through the territories of states or regions which had prohibited such movements, and the creation of a register listing those states to be updated periodically.¹⁰² At the next session, Nigeria proposed a preambular paragraph that would recognize the “increasing desire” that exports of hazardous wastes, especially to developing countries, be prohibited.¹⁰³

The stance of many developing countries at this stage was that no hazardous wastes exports were to be allowed, *except* when effected simultaneously with the transfer of adequate and environmentally sound technology.¹⁰⁴ In the absence of clear commitments by developed countries to provide technical and financial assistance to developing importing countries, however, the position of some African countries hardened. Fears that these countries could block the adoption of a convention led UNEP to support a meeting proposed by Senegal

¹⁰⁰ “Analysis of Responses,” *supra* note 69 at 5.

¹⁰¹ See “Working Group Convention 3rd session report,” *supra* note 76 at 2-3.

¹⁰² Nigeria also proposed the establishment of a mechanism to disseminate information about the movement of hazardous waste vessels such as “Dumpwatch,” an information-sharing system that had been created by a number of governments and NGOs. See *ibid.* at 5.

¹⁰³ See UNEP, “Corrigendum to Section II of the Report of the Ad Hoc Working Group on the Work of its fourth session,” UN Doc. UNEP/WG.190/4/Corr.1, Luxembourg (14 March 1989) at 1.

¹⁰⁴ See Kempel, “Transboundary Movements,” *supra* note 40 at 51 and *infra* note 111.

to allow African states to voice their concerns and agree to a common position with the developed countries before the working group's fourth session.¹⁰⁵ Accordingly, a ministerial conference on hazardous wastes was held in Dakar, Senegal, on 26 and 27 January 1989, and was attended by ministers from Africa, Europe and the United States. The meeting was reportedly very tense. While delegates from industrialised countries asked their African counterparts to accept PIC as the basis of the wastes convention, the latter started demanding a ban on exports to Africa in return for their support for the treaty. Disagreement was so strong that the only concrete outcome of the conference was a statement that appealed for the active participation of African countries in the Basel negotiations.¹⁰⁶

The Dakar meeting was only the prelude of the last three sessions of the working group, which proved exceptionally difficult. While the group was unable to produce a new revised draft version of the convention at its fourth session, agreeing instead to a few provisions, the fifth session was, in Tolba's words, "nearly disastrous,"¹⁰⁷ since only a few articles were discussed and delegates expressed reservations on almost every one of them.¹⁰⁸ This led UNEP to hold a series of informal consultations, the last one only a week before the last negotiating session, to resolve all outstanding issues.¹⁰⁹

¹⁰⁵ See Tolba and Rummel-Bulska, *supra* note 14 at 109 and Clapp "Toxic Exports," *supra* note 12 at 42.

¹⁰⁶ See Tolba and Rummel-Bulska, *ibid.* at 110, Kummer, "Waste Management," *supra* note 3 at 44 and Clapp, *ibid.* The discontent with the Basel Convention among African countries led to the adoption, within the framework of the OAU, of the "Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa" on 30 January 1991. Unlike the Basel Convention (as adopted in 1989), the Bamako Convention obliges parties (which can only be OAU members) to prohibit the import of all hazardous wastes, for any reason, into Africa from non-parties. See *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 30 January 1991, 30 I.L.M. 773 (entered into force 22 April 1998), online: <<http://www.londonconvention.org/Bamako.htm>>.

¹⁰⁷ See Tolba and Rummel-Bulska, *supra* note 14 at 110, and Kummer, "Waste Management," *supra* note 3 at 44.

¹⁰⁸ See UNEP, "Report of the fifth session of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes," UN Doc. UNEP/IG.80/4, Basel (22 March 1989) and Tolba and Rummel-Bulska, *ibid.*

¹⁰⁹ According to the Executive Director of UNEP, by the time representatives met in Basel on March 13, 1989, there had been six negotiating sessions and nine informal consultations.

At the opening of the diplomatic conference, the Minister of the Environment of Mali made a statement on behalf of the OAU President noting that African countries were not prepared to sign the Basel Convention at that stage, as it would be difficult for them to use the convention to prevent unscrupulous individuals from engaging in illegal dumping activities.¹¹⁰ This statement was in line with a resolution adopted by the OAU Council in February of 1989, which expressed concern that the draft wastes global convention was merely aimed at the regulation or control rather than the prohibition of hazardous waste exports. The resolution regretted that the convention “permit[ted] the illegal export of hazardous wastes from the country of generation, especially into Africa, without adequate provision for technical and financial support for their safe and environmentally sound disposal in the importing states.”¹¹¹ It therefore urged African states to actively participate at the diplomatic conference at which the convention would be adopted.¹¹² After the OAU statement was heard, many African ministers proposed amendments to the draft convention and informal consultations ensued, resulting in an assurance that the African states present would not object to the adoption of the Convention.¹¹³ In the end, no ban was adopted, since many industrialised countries threatened not to become parties to the convention if it went as far as banning trade in hazardous wastes.¹¹⁴ The Basel Convention was therefore adopted as scheduled on 22 March 1989, but African countries abstained from signing it.¹¹⁵ The treaty entered into force on 5 May 1992.

¹¹⁰ See Tolba and Rummel-Bulska, *supra* note 14 at 113.

¹¹¹ See OAU, *Council of Ministers Resolution on global convention for the Control of Transboundary Movement of Hazardous Wastes*, CM/Res. 1199 (XLIX), Addis Ababa, Ethiopia (20-25 February 1989), in OAU, *Resolutions of the Forty-Ninth Ordinary Session of the Council of Ministers as Adopted by the Council of Ministers*, CM/Res. 1177-1205 at 55-57.

¹¹² See *ibid.*

¹¹³ See Tolba and Rummel-Bulska, *supra* note 14 at 114.

¹¹⁴ This constituted a serious threat, since they represented the major hazardous wastes generators and exporters. See Clapp, “Toxic Exports,” *supra* note 12 at 43-44.

¹¹⁵ A number of African ministers were authorised by their governments to sign the Convention, but abstained from doing so, presumably in the name of solidarity. See Tolba and Rummel-Bulska, *supra* note 14 at 114. Nevertheless, all African countries eventually became parties to the Basel Convention.

i) Final Outcome

As adopted in 1989, the Basel Convention sets up a prior informed consent (PIC) system intended to control, rather than ban, trade in hazardous wastes.¹¹⁶ At the same time, the Convention requires parties to refrain from exporting hazardous wastes or “other wastes”¹¹⁷ to parties that have banned such imports, or to parties they have “reason to believe” will not manage the wastes in question in an environmentally sound manner.¹¹⁸ Parties are also required to ensure that hazardous waste exports are “reduced to a minimum.” In doing so, however, they may seek to achieve not only the environmentally sound but also the “efficient” management of hazardous wastes, which could be used to justify their export. In addition, the Convention allows parties to export hazardous wastes if such wastes are required as a “raw material” for recycling or recovery operations in the state of import.¹¹⁹

If ban opponents successfully prevented the adoption of an export ban in the text of the Basel Convention, the public pressure to which they were subjected led them to compromise and accept provisions in the Convention regarding the “desire for” and possible future adoption of a ban. Thus, one of the Convention’s preambular paragraphs recognises the “increasing desire for the prohibition of transboundary movements of hazardous wastes and their

¹¹⁶ To recapitulate, the PIC system requires parties to notify (or to require the waste generator to notify) the importing state and any transit states of a proposed shipment of hazardous wastes or “other wastes,” and to prohibit the export to proceed if such states parties have not consented to the proposed export. See Basel Convention, *supra* note 1, Arts. 4(c) and 6. While the state of import must respond in writing before an export can proceed, parties may decide not to require written consent for transit movements, in which case the state of export could allow the export to proceed if no response from the state of transit has been received within 60 days of its receipt of the notification by the state of export. See *ibid.*, Art. 6(2) and (4).

¹¹⁷ The Basel Convention defines “other wastes,” which are also subject to its control procedures, as wastes collected from households and residues arising from the incineration of household wastes. See Basel Convention, *supra* note 1, Annex II and *supra* note 64.

¹¹⁸ See Basel Convention, *supra* note 1, Arts. 4.1(b) and 4.2(e). Parties are also required not to export hazardous wastes to Antarctica or to non-party states, unless they have signed an agreement with those states that ensures the environmentally sound management of the wastes in question as required by the Basel Convention. See *ibid.*, Arts. 4.6, 4.5 and 11.

¹¹⁹ See *ibid.*, Art. 4.9(b).

disposal in other states, especially developing countries.”¹²⁰ More importantly, it was decided that the parties should undertake an evaluation of the Convention’s effectiveness three years after its entry into force and, if necessary, “consider the adoption of a complete or partial ban on the transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and economic information.”¹²¹

ii) The Ban Amendment

As many had expected, African countries, environmental NGOs and other ban supporters continued their efforts to introduce a ban on hazardous waste exports from developed to developing countries in the Basel Convention after the treaty’s entry into force.¹²² At the very first meeting of the conference of the parties (COP), held in December 1992, the pressure exerted by a coalition of developing countries, Nordic countries and Greenpeace International led to the unanimous adoption of a COP decision requesting developed countries to prohibit the export of hazardous wastes and other wastes for final disposal to developing countries.¹²³ Parties could not agree, however, on the application of the ban to trade in recyclables, which gave rise to another COP decision requesting the then newly created technical working group to consider the issue further.¹²⁴

¹²⁰ See Basel Convention, *supra* note 1, Preamble, para. 7.

¹²¹ See *ibid.*, Art. 15.7. According to Kummer, Greenpeace International proposed this provision. See Kummer, “Regulation of Wastes,” *supra* note 3 at 539.

¹²² In the period leading up to the United Nations Conference on Environment and Development, developing countries called for the prohibition of hazardous waste shipments from industrialised countries to developing countries. (See Decision I/22 of the Conference of the Parties, Preamble, para. 3, in “COP-1 report,” *supra* note 80 at 37-38 and Clapp, “Toxic Exports,” *supra* note 12 at 68.

¹²³ See *ibid.* Although the decision refers to “disposal,” which entails not only final disposal but also recovery and recycling operations, it defers the matter of whether the ban should apply to exports of recyclable wastes until the COP has received and acted upon the report of the technical working group called for in Decision I/16. See Decision I/16 of the Conference of the Parties, “Transboundary Movements of Hazardous Wastes Destined for Recovery Operations,” in “COP-1 report,” *ibid.* at 32.

¹²⁴ See *ibid.*

The question of trade in recyclables was addressed again at the next COP meeting, when most OECD countries, including the countries of JUSCANZ (i.e., Japan, the United States, Canada, Australia and New Zealand), the United Kingdom and the EU, made it clear that they could not support a ban on the export of hazardous wastes destined for recovery or recycling operations. In essence, these delegations argued that non-OECD countries could possess or acquire the technological capability to recover raw materials from hazardous wastes and that exports of hazardous wastes to those countries should therefore be allowed.¹²⁵ If disposal in the country of import was sound, they further argued, the export of hazardous wastes to developing countries could benefit “sustainable development,”¹²⁶ contribute to waste minimization by reducing the amount of wastes destined for final disposal and even “yield economic advantages.”¹²⁷

Most participants supported banning trade in recyclables, however, arguing that much of the hazardous waste exported supposedly for recycling was in fact intended for final disposal. Among those in the second group was Denmark, who decided to break ranks with the EU and ally itself with the G77 in its calls for a ban. In the end, ban opponents decided to compromise in view of the fact that those who supported a ban on recyclables constituted the required majority if the issue came to a vote.¹²⁸ Thus, a decision was adopted at the second COP meeting banning the export of hazardous wastes for final

¹²⁵ See UNEP, “Report of the second meeting of the [COP] to the Basel Convention,” UN Doc. UNEP/CHW.2/30, Geneva (25 March 1994) [COP-2 report] at 7 and 9-10. Industry representatives, Canada and Australia made a similar argument during the third COP meeting. See UNEP “Report of the third meeting of the [COP] to the Basel Convention,” UN. Doc. UNEP/CHW.3/34, Geneva (17 October 1995) [COP-3 report] at 11 and Annexes II and III.

¹²⁶ Statement made by the representative of Japan. See “COP-2 report,” *ibid.* at 9.

¹²⁷ Statement made by the representative of Australia. See *ibid.* at 10.

¹²⁸ Among those who supported the ban on trade in recyclables at the second COP meeting were the G77 and China, the Nordic states, a number of Eastern and Central European countries and Greenpeace International. See “COP-2 report,” *supra* note 125 at 6 and 9, Clapp, “Toxic Exports,” *supra* note 12 at 72 and Greenpeace International, “A Victory of Environment and Justice: the Basel Ban and How it Happened,” by Jim Puckett and Cathy Fogel (1994), online: <http://www.ban.org/main/about_Basel_Ban.html>.

disposal *and* for recycling from OECD to non-OECD countries.¹²⁹ However, some of the ban opponents, including Australia, Canada and Austria, questioned whether the ban decision was binding upon parties.¹³⁰ The representative of Austria claimed that it was not, stressing that “the rights and obligations” of parties could “only be [changed] by way of amendments according to the procedures of the Convention.” He also clarified that his delegation had joined the ban decision “for political reasons,” as it would have preferred to see a “flexible system” with specific exceptions in the field of recycling and recovery.¹³¹

The debate on the ban continued at the next COP meeting, when parties discussed the possibility of adopting it as an amendment to the Basel Convention. Once again, the countries of JUSCANZ and other OECD countries expressed their opposition to banning trade in recyclables,¹³² as did representatives of industry, including the ICC and the Bureau of International Recycling. Greenpeace urged parties to confirm the ban adopted at the second COP meeting, however, and suggested that a vote should be taken if consensus could not be reached.¹³³ As at the second COP meeting, the pressure exerted by the pro-ban coalition and the possibility of a vote brought about the unanimous adoption of a decision confirming the ban as an amendment to

¹²⁹ The decision immediately bans all transboundary movements of hazardous wastes destined for final disposal from OECD to non-OECD countries and prohibits all transboundary movements of hazardous wastes destined for recycling operations from OECD to non-OECD countries as of 31 December 1997. See Decision II/12, in “COP-2 report,” *supra* note 125 at 19-20. Parties decided to use OECD membership as the criterion to implement the ban on the basis that it reflected the level of technical, legal and institutional capacities for a country to ensure ESM of hazardous wastes. They also used it to prevent wastes from being exported to the countries of Eastern and Central Europe after the fall of the Berlin Wall. See Kummer “Ten Years Basel,” *supra* note 64 at 229 and Clapp, “Toxic Exports,” *supra* note 12 at 68.

¹³⁰ See “COP-2 report,” *supra* note 125 at 10.

¹³¹ See *ibid.*

¹³² Canada opposed the amendment on the basis that environmentally sound recycling of hazardous wastes was consistent with, and an integral part of, sustainable development. With Australia, it also argued that there was insufficient clarity as to which “recyclable materials” would be subject to the ban amendment and the adoption of a legally binding ban was thus premature. See “COP-3 report,” *supra* note 125, Annexes II and III.

¹³³ See *ibid.* at 10-11. The Basel Convention provides that, in the absence of a consensus concerning a proposed amendment, the amendment shall be adopted by the three-fourths majority of the parties present and voting. See Basel Convention, *supra* note 1, Art. 17.3.

the Convention (Decision III/1).¹³⁴ Instead of referring to OECD membership, however, Decision III/1 banned the export of hazardous wastes destined for final disposal and for recycling from states parties listed in a new annex to the Convention (Annex VII), to states parties not listed in that annex.¹³⁵

While the adoption of an amendment finally resolved the legal status of the ban and the issue of whether it would also apply to trade in recyclables, the use of an annex to divide parties into the two groups to which the amendment would apply in a way reopened the discussion.¹³⁶ It is thus no surprise that the representative of Australia, a relentless opponent of the ban, declared that Australia was “pleased” to see that “arbitrary distinctions” between parties were no longer part of the text of the Basel Convention, as the placement of a list of parties in an annex would provide a mechanism through which other parties could be listed in Annex VII if they so wished.¹³⁷

That the use of an annex reopened the ban discussion is evidenced by the fact that, at the fourth COP meeting, Monaco and Israel presented proposals to be added to Annex VII, arguing that they possessed the same technical capacity to manage hazardous wastes in an environmentally sound manner as any other

¹³⁴ According to the Basel Action Network, at the third COP meeting a number of developing countries, namely India, Brazil and the Philippines, began to argue against the ban, as did about thirty industrialists from India who came to the meeting wearing blue badges reading “Recycle Now.” Eventually, however, Decision III/1 was adopted by consensus. See Puckett, “Basel Ban Victory,” *supra* note 12.

¹³⁵ Following its entry into force, the decision was to take immediate effect in relation to wastes bound for final disposal and was expected to take effect at the beginning of 1998 for all hazardous wastes destined for recycling or recovery operations. As adopted, Annex VII includes parties and other states that are members of OECD or the European Community, as well as Liechtenstein. See Decision III/1, in UNEP, “Decisions Adopted by the third meeting of the [COP] to the Basel Convention,” UN. Doc. UNEP/CHW.3/35, Geneva (28 November 1995).

¹³⁶ The Basel Action Network (BAN) has argued that while the OECD/non-OECD dichotomy is imperfect, it addresses the “worst abuses” of dumping for profit and that if non-OECD countries are allowed to join Annex VII they could become the target for economically motivated waste dumping, while also allowing OECD countries to avoid their special responsibility to fulfill ESM and waste minimization obligations under the Convention. See Basel Action Network, “The Basel Ban Amendment: The First Step Toward ESM of Hazardous Wastes” (April 2000) at 8 [BAN, “Ban Amendment”] online: <<http://www.ban.org/Library/firststep.html>>.

¹³⁷ See “COP-3 report,” *supra* note 125, Annex III.

Annex VII country.¹³⁸ In the end the parties decided to keep Annex VII membership unchanged until the entry into force of the ban amendment, despite the objections of Australia and New Zealand.¹³⁹ Nevertheless, they agreed to ask the Basel Convention's technical working group to undertake a detailed study of "Annex VII-related issues."¹⁴⁰ This decision was supported by most developing countries, even though Denmark expressed the fear that the study could be "misused by certain delegations to serve as a means of undermining the adopted ban on exports of hazardous wastes from Annex VII to non-Annex VII countries, which meant, practically speaking, from OECD to non-OECD countries."¹⁴¹

Subsequent debate concerning Annex VII membership has confirmed Denmark's fears, as it has given ban opponents a renewed opportunity to challenge the ban and seek to renegotiate its terms. What is interesting about this debate is not that long-time opponents of the ban continue to argue against it, but that a few developing countries have now joined them in their reservations, revealing a wider embrace of liberal economic norms among the parties to the Convention. At the fifth COP meeting of the COP, for instance, the representative of Brazil suggested that the low rate of ratifications¹⁴² of

¹³⁸ See UNEP, "Report of the fourth meeting of the [COP] to the Basel Convention," UN Doc. UNEP/CHW.4/35, Kuching, Malaysia (18 March 1998) [COP-4 report] at 7-8. According to the Earth Negotiations Bulletin, Slovenia also presented a proposal to be included in Annex VII. See "Summary of the fifth COP to the Basel Convention," 20:6 *Earth Negotiations Bulletin* (13 December 1999) [COP-5 ENB report] at 1, online: <<http://www.iisd.ca/download/pdf/enb2006e.pdf>>.

¹³⁹ See UNEP, "COP-4 report," *ibid.* at 7 and 10. In comments submitted to the Secretariat in preparation for the third meeting of the Open-ended Working Group, Australia reiterated that the distinction between Annex VII and non-Annex VII countries would remain "problematic until environmental criteria [we]re developed under the Basel Convention to distinguish between the two groups of countries." Thus, it urged that a procedure be developed for amending Annex VII, "even if such a procedure [wa]s not yet in use." See UNEP, "Analysis of Issues Related to Annex VII," UN Doc. UNEP/CHW.7/12, Geneva (16 August 2004) [Annex VII Study Phase II] at 17-18.

¹⁴⁰ Arab countries were particularly vocal in their opposition to changing Annex VII. They argued that Israel, who was asking to be included in Annex VII, had been disposing of hazardous wastes in a "non-environmentally sound way" in the Palestine territories and other occupied Arab territories. See "COP-4 report," *supra* note 138 at 7-8 and 17-18 (Decision IV/8).

¹⁴¹ See "COP-4 report," *supra* note 138 at 8.

¹⁴² Since their seventh meeting, parties have engaged in discussions concerning the interpretation of paragraph 5 of Article 17 of the Basel Convention, which provides that amendments to the Convention will enter into force after three-fourths of the Parties "who accepted them" have ratified such amendments.

the ban amendment was due to the fact that the criteria used to assign state parties to Annex VII were based on economic rather than technical considerations. He thus suggested that work was needed to develop such criteria based on the capacities of countries to manage wastes soundly rather than on their status as developing or developed countries.¹⁴³ More overtly against the ban and in defense of free trade, the representative of India said that the amendment could “impede” technology upgrading in the recycling industry in non-Annex VII countries. A similar point was made in the second phase of the Annex VII study, which was considered by the parties two years later and claimed that one of the possible impacts related to Annex VII on trade in lead was that “Annex VII recyclers could become more competitive than non-Annex VII recyclers.”¹⁴⁴

The Indian delegation restated its opposition to the ban at the seventh COP meeting, when it agreed with ban opponents that the criteria for Annex VII membership was discriminatory and arbitrary (in contradiction of WTO law) and that developing countries should be allowed to compete in the recycling market.¹⁴⁵ These statements are telling because they reveal a greater acceptance by some parties of liberal economics in the later days of the Convention. Compare, for instance, India’s statements above with what its

While ban supporters, in particular BAN, argue that the three-fourths majority must be applied to the number of parties who initially adopted the ban at the third COP session, others, including Canada, Australia and the United States, claim that ratification by three-fourths of the *current* number of parties is required. Environmental NGOs argue that this is yet another strategy of some parties to undermine the ban, since under the first interpretation the ban would have already entered into force. Thus, at the eighth COP meeting, they urged parties to adopt a decision affirming that under Article 17(5) the Ban Amendment should enter into force “immediately,” given that it had been ratified by 63 parties. Although the early entry into force of the ban amendment was supported by the EC and several developing countries, the COP adopted a decision that urged all Parties to make “every effort” to facilitate the “early resolution” of the issue of how Article 17(5) is to be interpreted and requested the Open-ended group to consider the issue in preparation for the next COP session. See UNEP, “Report of the [COP] to the Basel Convention on its eighth meeting,” UN Doc. UNEP/CHW.8/16, Nairobi (5 January 2007) [COP-8 report] at 6 and 19 and Decision VIII/30, in “COP-8 report,” *ibid.* at 54-55.

¹⁴³ See UNEP, “Report of the fifth meeting of the [COP] to the Basel Convention,” UN Doc. UNEP/CHW.5/29, Basel (10 December 1999) [COP-5 report] at 9 and “COP-5 ENB report,” *supra* note 138 at 3.

¹⁴⁴ See “COP-5 ENB report,” *ibid.* at 11 and “Annex VII Study Phase II,” *supra* note 139 at 12.

¹⁴⁵ Notes taken by the author at the seventh COP meeting, Geneva, 25-29 October 2004.

head of delegation said at the first COP meeting: “you industrialised countries have been asking us to do many things for the global good – stop cutting down our forests, stop using your [chlorofluorocarbons]. Now we are asking you to do something for the global good: keep your own waste.”¹⁴⁶

Although India’s open opposition to the ban is exceptional, other developing countries have remained silent on the issue and at least one of them is facing internal difficulties with ratifying the amendment it initially supported.¹⁴⁷ Apart from a few developing countries who still unequivocally support the ban,¹⁴⁸ it is environmental NGOs that have taken the lead in defending the amendment, reminding parties that it was the determination of the G77 and China that led to its adoption. Greenpeace International and the Basel Action Network (BAN) have been particularly vocal. These organizations argue that the relevance of the ban does not rest on whether or not appropriate facilities exist in developing countries, but on the fact that the ban is directly connected to other fundamental obligations of parties, in particular the attainment of self-sufficiency in waste disposal and the reduction of transboundary

¹⁴⁶ Nityanand Jayaraman, “Dump on Us: We’re Indians,” *Infochange News & Features India* (January 2006), online: <<http://www.infochangeindia.org/features323.jsp>>.

¹⁴⁷ Such is the case with Colombia. While the Ministry of Environment supported the adoption of the ban and the ratification of the amendment, other ministries and a major industry association have expressed reservations about it on the basis that it could have a considerably negative effect on those industries that depend on the use of imported hazardous wastes to be used as raw materials.

¹⁴⁸ In a note submitted to the Secretariat concerning the study of Annex VII-related issues, Egypt expressed its full and unconditional support for the ban amendment, arguing that it represented a “significant achievement for the environment” by preventing the transfer of hazardous wastes to developing countries. See “Annex VII Study Phase II,” *supra* note 139 at 20. Similarly, at the seventh COP meeting, Malaysia, supported by China, said that even if developing countries acquired the capacity to ensure the environmentally sound management of hazardous wastes, they should cope with their own domestically generated waste rather than import foreign waste (Notes taken by the author at the seventh COP meeting, Geneva, 25-29 October 2004). Although initially the EU did not support a ban on hazardous waste exports, the EU position turned around during the second COP meeting, where a decision to ban exports of hazardous wastes from OECD to non-OECD countries was adopted. According to Greenpeace International, the representative of the Netherlands realized that the EU’s opposition to the ban would not be defensible to its citizenry and decided to join ranks with the G77. So did Italy, which presented a new proposal that incorporated a ban. Italy’s proposal was discussed at a meeting of the EU Environment Ministers that was taking place in Brussels and gained the support of all EU countries except the U.K., Germany, France and Belgium. Eventually, however, these countries decided to support the ban. The EC ratified the ban amendment on 30 September 1997, and it has adopted legislation to implement the ban. As a result, at the eighth COP meeting the representative of the EU stressed that the EC had already implemented the ban and “hoped to see it enforced internationally.” See “COP-8 highlights,” 20:23 *Earth*

movement and hazardous waste generation to a minimum.¹⁴⁹ The ban amendment was adopted, they claim, because Annex VII countries were in the best position to implement these obligations, and because allowing them to export their hazardous wastes to developing countries, where disposal (including recycling) is cheaper, would constitute a disincentive to waste minimization and the widespread implementation of cleaner production methods to achieve waste disposal self-sufficiency.¹⁵⁰

UNEP Executive Director Mostapha K. Tolba made a similar argument during the initial negotiations, when he claimed that trade restrictions, and ideally the complete banning of the movement of hazardous wastes away from their point of origin, would act as an incentive for reducing the generation of such wastes and for disposing of them as close as possible to their source.¹⁵¹ In the same way, one of the conclusions of the Annex VII study is that the ban amendment could be expected to “provide incentives to adopt cleaner production methods and minimize hazardous waste generation in Annex VII countries [and] to stimulate Annex VII countries to become self-sufficient in hazardous waste disposal.”¹⁵² Ban supporters argue that this incentive would be lost if Annex VII were amended to include countries that offer considerably lower disposal costs.¹⁵³

At the centre of the debate is the definition of what constitutes “hazardous waste” under the Basel Convention. Environmental groups argue that

Negotiations Bulletin (30 November 2006) at 2 and Puckett and Fogel, *supra* note 128.

¹⁴⁹ See Basel Convention, *supra* note 1, Arts. 4.2(b), 4.2.(d) and 4.2.(a), respectively.

¹⁵⁰ Statement made by Greenpeace International and BAN (Notes taken by the author at the seventh COP meeting, Geneva, 25-29 October 2004 and *infra* note 153).

¹⁵¹ See “Further Development,” *supra* note 70 at 1.

¹⁵² See UNEP, “Analysis of Issues Related to Annex VII,” UN Doc. UNEP/CHW.6/34, Geneva (30 August 2002) at 8, online: <<http://www.basel.int/meetings/cop/cop6/english/34e.doc>>.

¹⁵³ One of the points made by the Basel Action Network is that “the export of hazardous wastes from higher cost waste disposal facilities to lower cost facilities, which is almost always the case in the Annex VII to non-Annex VII waste trade subject of the ban, acts as a powerful and damaging disincentive to cost internalization and the realization of waste reduction at the source.” See BAN, “Basel Ban Amendment,” *supra* note 136 (It is worth noting that Mexico joined the OECD on May 18, 1994, thereby becoming an Annex VII country. See *supra* note 8).

contaminated “recyclable materials” such as tainted metals or plastic scraps and hazardous materials such as lead and cadmium should not be seen as “commodities” but as toxic waste. Thus, even if they have a positive economic value when recycled, they should not be subject to free trade rules.¹⁵⁴ Egypt made a similar claim in a note concerning the Annex VII study submitted to the Secretariat, where it expressed support for the ban amendment and argued that it was “important to note that free trade d[id] not apply to hazardous wastes.”¹⁵⁵

The understanding of contaminated recyclables as hazardous waste is more or less consistent with the Basel Convention’s definition of hazardous waste, which is dependent upon specific materials and characteristics that wastes must contain or exhibit to be “hazardous.”¹⁵⁶ In order to clarify further, however, which wastes would fall under the ban amendment, the parties requested the technical working group to develop two lists of “hazardous” and “non-hazardous” wastes. The lists were adopted as two new annexes (Annexes VIII and IX) to the Convention at the fourth COP meeting. List A (Annex VIII) includes wastes that would in principle be considered “hazardous” under the Convention and would thus be subject to the ban, including metal wastes and wastes containing arsenic, lead, mercury, asbestos, and dozens of other chemicals and substances. List B (Annex IX) includes wastes that would normally not be considered hazardous and could thus be exported for recycling, including scrap iron, steel or copper, certain electronic assemblies, non-hazardous chemical catalysts, solid plastic waste and paper and textile wastes.¹⁵⁷

The adoption of Annexes VIII and IX alleviated some of the concerns of ban opponents, who have concluded that “almost all traded recyclable materials”

¹⁵⁴ See Puckett, “Basel Ban Victory,” *supra* note 12.

¹⁵⁵ “Annex VII Study Phase II,” *supra* note 139 at 20.

¹⁵⁶ See Basel Convention, *supra* note 1, Annexes I and III.

would not be subject to the ban amendment, “except through individual decisions by [Annex VII] parties.”¹⁵⁸ Still, ban opponents continue to argue against the ban on the basis that it contradicts key international trade principles and removes from importing countries the “right” to determine which raw materials they can import, even when those countries are capable of treating hazardous recyclables in an environmentally sound manner.¹⁵⁹

Not all industrialized countries reject the ban, however. Such is the case with the EU, which as discussed above initially opposed the idea of an export ban¹⁶⁰ but ratified the ban amendment in September 1997 and has already enacted legislation to implement it in the EU.¹⁶¹ Although the recent enlargement of the EU means that Annex VII (which lists the countries to which the ban amendment applies) has been effectively amended to include these new EU members, some of which might offer cheaper disposal costs for the waste generated in highly industrialized EU countries,¹⁶² the EU’s support for the ban reveals that there is a fissure in the hegemony of liberal economic norms in the context of the Basel Convention. This is because, while it is apparent that the EU interprets the ban as a legitimate exception to, rather than the invalidation of, WTO law, the ban amendment poses a challenge to the liberal economic worldview.

¹⁵⁷ See Decision IV/9, “Amendment and Adoption of Annexes to the Convention,” in “COP-4 report,” *supra* note 138 at 18-30 and Basel Convention, *ibid.*, Annexes VIII and IX.

¹⁵⁸ See ICC, “The Basel Convention Export Ban Amendment: A Business Perspective” (8 November 1999), online: <<http://www.iccwbo.org/id396/index.html>>.

¹⁵⁹ See *ibid.* and *supra* notes 126, 127, 132 and 139.

¹⁶⁰ See *supra* note 148.

¹⁶¹ See EC, *Regulation No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste*, [2006] O.J. L 190/1, Arts. 34, 36 and 37, online: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_190/l_19020060712en00010098.pdf>.

¹⁶² According to the Trade and Environment Database (TED) of the American University, the need for cash in the former Eastern bloc countries (including Romania, Bulgaria and Poland) has created a new market in toxic waste since the fall of the Berlin wall and some industrialized countries (e.g., Germany) are exporting their waste to these countries because they offer less expensive disposal costs (See TED, “Poland Waste Imports,” online: <<http://www.american.edu/ted/polwaste.htm>> (last visited 8 December 2007). For details on EU enlargement see EU, “Understanding Enlargement” (last visited 1 October 2007), online: <http://ec.europa.eu/enlargement/enlargement_process/index_en.htm>.

The relationship between WTO agreements and trade-related measures adopted by states in order to implement a multilateral environmental agreement (MEA) such as the Basel Convention is still unclear. No WTO dispute settlement panel has yet been asked to consider a case involving the implementation by a WTO member of a trade-restrictive measure adopted pursuant to an MEA, while the Committee on Trade and Environment (CTE) of the WTO, which has been discussing the matter since its establishment in 1994, has yet to deliver its recommendations on the matter.¹⁶³

In the context of the initial discussions of the CTE, however, the EU made a proposal to modify the General Agreement on Tariffs and Trade (GATT) to include a new general environmental exemption according to which measures taken by WTO members “pursuant to specific trade provisions of an MEA” would be considered legitimate under the WTO. Although the proposal did not succeed, as the majority of members considered that the environmental exemptions in the current WTO rules could accommodate environmental concerns, it clarified the EU’s position on the issue.¹⁶⁴ More recently, the EU, Switzerland and Norway have called for a WTO decision or ministerial declaration to assert that there is no hierarchy between WTO rules and MEAs and that WTO agreements and MEAs are “equal bodies of international law,” responsible and competent for issues falling within their respective and primary areas of competence. Although this proposal is less ambitious than the original EU proposal to modify the GATT agreement, it has been strongly

¹⁶³ Following its establishment in 1994, the Committee on Trade and Environment (CTE) was asked to consider the relationships between the trading system and MEAs and between the dispute settlement procedures of the trading system and those of MEAs. These discussions bore no fruit and the CTE is still discussing the relationship between WTO law and MEAs, but under a much narrower mandate given by the Doha Ministerial Declaration. See *infra* note 165 and Robyn Eckersley, “The Big Chill: The WTO and Multilateral Environmental Agreements” (2004) 4:2 *Global Environmental Politics* at 24-50.

¹⁶⁴ Under the EU proposal, a number of conditions would need to be met for the measure to be considered “necessary” under WTO law. For instance, the MEA in question would need to be “open to participation by all parties concerned about [its] environmental objectives” and reflect, “through adequate participation, the interests of parties concerned, including parties with relevant significant trade and economic interests.” WTO, CTE, “[MEAs] and WTO Rules: Proposals Made in the [CTE] from 1995-2002,” doc. TN/TE/S/1 (23 May 2002) at 6-7.

rejected by a number of countries, including Australia, Canada, the United States and several developing countries.¹⁶⁵

Until the issue of whether a trade-related measure such as the Basel ban amendment is a legitimate trade-restriction under WTO law is resolved, it is fair to say that the ban contradicts key principles of international trade, which is precisely why an exception would be necessary to ensure that a measure

¹⁶⁵ The Doha Ministerial Declaration asked the CTE to conduct negotiations on the relationship between existing WTO rules and “specific trade obligations” set out in MEAs (which according to the United States, Canada and several developing countries rules out “non-mandatory” trade measures and “non-specific” trade obligations), but *only* in relation to the applicability of WTO rules “as among parties to the MEA in question.” This means that the issue of whether a trade-restrictive measure taken by a WTO member pursuant to an MEA could be challenged by a WTO member that was not a party to the MEA in question would not be addressed by the CTE. Furthermore, the Doha Declaration also stated that the CTE negotiations should neither “prejudice the WTO rights of any [WTO] Member that is not a party to the MEA in question,” nor “add to or diminish the rights and obligations of members under existing WTO agreements,” thereby confirming the right of WTO members to challenge trade-restrictive measures in MEAs before WTO dispute settlement bodies [See WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1 (20 November 2001), online:

<http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>, para. 31(i)]. □

The CTE discussions began in March 2002 and are still ongoing, owing to a lack agreement between government representatives on, among other things, the interpretation of the CTE’s mandate and what the outcome of the negotiations should be. In July 2007, Australia and Argentina proposed that the CTE simply produce a report outlining its deliberations in which it “might wish to recommend” ways in which WTO members could “build on” those discussions. Most members welcomed the proposal, but the EU, Switzerland and Norway felt that it did not address the substance of the CTE’s mandate. Thus, the EU presented another proposal containing a draft decision to be adopted by WTO members (which it had also presented in 2006), which was supported by Norway. The proposed decision contained a number of principles that would “govern the relationship between MEAs and WTO rules,” including “mutual supportiveness,” according to which, “under WTO rules, no country shall be prevented from taking measures for the protection of [health or the environment] ensuring the level of protection it considers appropriate;” “no subordination,” which would affirm that MEAs and WTO agreements have “equal standing;” and “deference,” which would affirm that MEAs and the WTO have “distinct competences within a mutually supportive” framework and that their “respective expertise” should be valued and utilised. The draft decision also stated that, where a WTO committee or panel examined issues “with an environmental content” relating to a particular MEA, the committee or panel should “call for and defer to, in the relevant points, the expertise of the MEA in question.” These provisions would apply to cases involving both parties and non-parties to MEAs, and were thus rejected by Australia and others on the basis that they exceeded the CTE’s Doha’s mandate. For further details on these proposals see WTO, CTE, “Proposal for an Outcome on Trade and Environment Concerning Paragraph 31(i) of the Doha Ministerial Declaration: Submission by Australia and Argentina,” doc. TN/TE/W/72/Rev.1 (7 May 2007) at 3; WTO, CTE, “Proposal for a Decision of the Ministerial Conference on Trade and Environment: Submission by the EC,” doc. TN/TE/W/68 (30 June 2006) at 2; and WTO CTE, “Summary Report of the twentieth meeting of the [CTE] in special session,” doc. TN/TE/R/20 (8 August 2007) at 2-3 (All these documents are available online at <http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm>. See also “MEA-WTO Relationship: Debate Matures, No Solution Yet,” *Bridges* 7:16 (7 May 2003), online: <<http://www.ictsd.org/weekly/03-05-07/story1.htm>>; and “CTE: No Movement Until Progress on AG, NAMA,” *Bridges* 11:27 (25 July 2007), online: <<http://www.ictsd.org/weekly/07-07-25/wtoinbrief.htm#2>>.

taken to implement the ban will not be challenged under the WTO. Not only does the ban amendment contradict the principle of non-discrimination, but it can be argued that it also violates the principle that states should adopt the “least-trade restrictive” measures necessary to protect the environment or human health from harm.¹⁶⁶ More generally, the ban amendment itself challenges the liberal economic perspective because it is premised on the notion that industrialised countries should not export hazardous wastes to developing countries regardless of whether the latter can properly manage such wastes and regardless of economic efficiency.¹⁶⁷ Thus, even if EU interprets the ban amendment as being a legitimate exception to WTO law on the basis that it is a trade-restrictive measure incorporated in an MEA, the fact that it has decided to accept the ban can be seen as an indication that the liberal economic perspective is not entirely accepted by all actors in the context of the Basel Convention.

A similar conclusion can be drawn from the position of environmental NGOs regarding the ban. One of the claims made by BAN, who continues to support the ban amendment unreservedly, is that there is a strong correlation between the ban and the obligation of parties to minimize waste generation. The argument is that by “closing off cheap and dirty options for waste management, [the ban] can force cost internalizations which in turn drive “green design” and thus hazardous waste minimization.”¹⁶⁸ Similarly, the World Conservation Union (IUCN) defended the ban at the eighth COP meeting on the grounds that the export of toxic post-consumer wastes from

¹⁶⁶ The ban might be said to contradict the principle of non-discrimination because it requires parties to discriminate between Annex VII and non-Annex VII countries when trading hazardous wastes. In addition, if one agreed that the PIC procedure were sufficient to protect health and the environment from hazardous wastes, it should be preferred to the ban, which is more trade restrictive. For a review of the ways in which ban amendment may conflict with international trade law see David A. Wirth, “Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes” (1998) 7:3 R.E.C.I.E.L. 237 at 237-248 and *supra* note 26. POPO

¹⁶⁷ One of the key arguments against the ban is that the export of hazardous wastes to developing countries that can manage such wastes soundly can contribute to sustainable development by reducing the amount of wastes destined for final disposal and by bringing economic profits to the importing country. See *supra* notes 125, 126, 127 and 132.

rich developed countries to developing countries “facilitates externalisation of the costs of waste disposal from stronger economies to weaker economies and thus discourages the development of upstream manufacturing processes that are needed to solve the long-term problem of toxic-waste generation.”¹⁶⁹

As in the case with the EU, the fact that some ENGOs continue to support the ban amendment unconditionally can be interpreted as a sign that not all actors have accepted the liberal economic perspective in the context of the Basel Convention. Just as they have supported the ban, however, these ENGOs have consistently hinted that waste minimization requires nothing but changes in production. In doing so, they are contributing to reinforce the belief that the “long-term problem of toxic-waste generation,” as IUCN puts it, can be effectively addressed through solutions premised upon the maintenance of a liberal economic world order and rising consumption. This issue is considered next.

c) Waste Minimization

The Basel Convention incorporates the idea that the most effective way of protecting the environment and human health from hazardous wastes is the “reduction of their generation to a minimum” in terms of quantity “and/or” hazard potential.¹⁷⁰ Thus, parties are required to ensure that the generation of hazardous wastes within their territories is “reduced to a minimum,” taking into account “social, technological and economic aspects.”¹⁷¹

¹⁶⁸ “Annex VII Study Phase II,” *supra* note 139 at 35 (comments by BAN).

¹⁶⁹ UNEP, “IUCN Recommendation 3.088 on the ‘Ban Amendment’ to the Basel Convention,” UN Doc. UNEP/CHW.8/INF/28, Nairobi (14 November 2006) at 2.

¹⁷⁰ See Basel Convention, *supra* note 1, Pmbl., para. 3.

¹⁷¹ *Ibid.*, Art. 4.2(a).

Although various participants emphasized the importance of waste minimization at the first four COP meetings,¹⁷² parties only started grappling with the issue at their fifth meeting, as they considered the challenges of the Basel Convention for the next decade. At that meeting, parties adopted the Basel Declaration on Environmentally Sound Management (ESM). The Declaration states that the prevention and minimization of hazardous waste generation and the active promotion of the transfer and use of cleaner technologies are two central objectives of the Basel Convention,¹⁷³ and expresses the commitment of parties to augment their efforts in both areas.¹⁷⁴

Also at its fifth meeting, the COP adopted a decision that set the agenda on ESM for the next decade,¹⁷⁵ establishing the “prevention, minimization, recycling, recovery and disposal” of hazardous wastes and the active promotion and use of cleaner technologies as two key areas for future work. The decision called for concrete activities regarding waste minimization, including the elaboration of a programme for ESM with an emphasis on waste prevention and minimization; cooperation by the Basel Convention regional centres (BCRCs)¹⁷⁶ with cleaner production centres and similar institutions;¹⁷⁷ and the strengthening of the activities of BCRCs aimed at promoting waste minimization methods.¹⁷⁸ The emphasis on waste minimization continued through the next two meetings, where parties adopted a strategic plan for the implementation of the Basel Convention to further the goals of the Basel

¹⁷² Several participants, including UNEP Executive Directors Tolba, Dowdeswell and Töpfer and government representatives, highlighted the central importance of the goal of waste minimization and cleaner production at various COP meetings. See “COP-1 report,” *supra* note 80 at 2; “COP-3 report,” *supra* note 125 at 3 and 16; “COP-4 report,” *supra* note 138 at 10.

¹⁷³ See “Basel Declaration on Environmentally Sound Management” [Basel Declaration on ESM], in “COP-5 report,” *supra* note 143, Annex II, para. 3.

¹⁷⁴ See “Basel Declaration on ESM,” *ibid.*, paras. 6(a) and 6(b).

¹⁷⁵ See *ibid.*, para. 9 and Decision V/33, “Environmentally Sound Management,” in “COP-5 report,” *supra* note 143 at 60-69.

¹⁷⁶ See *supra* note 82.

¹⁷⁷ See Decision V/33, *supra* note 175, para. 1(a).

¹⁷⁸ See *ibid.*, paras. 1(e) and 1(f).

Declaration on ESM,¹⁷⁹ as well as a decision on waste minimization. The decision called on parties and other states to increase their efforts to reduce waste generation. It also encouraged parties to make efforts to “prevent or reduce” hazardous wastes generation in at least one key stream or through pilot projects and “to support partnerships between governmental authorities, industry, environmental groups and other stakeholders.”¹⁸⁰

Despite the declared commitment by parties and other states to waste minimization, there is no agreed definition of the term. Many actors, in particular environmental NGOs, have portrayed it as requiring the widespread implementation of cleaner production methods and technologies in order to avoid the generation of hazardous wastes. This interpretation is reflected in several COP decisions and in calls for the minimization of waste generation at source, which implies that hazardous wastes should, whenever possible, simply not be produced.¹⁸¹

More recently, a number of actors have put a greater emphasis on the role of recycling and recovery operations in waste minimization.¹⁸² This was evident at the seventh COP meeting, when participants considered elements for a draft ministerial declaration or COP decision on waste minimization, which had been drafted by the Basel Convention Secretariat. One of the proposed elements affirmed that the challenge of waste minimization was “to promote a fundamental shift in emphasis from landfilling of hazardous and other waste

¹⁷⁹ See Decision VI/1, “Strategic Plan for the implementation of the Basel Convention (to 2010),” in UNEP, “Report of the [sixth meeting of the COP] to the Basel Convention,” UN Doc. UNEP/CHW.6/40, Geneva (10 February 2003) [COP-6 report] at 34-35.

¹⁸⁰ See Decision VII/2, “Hazardous Waste Minimization,” in UNEP, “Report of the seventh meeting of the [COP] to the Basel Convention,” UN Doc. UNEP/CHW.7/33, Geneva (25 January 2005) [COP-7 report] at 29-30, online: <<http://www.basel.int/meetings/cop/cop7/docs/33eRep.doc>>.

¹⁸¹ See, for instance, Decision V/27, “Hazardous Waste Minimization,” in “COP-5 report,” *supra* note 143 at 55; Decision VII/2, *ibid.*, Pmbl., para. 1; and “COP-7 report,” *supra* note 180 at 19.

¹⁸² The United States (a non-party), Japan and Germany have been particularly vocal in supporting recycling as a way to minimize waste. See “COP-5 ENB report,” *supra* note 138 at 6, “Summary of the sixth COP [meeting] of the Basel Convention,” 20:12 *Earth Negotiations Bulletin* (16 December 2002) at 11 (additional notes taken by the author at the seventh COP meeting, Geneva, 25-29 October 2004).

to reduction at source, recovery, reuse and recycling.”¹⁸³ The representatives of a few OECD countries supported making a reference to “landfills,” arguing that what was key to fulfilling the goal of waste minimization was the diversion of hazardous wastes away from landfills. This, they claimed, could be achieved through increased recycling and recovery operations. Environmental NGOs and delegates from several developed and developing countries, however, preferred to avoid making a specific reference to landfills. They argued that the primary component of the waste minimization obligation was to *prevent* waste at source, and that this could only be achieved through the widespread implementation of cleaner production methods to avoid the generation of waste as much as possible.¹⁸⁴

The view that waste minimization requires a real shift to cleaner production in all countries would appear to be more progressive than the idea that waste reduction could be achieved primarily through increased recycling and recovery. Neither of the two approaches, however, addresses whether economic growth or consumption patterns in large parts of the world are sustainable. Instead, they focus on how to make production more efficient or “greener,” failing to ask what is the relationship between consumption and the waste problem (and more generally environmental degradation).¹⁸⁵ In other words, both approaches assume that the environment and human health can be effectively protected from the negative effects of hazardous wastes notwithstanding increasing consumption.

¹⁸³ UNEP, “Partnership for Meeting the Waste Challenge: Proposed Ministerial Statement or Possible Elements for a Decision,” UN Doc. UNEP/CHW.7/27/Add.1, Geneva (6 October 2004) at 2, online: <<http://www.basel.int/meetings/cop/cop7/docs/27a1e.doc>>. In the end, the COP adopted a decision rather than a ministerial declaration on hazardous waste minimization (see *supra* note 180).

¹⁸⁴ Notes taken by the author at the seventh COP meeting, Geneva, 25-29 October 2004.

¹⁸⁵ For further reading on this issue see Jennifer Clapp, “Distancing of Waste: Overconsumption in a Global Economy” (working paper, 2005) Trent International Political Economy Centre, online: <<http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.2005.10.10Clapp.pdf>>; Ken Conca, Thomas Princen and Michael F. Maniates, eds., *Confronting Consumption* (Cambridge, Mass.: MIT Press, 2002); and Ken Conca et. al, “Confronting Consumption” (2001) 1:3 *Global Environmental Politics* 1.

In fact, the idea that hazardous wastes should be reduced through cleaner production methods was not new at the time of the Basel Convention negotiations. As discussed in section 2 of Part II, the experts who drafted the Cairo Guidelines agreed that waste minimization involved not only the recycling and re-use of hazardous wastes but also the development and implementation of “low-waste” and even “non-waste” technologies. The idea that waste minimization required cleaner production was also recognised as a key component of waste management in the United States and some European countries and was reflected in their waste regulations by the mid-1980s.¹⁸⁶ The concept of clean technology was officially recognised by the EC Council of Ministers in 1979, after which the EC committed itself to a policy of reducing the wastes generated by certain industrial sectors, including the chemicals industry.¹⁸⁷ Furthermore, understood as the need for cleaner production technologies and processes, waste minimization has been accepted by some in the chemicals industry at least since the mid-1980s,¹⁸⁸ in recognition of the fact that it could provide an opportunity to avoid or reduce the high costs of disposal and offer a way to protect the industry’s image.¹⁸⁹

¹⁸⁶ These countries are the Federal Republic of Germany, the Netherlands, France and the United States. For details see Williams, *supra* note 11 at 186-199. In the United States, the *Hazardous and Solid Waste Management Amendments* [Pub. L. No. 98-616 98 Stat. 3221 (1984)], which amended the US RCRA (see “RCRA,” *supra* note 10), required the Environmental Protection Agency to submit to Congress by 1 October 1986 a report on the feasibility and desirability of any legislative changes to require hazardous waste generators to reduce the volume, quantity and toxicity of the hazardous waste they generated and implement the national policy established in the amendments. The policy declared that, whenever feasible, the generation of hazardous wastes was to be reduced or eliminated as expeditiously as possible. See Williams at 168 and Robert F. Blomquist, “Developing a Long-Term Waste Management Strategy: Beyond the EPA and OTA Reports: Toward A Comprehensive Theory and Approach to Hazardous Waste Reduction in America” (1987) 18 *Envtl. L.* 817 at 822-824.

¹⁸⁷ See Brice Lalonde (former French Minister of the Environment), “Reduction of Waste At Source” (1990) 14:3 *Marine Environment* 224 at 225.

¹⁸⁸ In its statement of principles for sound waste management (1985), for instance, the European Council of Chemical Manufacturer’s Federations (CEFIC) adopted as its first principle to “take all economically and technically justifiable measures to minimize generation of waste, through process optimization or re-design.” See Williams, *supra* note 11, at 236.

¹⁸⁹ Major french chemical manufacturer Rhône-Poulenc, for instance, developed policies of waste minimization that gave the highest priority to clean technologies in order to prevent the creation of pollution at source, followed by recycling and recovery as the next preferred alternatives and disposal as the last-resort method. The Director of Environmental Protection of the company mentioned as reasons for adopting this approach: the protection of the company’s image; the difficulty of establishing new facilities for treating and disposing of hazardous waste; and the economic impact of treatment, disposal and regulatory compliance costs. See Williams, *ibid.* at 237.

The Production and Consumption Branch of UNEP's Division of Technology Industry and Economics (DTIE) has articulated an interpretation of waste minimization that is consistent with that of industry,¹⁹⁰ revealing an unreserved readiness to embrace liberal economic approaches to tackling the waste problem. The branch not only equates waste minimization with cleaner production, but it also defines the latter as "a mentality of how goods and services are produced with the minimum environmental impact under present technological and economic limits."¹⁹¹ Furthermore, in the view of UNEP DTIE, cleaner production "does not deny growth, it merely insists that growth be ecologically sustainable. It should not be considered only as an environmental strategy, because it also relates to economic considerations."¹⁹² These views epitomize liberal environmentalism by portraying waste minimization as a "win-win strategy" that can protect the environment, the consumer and the worker, while at the same time improving industrial efficiency, profitability and competitiveness.¹⁹³ Since DTIE's interpretation of waste minimization presupposes economic growth, the issue of consumption is entirely overlooked.

UNEP Executive Director Klaus Töpfer has advocated a similar approach in the context of the Basel Convention. At the fifth meeting of the COP, Töpfer stressed that the prevention and minimization of hazardous waste generation required the world "to come step-by-step to an integrated life-cycle approach and to leave behind us the throw-away-based society, [an] approach that necessarily involve[d] the market economy by stimulating its sense of responsibility regarding the generation of wastes—its storage, transport,

¹⁹⁰ The purpose of the production and consumption branch of UNEP DTIE is to "promot[e] sustainable consumption and production patterns to contribute to human development *through the market*" (emphasis added). See UNEP Division of Technology, Industry, and Economics, (UNEP DTIE) "Branches," online: <<http://www.unep.fr/en/branches/index.htm>>. (Note: UNEP DTIE was created in 1998 as part of the re-organisation of UNEP in an attempt to provide integrated responses to industrial and urban issues. See "About DTIE," online: <<http://www.uneptie.org/division/dtie/about.htm>>).

¹⁹¹ See UNEP DTIE, Production and Consumption Branch, "Cleaner Production—key elements" (last visited 6 October 2007), online: <http://www.uneptie.org/pc/cp/understanding_cp/home.htm>.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

treatment, re-use, recycling, recovery and final disposal.” UNEP DTIE, he added, had “proven” that cleaner production measures were not only visions but “economically feasible as well [and that there were] lots of win-win situations [that had to be] single[d] out.”¹⁹⁴

A comparable picture was presented by the Basel Convention Secretariat and UNEP in a brochure that they issued in 2002. Among other things, the brochure states that “cleaner production processes can lower costs for manufacturers while reducing damages to the environment –a happy combination,” and that “many companies have already demonstrated that eliminating or reducing hazardous by-products can be both economically efficient and environmentally safe.”¹⁹⁵ Also in 2002, the World Summit on Sustainable Development expressed its commitment to “promot[ing] waste prevention and minimization by encouraging production of reusable consumer goods and biodegradable products and developing the infrastructure required,”¹⁹⁶ thereby reinforcing the notion that waste minimization requires nothing but changes in production.

A number of ENGOs have also adhered to the view that waste minimization can be equated with cleaner production. Despite their continued support for the ban amendment and their rejection of free trade when it comes to toxic waste, these organizations are contributing to widen and bolster the conviction that the hazardous waste problem can be tackled effectively within a liberal economic world order and irrespective of consumption. During the eighth COP meeting, for instance, the International POPs Elimination Network (IPEN) suggested that the solutions to the electronic waste or

¹⁹⁴ See UNEP, “Executive Director Töpfer’s Speech at the Ministerial Segment of the fifth [COP meeting] to the Basel Convention,” Basel, Switzerland (9 December 1999) at 3, online: <www.ban.org/COP5/toepfer-cop5.pdf>.

¹⁹⁵ UNEP and Basel Convention Secretariat, “Minimizing Hazardous wastes: A Simplified Guide to the Basel Convention” (first published in September 2002) [Waste Minimization Guide] at 6-7.

¹⁹⁶ See “Plan of Implementation of the World Summit on Sustainable Development (WSSD),” in UN, “Report of the [WSSD],” UN Doc. A/CONF.199/20, Johannesburg, South Africa (4 September 2002) [WSSD plan of implementation] paras. 3 and 22(b).

“e-waste” crisis were based on “right to know” and informed consumer choices, “the elimination of toxic ingredients in products,” vastly improved controls of e-waste exports to less developed countries and extended producer responsibility throughout the lifecycles of products, including designing products for longevity and efficacy rather than obsolescence.¹⁹⁷ In short, the solution lay in changes in production and the consumption of cleaner, “greener” products. As discussed in the previous section, the IUCN made a comparable statement when it suggested that the long-term problem of toxic waste generation could be solved through “upstream manufacturing processes.”¹⁹⁸

Most notably, at the eighth COP meeting the representative of BAN suggested that to “solve the problem” of e-waste required “tackling the crisis at its source.” There were “two primary reasons,” he suggested, for the e-waste crisis. The first was that we had come to accept as a “fact of life” that information technology (IT) equipment had to be hazardous, when in fact he had received information from industry that such equipment could be made “toxic free by the year 2015.” It was therefore “no longer a problem of technology but a question of will and consumer demand.” The second was the export of e-waste from rich developed countries to developing countries, which not only victimized and exploited the poor but also ensured that we would “not achieve green design by creating disincentives for upstream responsibility.” The solution lay in tackling these two problems by putting an end to “economically-driven exports” from developed to developing countries and by promoting “drivers” for ensuring a “near-term future” in which “all IT equipment [was] non-hazardous, [wa]s designed for longevity, and [wa]s also designed for the safest and most efficient re-use and recycling.”¹⁹⁹ Again, the proposed solutions focused exclusively on cleaner production and improved

¹⁹⁷ Statement of IPEN at the eighth COP meeting of the Basel Convention (distributed during the meeting).

¹⁹⁸ *Ibid.*

¹⁹⁹ See BAN, “Statement at the Global e-Waste Forum” (COP-8) (1 December 2006), online: <http://www.ban.org/cop8/061201_ban_statement.html>.

design, implying that technological improvements and export controls would be sufficient to solve the hazardous waste problem.

What is most remarkable about BAN's statement at the eighth COP meeting is that, in a briefing paper made available to participants at the same meeting, BAN criticized industry's focus on recycling because it failed to address over-consumption. The subject of the briefing paper was a "3R Initiative" approved by the industrialised countries of the G8 in June 2004. The "3R initiative," initially launched by the government of Japan, calls for the reduction, reuse and recycling of wastes (thus the three "Rs") as a way to use materials and resources more efficiently and thereby minimize waste.²⁰⁰

In the paper, BAN expressed concern that one of the primary goals of the "3R Initiative" endorsed by the G8 was to "reduce barriers to the international flow of goods and materials for recycling and remanufacturing,"²⁰¹ which it claimed could lead to increased exports of hazardous wastes (and e-wastes in particular) for recycling to developing countries.²⁰² BAN also argued that the initiative focused almost entirely on recycling, which it argued was "far from being the best solution in comparison to the first 2Rs," reduction and reuse, as it could not "address issues of over-consumption and profligate wastefulness." If recycling was being embraced by industry, BAN argued, it was because it "mask[ed] problems of over-consumption, short lived products and the throw-away society, while seemingly offering a solution and a green cloaking to business-as-usual."²⁰³ Despite these remarks on the consumption side of the waste problem, BAN chose to focus on production, not consumption, in its address to the parties at the eighth COP meeting. In doing so, it suggested that

²⁰⁰ See Ministry of Environment of Japan, "The 3R Initiative," online: <<http://www.env.go.jp/recycle/3r/en/outline.html>> (Last visited 7 August 2007) and UNEP, "Strategic Elements in Implementing the 3R Platform: UNEP's Contribution" (undated), online: <http://www.unep.or.jp/ietc/SPC/3R_Strategic_Elements.pdf> (last visited 5 August 2007).

²⁰¹ BAN, "The 3R Initiative: A Mask for Toxic Trade?" (April 2006) at 1, online: <http://www.ban.org/Library/briefingp9_april2006.pdf>.

²⁰² *Ibid.* at 2.

²⁰³ *Ibid.*

the problem was not that the quantity of IT equipment was increasing spectacularly, but that the equipment was currently toxic.

The reason why some ENGOs such as BAN have decided to focus on the qualitative (the hazardousness of what we consume) rather than the quantitative (*how much* we consume) aspect of the waste problem facing the Basel Convention is that they see the elimination of toxics in products as a more attainable goal. According to a representative of BAN, if some ENGOs have made it a priority to rid the world of toxics first it is because that goal is “imminently achievable in a short time frame.” Not only does it have the support of industry, which would be happy to become “greener” while still selling the same amount of product, but market-based mechanisms such as eco-labelling and extended producer responsibility schemes could be used to achieve it.²⁰⁴ On the basis that minimizing consumption is “far more difficult” to achieve, since “harnessing market forces with our current ownership society would be impossible, as the market success is based on ever increasing consumption rates,” these ENGOs have adopted as their “first priority” to “stop putting persistent pollutants into the environment.” Even though they recognise that this approach may be “problematic” because the quantity of consumption might also be a serious problem, these ENGOs have decided to focus on production.²⁰⁵

The statement above suggests that the liberal economic perspective is not accepted by all actors and that the potential therefore exists for redefining waste minimization under the Basel Convention in ways that pose a direct challenge to current consumption patterns and liberal economics. The

²⁰⁴ Interview with a representative of the Basel Action Network, 8 August 2007.

²⁰⁵ According to a representative of BAN, tackling consumption would require considering new ways of using products, for instance through the leasing of equipment and products from companies that manage the entire life cycle of those products. If such a scheme became the norm, such companies would have incentives to make the hardware last as long as possible and to design hardware that was upgradable and adaptable to new software and anticipated technological advances. To create such incentives, however, we would have to rely on “command and control legislation to mandate products meet a certain standard of longevity,” which so far has been seen as a “radical step against capitalism.” *Ibid.*

statement also suggests, however, that the liberal economic perspective is indeed hegemonic in the Basel Convention, since even those who do not see liberal economic norms as desirable or acceptable have chosen to avoid presenting proposals that directly challenge those norms because they see them as unrealistic or unachievable. The irony is that, by focusing on what they see as more achievable goals, those ENGOs who are seeking to gain influence by focusing on production are helping to divert attention from the consumption aspect of the waste problem. In doing so, they are contributing to reinforce the belief that waste minimization can be achieved irrespective of the amount of consumption and thus that the hazardous waste crisis can be effectively addressed *within* a liberal economic world order. This belief, in turn, makes it less likely that parties will understand waste minimization as requiring radical changes in consumption.

As discussed in the next section, the increased participation of industry in the implementation of the Basel Convention also promises to reinforce the view that waste minimization requires nothing but changes in production methods. Furthermore, the widespread acceptance of industry's greater role in the Convention's implementation is another indication of the extent to which actors are embracing liberal environmentalism in the Basel Convention.

d) The Partnership Approach and the Role of Industry

Since their fifth meeting, parties have been discussing the need for partnerships with industry and environmental NGOs to promote the implementation of the Basel Convention. The interest in partnerships, in particular with industry, was triggered by the need to mobilize resources needed to achieve the Convention's goals, in particular the environmentally sound management (ESM) and minimization of hazardous wastes. Since the renewed interest by parties in these goals was not matched by commitments from governments to provide new funds to implement them, the idea that

industry could get involved in the Convention's implementation was generally welcomed.²⁰⁶

UNEP and the Basel Convention Secretariat, for instance, have expressed the view that the relationship with industry should be strengthened because industry is partly responsible for the wastes that are generated and because "only industry has the tools, technologies and financial resources for minimizing these wastes, managing them better and helping destroy old stocks."²⁰⁷ Similarly, at the sixth COP meeting, the representative of Switzerland (who presided over the fifth COP meeting) said that the Basel Convention "needed to work in partnership with the private sector, since it could not achieve its objectives without having recourse to the resources and expertise of industry."²⁰⁸

In the decision that set the ESM agenda for the next decade, which was adopted at the fifth COP meeting in 1999, parties resolved that one of the key fields in which activities should be undertaken to achieve the objectives of ESM was "cooperation and partnership at all levels between countries, public authorities, international organizations, the industry sector, non-governmental organizations and academic institutions."²⁰⁹ In order to pursue that objective, they adopted another decision on cooperation with environmental NGOs and with the industry and business sectors. The decision requested the Basel Convention Secretariat, in close collaboration with the Basel Convention regional centres, "to explore ways and means of establishing partnerships with the industry sector and with [NGOs], with a view to promoting and improving

²⁰⁶ See "Summary of the seventh COP [meeting] of the Basel Convention," 20:18 *Earth Negotiations Bulletin* (1 November 2004) at 8, 10 and 11.

²⁰⁷ "Waste Minimization Guide," *supra* note 195 at 7.

²⁰⁸ "COP-6 report," *supra* note 179 at 26.

²⁰⁹ Decision V/33, *supra* note 175, para. 1(h). The activities included the enhancement of partnership with all stakeholders and "the facilitation of partnerships, in particular with industry, for the development of minimization methods and environmentally sound waste-management solutions." See *ibid.*

the management and minimization of such wastes, as well as to promoting awareness on hazardous waste issues.”²¹⁰

The role of partnerships in achieving the goals of sustainable development was also strongly emphasized by participants at the 2002 World Summit on Sustainable Development (WSSD), held shortly before the sixth COP meeting of the Basel Convention. Participants at the WSSD made a specific commitment to “encourage partnerships” to promote activities aimed at enhancing the ESM of chemicals and hazardous wastes and implementing multilateral environmental agreements such as the Basel Convention.²¹¹

In line with the WSSD outcome concerning the need for partnerships, at the sixth COP meeting of the Basel Convention parties decided that partnerships were necessary to achieve the aims of the Convention. Thus, they adopted a decision on partnerships with ENGOs and the industry and business sectors requesting the Convention’s Secretariat to prepare a work programme for such cooperation. The decision placed a special emphasis on partnership with the private sector and included draft elements of a framework for cooperation with industry.²¹² On the basis of that decision and comments provided by both ENGOs and industry, the Secretariat prepared a partnership programme work plan that was adopted by the COP at its seventh meeting.²¹³

The partnership programme work plan is worthy of consideration because, while it purports to address the issue of consumption and suggests that the Basel Convention could contribute to changing consumption patterns, it focuses entirely on the production side of the waste problem. The work plan

²¹⁰ Decision V/13, “Cooperation with Environmental Non-Governmental Organizations and with the Industry and Business Sectors,” para. 3, in “COP-5 report,” *supra* note 143 at 42.

²¹¹ See “WSSD plan of implementation,” *supra* note 196, paras. 3 and 23(d), online: <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>.

²¹² See Decision VI/32, Pmbl., paras. 7 and 8 and Appendix, in “COP-6 report,” *supra* note 179 at 151-152.

²¹³ See Decision VII/3, “Basel Convention Partnership Programme,” Annex (Basel Convention Partnership Programme: 2005–2006 work plan), in “COP-7 report,” *supra* note 180 at 30-33 (Australia, Japan and Switzerland provided funding for the programme).

affirms that “alternative development models do exist,” yet what follows is simply the assertion that “industry and governments have begun to embrace cleaner production technologies and extended producer liability, which provides built-in incentives for greener, less wasteful production and products.” Similarly, the document claims that the Basel Convention has a role to play in “changing consumption patterns,” but suggests that this role has to do with promoting “effective life cycle management of materials and products,” rather than reducing consumption. The challenge is therefore not to limit growth, but “to find and develop practical, sustainable solutions to de-link economic development and the waste it traditionally generates.”²¹⁴

Not surprisingly, the first and thus far only partnership between the Basel Convention and industry, the “mobile phone partnership initiative” (MPPI), focuses exclusively on how to make production more efficient and cleaner.²¹⁵ As discussed in the next section, the fact that the MPPI has been widely embraced as a model for future partnerships reveals the extent to which parties and other actors have received liberal environmentalism in the context of the Basel Convention. The MPPI also shows that the increased participation of industry in the implementation of the Convention is likely to reinforce the hegemony of the liberal economic perspective, in particular the notion that waste minimization can be achieved through changes in production only.

i) The Mobile Phone Partnership Initiative (MPPI)

At the sixth COP meeting of the Basel Convention, parties decided to launch a partnership with ten mobile phone manufacturers for the environmentally sound management of end-of-life mobile phones. At the suggestion of the

²¹⁴ See Decision VII/3, *ibid.*, Annex, paras. B (5) and B (6).

²¹⁵ At its ninth meeting, the COP is expected to launch two new global partnerships on the environmentally sound management (ESM) of used and end-of-life computing equipment and on the ESM of electronic wastes, respectively. See UNEP, “Implementation of Decisions VIII/2 and VIII/5 on Strategic Partnerships for Electrical and Electronic Wastes and Used and End-of-life Computing Equipment,” UN Doc. UNEP/CHW/OEWG/6/20, Geneva, Switzerland (25 July 2007) at 1.

representative of Switzerland, a small group of experts was established to consider a work programme setting priorities and identifying specific programmes for the environmentally sound management of end-of-life mobile phones, taking into account the “fields of common interest for cooperative work identified in the announcement by the mobile phone manufacturers.”²¹⁶ In their announcement, mobile phone manufacturers had declared their intention, among other things, to “promote the sound management of end-of-life mobile phones with the aim of protecting human health and the environment” and to “take all reasonable steps for ensuring responsible design and manufacturing and contribute towards products’ stewardship.”²¹⁷

Once established, the mobile phone working group (MPWG)²¹⁸ created four subgroups that produced guidelines on five key issues: awareness-raising design considerations, collection of used mobile phones, material recovery and recycling of end-of-life mobile phones, refurbishment of used mobile phones and transboundary movement of used and end-of-life mobile phones.²¹⁹ In the guideline on “Awareness-Raising Design Considerations,”²²⁰ the MPWG asserts that mobile phone product design can play a role in achieving the Basel Convention’s goal of waste minimization “through design for longevity, re-use, and reduced material use and toxic input.”²²¹ The guideline then makes

²¹⁶ See Decision VI/31, “Sustainable Partnership for the [ESM] of End-of-life Mobile Telephones,” Appendix, paras. 1 and 2, in “COP-6 report,” *supra* note 179 at 150.

²¹⁷ *Ibid.*

²¹⁸ The members of the MPWG are: Belarus, Brazil, Canada, Czech Republic, Germany, Japan, Sweden, Switzerland (Chair) and the United States (a non-party); the Basel Convention regional centres located in Pretoria and Beijing; the Secretariat of the Basel Convention; LG, Matsushita Panasonic, Mitsubishi, Motorola, NEC Europe, Nokia, Philips, Samsung, Siemens and Sony Ericsson. See Mobile Phone Partnership Initiative, “Report of the first meeting of the Mobile Phone Working Group,” Geneva (7-8 April 2003) at 1, online: <http://www.basel.int/industry/mppiwp/reports/REPORT_3.doc>.

²¹⁹ The guidelines were approved by the parties at the eighth COP meeting. See UNEP, “Mobile Phone Partnership Initiative: Progress Report,” UN Doc. UNEP/CHW/OEWG/4/INF/14, Geneva (9 June 2005) [MPPI report OEWG-4] at 4-5 and Decision VIII/6, “Mobile Phone Partnership Initiative,” in “COP-8 report,” *supra* note 142 at 33.

²²⁰ The project group that produced the guideline included experts from mobile phone companies, governments, environmental NGOs, academia, network service providers and recycling industries. See “MPPI report OEWG-4,” *ibid.* at 4.

²²¹ Mobile Phone Working Group, “Guideline on the Awareness Raising-Design Considerations” (Approved draft) (20 March 2006) at 7, online: <<http://www.basel.int/industry/mppiwp/guid-info/guiddesign.pdf>>.

a number of recommendations, all of which concern production and design. They include avoiding unnecessary generation of waste from mobile phones,²²² improving energy efficiency in order to prolong the life of mobile phones, improving mobile phone design to allow for reuse and recycling and considering the feasibility of eliminating toxic substances in mobile phones.²²³ Most notably, the guideline calls on manufacturers to adopt a “life-cycle thinking” approach so that environmental considerations are brought “into the multitude of decisions that are made for any product and any activity, by manufacturers, by consumers and by civil society.” A life-cycle thinking approach entails, for instance, considering “the environmental consequences of advertising phones as ‘disposable.’”²²⁴

What is interesting, albeit entirely unsurprising, about the guideline is that while it recognises that the increased and ever growing use of mobile phones worldwide presents an enormous challenge, it takes that growth for granted and focuses only on how to improve phone design.²²⁵ Thus, while it notes that “there are now more than a billion phones to consider” and that the future promises “even greater and widespread use,” it depicts the adoption of “Life Cycle Thinking to prepare for their manufacture, lifetime use, and end of life” as the solution. End-of-life design, it goes on, “must now take a view toward easing the collection of hundreds of millions of phones each year [...] as well as toward further reduction of toxic substances, greater steps to make reuse, refurbishment and recycling easier and extending the life of products and reusable components which are then recovered.” The final conclusion of the guideline is that the application of “Life Cycle Thinking” by all manufacturers will deliver “the promise of mobile telephony, bringing

²²² It notes, for instance, that some technical incompatibilities among manufacturers appear to be unnecessary and give rise to excess waste, such as when consumers discard mobile phones when changing service providers. See *ibid.* at 11-13.

²²³ See *ibid.* at 13-19.

²²⁴ *Ibid.* at 20.

²²⁵ See *ibid.* at 10-11.

personal communications to all [in a way that] will be environmentally sustainable for the future.”²²⁶

The intention of this analysis is not to oppose the MPPI, which may indeed have a positive impact on the production of mobile phones if the guidelines are widely implemented.²²⁷ The purpose is rather to show the implications of relying on public-private partnerships for the implementation of the key goals of the Basel Convention, in particular the minimization of hazardous waste generation. While partnerships with industry could help promote the ESM and disposal of hazardous wastes and result in improvements in design and recycling of various waste streams, they also bring parties further and further away from tackling or even discussing the issue of consumption. Because the success of the market depends on ever-increasing consumption rates, industry cannot be expected to go against its own interests by suggesting that consumption needs to be curtailed. Mobile phone manufacturers are prepared to deal with the characteristics of their product to make it safer, but they cannot be expected to question whether the *quantity* of mobile phones on the market is environmentally sustainable, or to consider how to influence consumers’ choices through awareness campaigns aimed at convincing them *not to buy* mobile phones.

The limits of what can be achieved through partnerships with industry can be seen in the awareness-raising component of the MPPI, which purports to seek to “influence consumer behaviour towards more environmentally friendly actions.”²²⁸ Predictably, the group that was asked to produce the awareness-raising guidelines did not see the increasing consumption of mobile phones as part of the problem to be addressed. Instead, it saw its work as relating to the provision of “information to consumers to assure them that the

²²⁶ *Ibid.* at 22.

²²⁷ The MPPI guidelines are expected to result in the implementation of various pilot projects. See Decision VIII/5, “Basel Convention Partnership Programme” (Annex), in “COP-8 report,” *supra* note 142 at 29.

²²⁸ See MPWG, “Guidance Document on the [ESM] of Used and End-of-life Mobile Phones,” para. 29, online: <www.basel.int/industry/mppi/MPPI%20Guidance%20Document.doc>.

way the current mobile phones [we]re designed they d[id] not pose any effects on health of consumers” and the suggestion of “design features for new mobile phones that would facilitate their extended use and improve their end-of-life recycling and material recovery with economic efficiency and minimal environmental impact.”²²⁹ Consistent with this view, the guidelines fail to address the issue of the growing consumption of mobile phones.

Partnerships with industry are likely to divert attention from the issue of consumption because they reinforce the view that the solution lies in cleaner production and better design. Thus, while many participants have expressed concern about the exponential growth in mobile phone use, in particular in developing countries, they have generally embraced the MPPI as the key answer to the mobile phone waste problem.²³⁰ Meanwhile, mobile phones are increasingly seen as a necessity worldwide and their use by consumers continues to grow spectacularly.²³¹ A similar outcome can be expected of two new global partnerships, one on used and end-of-life computing equipment and another on electronic wastes, which the parties to the Basel Convention are expected to launch at their ninth meeting, to be held in 2009.²³²

IV. Conclusion

This chapter has attempted to show that while the parties to the Basel Convention have adopted a decision that overtly counters liberal economics

²²⁹ See “MPPI report OEWG-4,” *supra* note 219 at 4.

²³⁰ See UNEP, “Report of the Open-ended Working Group of the Basel Convention,” UN Doc. UNEP/CHW/OEWG/5/5, Geneva (7 April 2006) at 5; “COP-7 report,” *supra* note 180 at 22 (additional notes taken by the author during the meeting); and “COP-8 report,” *supra* note 142 at 2-3.

²³¹ According to the Gartner Group, the world’s largest information technology research and advisory company, mobile-phone sales worldwide will reach 1 billion units by 2009, while in May 2005 the International Telecommunication Union in Geneva reported that about 20 percent of the global population was at the time using mobile phones, compared with 0.3 percent in 1991. See United Press International, “Emerging markets pushing cell-phone growth” (21 July 2005), online: <<http://www.physorg.com/news5335.html>> and Kevin Maney, “A very different future is calling—on billions of cell phones,” *USA Today* (26 July 2005), online: <http://www.usatoday.com/money/industries/technology/maney/2005-07-26-cell-phones_x.htm>.

by banning hazardous waste exports from rich to poor countries, they have otherwise embraced liberal environmentalism in the interpretation of the Convention and, in some cases, have worked to limit the impact of the ban on exports. The adoption of the ban was the result of a highly morally loaded and politically charged environment that put pressure on negotiators to accept the basic principle that toxic waste (including contaminated recyclable waste) should not be traded freely. That principle, however, has never been accepted by a number of key actors who have consistently defended the application of international trade principles to the Basel Convention. These participants, including the countries of JUSCANZ and industry representatives (most notably the ICC and the recycling industry), have found various ways to undermine the ban and reopen the debate to renegotiate its terms, in particular by attempting to modify the list of countries to which the ban applies. These actors are part of the “transnational historical bloc” that, as discussed in Chapter 1, is pushing for a more open world economy.

Environmental NGOs and several governments (including those of the countries of the EU) have expressed their support for the ban amendment, suggesting that the liberal economic perspective is by no means uncontested in the context of the Basel Convention. On the other hand, the debate concerning the ban reveals that its support by developing countries, who initially advocated it, has receded considerably. While only a few developing countries (most notably India) have explicitly opposed the ban amendment on the grounds that it contradicts key principles of international trade and economic efficiency, many others have remained silent when the ban has come under attack and at least one of them is facing internal difficulties with ratifying the ban amendment due to economic considerations. This change in positions evidences a greater embrace of liberal environmentalism in the latter stages of the Basel Convention’s ongoing evolution.

²³² See *supra* note 215 and Decision VIII/5, *supra* note 227 at 29-30 (two regional partnerships are also planned to deal with e-wastes in the Asia-Pacific region and in South America).

While some ENGOs have consistently and vociferously defended the ban, they also appear to have adhered to the widely agreed view that waste minimization requires nothing but changes in production. By suggesting that technological improvements to make production cleaner and products “greener” are all that is required to reduce hazardous waste generation, these actors are helping to reinforce the belief that the hazardous waste problem can be addressed effectively within a world economic order that presupposes continued economic growth (i.e., ever-greater consumption) in all countries, including those that are already highly industrialized.

The decision by some ENGOs to operate within a liberal economic framework to achieve the goal of waste minimization does not mean that they have necessarily internalized or fully accepted liberal economic principles, as the paper on the 3R initiative by the Basel Action Network reveals. It does suggest, however, that the liberal economic perspective is playing a hegemonic role in the Basel Convention. As discussed in Chapter 1, hegemony does not imply a lack of contestation but that, for “practical purposes, alternatives are not fully considered because they lack weight, plausibility, credibility or practical effectiveness.”²³³ The behaviour of a number of ENGOs in the Basel Convention suggests that liberal environmentalism is hegemonic because even those actors who recognize the need to tackle consumption in the Basel Convention have decided not to do so because of a perceived need to be realistic and practical. Because reducing the amount of consumption is much harder to do and is not something that is likely to resonate well with governments or industry, these actors have decided to limit themselves to calling for changes in production to ensure that whatever is produced is produced in the cleanest way possible and that the products that industry sells are “greener.” While cleaner production might indeed contribute to reducing hazardous waste generation, the focus exclusively on production contributes to diverting attention from the issue of

²³³ Stephen Gill, *Power and Resistance in the New World Order* (NY: Palgrave MacMillan, 2003) at 169.

consumption and the possible causal relationship between liberal economics and the global waste problem.

The increased role of industry in the implementation of the Basel Convention through partnerships and the widespread acceptance of this approach by the parties and ENGOs also indicates a greater embrace of liberal environmentalism in the Convention and promises to divert attention ever farther from the consumption aspect of the global waste problem. Some participants may have decided to welcome a greater role for industry because it possesses the resources and expertise that the Convention requires and parties do not seem willing or able to provide. The widespread support for the partnership approach, however, has given industry a unique opportunity to further the characterization of waste minimization as cleaner production and improved waste management and thereby frame the global waste crisis as a matter of better production rather than less consumption. This can already be seen in the context of the mobile phone partnership initiative (MPPI), which predictably did nothing to tackle consumption and was widely praised by many parties, UNEP and other participants as the solution to the waste-related problems resulting from the spectacular increase in mobile phone use worldwide. If things continue in a similar manner, it is likely that the future will see more public/private partnerships such as the MPPI, including on electronic wastes and computers. It is also predictable that this and other manifestations of the increasing influence of industry and liberal economic norms will make it less likely that parties will address the issue of consumption under the aegis of the Convention and thus tackle *all* key aspects of the global waste crisis.

Chapter 3

The Rotterdam Convention on Hazardous Chemicals

I. Introduction

The subject of this chapter is the “Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.”¹ The treaty was adopted in 1998 and it entered into force on February 24, 2004. In essence, it provides for a system of information exchange and prior informed consent (PIC) that gives countries the opportunity to refuse in advance the import of a number of hazardous chemicals banned or strictly controlled in other countries for environmental or health reasons. The chapter argues that the acceptance of liberal economic norms in the Rotterdam Convention has been almost complete. This is largely because governments decided that the mandate of the negotiators that drafted the treaty should be restricted to making legally binding a voluntary PIC procedure that had been established in the late 1980s. The decision to limit the treaty to PIC and information exchange not only precluded the possibility of adopting trade bans or production phase-outs for the chemicals subject to the Convention, but also the prospect of debating chemicals management-related issues that could have presented a challenge to the liberal economic perspective. A PIC-focused approach prevented, for instance, a debate on possible commitments to reduce or work towards eliminating the use of hazardous chemicals in agriculture. It also made it possible for actors to insist that, like the voluntary PIC procedure, the Rotterdam Convention should incorporate key principles of international trade.

¹ *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, UN Doc. UNEP/FAO/PIC/CONF/2, 38 I.L.M. 1 (1999), (entered into force 24 February 2004) [Rotterdam Convention], online: <<http://www.pic.int/en/ViewPage.asp?id=104>>.

Even though the Rotterdam Convention is consistent with international trade norms, the chapter argues that there is one way in which the Convention could be used to challenge liberal economics. Because many actors see the list of substances subject to the PIC procedure as a “blacklist” of chemicals that should be banned in all countries, the Convention could eventually bring about de facto global phase-outs of hazardous chemicals included on that list. This would impose limits on the production, trading and use of a potentially very large and varied number of chemicals. Nevertheless, this possibility is significantly constrained by the fact that the Convention requires the adoption of any decision to add a new chemical to the PIC list by consensus, a voting rule that was most enthusiastically defended by those who supported liberal economic norms in the context of the multiple efforts to deal with hazardous chemicals that preceded the Convention. This voting rule, it will be shown, is already being used by some parties to prevent chemicals of commercial significance from entering the PIC list.

The decision to limit the scope of the Rotterdam Convention, it is further claimed, was the product of a succession of events in which a number of key actors succeeded in establishing that the problems caused by hazardous chemicals traded internationally should be addressed in terms that were consistent with international trade law. When the opportunity arose to expand the scope of the Rotterdam Convention beyond PIC to include bans and phase-outs of certain chemicals, governments decided that the future convention should be limited to PIC and related matters. This was due to at least four reasons. First, the principles of international trade reflected in the voluntary PIC system were reflected in widely accepted “soft law” instruments dealing with hazardous chemicals, in particular Agenda 21. Thus, even though some governments wanted the PIC treaty to include additional measures for certain PIC chemicals that had “global” effects, even they agreed that the trading of other PIC chemicals should be controlled but allowed. Second, most industrialised countries had relatively little stake in the issue to

be tackled given that the negative effects of the chemicals that were regulated under the voluntary system were felt primarily where they were used, for the most part in developing countries. Persistent organic pollutants (POPs) were an important exception, but the concerns of a few developed countries that wanted to extend the scope of the PIC convention to take more stringent measures on POPs were eased when it became clear that a separate POPs convention would soon be negotiated. The third element is connected to the first two. In the absence of scandals similar to those that fuelled the Basel Convention negotiations to generate public support for stronger action, there was no pressure on donors to commit additional funds for the implementation of a convention that would benefit primarily developing countries. Sensing that a PIC convention would be challenging enough to implement, most developing countries focused their efforts on calling for financial and technical assistance, rather than on supporting proposals to widen the treaty's scope to take in additional measures. Lastly, unlike the widespread public perception of hazardous wastes as harmful, hazardous chemicals were generally seen as useful and even necessary in some cases. In addition, some hazardous chemicals were being produced in developing countries by multinational corporations or, in a few cases, by national industries. In view of these circumstances, very few actors called for bans on the export of chemicals banned or severely restricted for use in exporting countries.

Because the decision to restrict the convention to PIC restricted the debate in decisive ways, much of this chapter is dedicated to the various discussions that brought about that decision, including the sequence of initiatives that lay the ground for a legally binding PIC instrument. Part II examines the circumstances that prompted governments and other actors to deal with certain chemicals traded internationally at the multilateral level. It also looks at the antecedents of the Rotterdam Convention, in particular the two voluntary instruments on information exchange and PIC adopted in the late 1980s that formed its basis, as well as a recommendation by the Organisation for

Economic Co-operation and Development (OECD) that exerted a powerful influence on how those two instruments were built. Part III studies the negotiations that led to the adoption of the Rotterdam Convention in 1998, focusing on a few issues that are relevant to this study, including the debate regarding the scope of the treaty and its relationship with international trade norms. Part IV outlines a number of key provisions of the Rotterdam Convention. The last part makes some concluding remarks and summarizes the argument of the chapter.

II. Antecedents

1. What are Hazardous Chemicals?

Hazardous chemicals can be defined as industrial chemicals and chemical pesticides that in small doses can cause significant harm to the environment or human health.² They can pollute water, air and soil and destroy fauna and flora, and some of them persist in the environment for a long period of time and accumulate in the food chain.³ Impacts on health can be both acute and chronic. Acute effects include skin burns, paralysis, blurred vision, blindness and death, while chronic effects include neurological damage, endocrine disruption, reproductive damage, birth defects, cancer, immune system suppression, kidney damage and lung and heart disease.⁴

² See Lakshman D. Guruswamy & Brent R. Hendricks, *International Environmental Law in a Nutshell* (St. Paul, Minn.: West Pub. Co., 1997) at 190. Industrial chemicals are chemical compounds used or produced by industry, while pesticides are substances intended to prevent, destroy or control pests, such as vectors of human or animal disease and unwanted species of plants or animals. For details see Paula Barrios, "The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Towards Environmental Protection?" (2004) 4:16 *Georg. Int'l. Env't'l. L. Rev.* 679 at 683-684.

³ Organochlorines, for instance, persist in the environment and accumulate in fatty tissue of animals, reaching the greatest magnitudes in predatory birds and mammals. Bioaccumulation means an increase in the concentration of a chemical in a biological organism over time compared to the chemical's concentration in the environment (e.g., some POPs present in water can bioconcentrate in the fatty tissue of fish by factors up to 70,000 times their concentration in the water column). See Resource Futures International, "[POPs] and the Stockholm Convention: A Resource Guide" (Draft presented at the Forum "Implementing the Stockholm Convention," Vancouver, Canada, 11-12 March 2002) at 2.

⁴ See Barrios, *supra* note 2 at 683-691.

The spectacular increase in the production of chemicals since the middle of the twentieth century and public concern about their possible risks⁵ led governments in most industrialised countries to enact regulations dealing with the registration, testing, production, distribution and sale of chemicals by the mid 1970s.⁶ Many chemicals were also banned or severely restricted for domestic use in these countries, but regulations were silent or lenient with regard to exports. This legal loophole allowed major chemical manufacturers based in developed countries to continue producing domestically restricted or banned chemicals for export to developing countries. The recipient countries needed low-priced pesticides to sustain export agriculture or control vector-borne diseases, but they also had less stringent environmental and health regulations, were less aware of the risks involved and had very limited capacity to ensure that users would handle the imported chemicals safely. It is thus unsurprising that the risks to human health and the environment magnified when those chemicals were used in developing countries.⁷

In the 1970s, international trade in chemical substances grew at an exponential rate, rising more than fourfold between 1970 and 1978.⁸ In the same period, exports of chemical products (including pharmaceuticals,

⁵ In 1978, UNEP estimated that there were four million identified chemical substances and that the value of chemical sales exceeded \$300 billion per year, with some 1000 chemicals being brought onto the market every year. See UNEP, "The Environment Programme: Report by the Executive Director," UN Doc. UNEP/GC.6/7, Nairobi, Kenya (20 February 1978) [Environment Programme] at 51.

⁶ See, for instance, *Toxic Substances Control Act*, 15 U.S.C. § 2601 (1976) and *Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA), 7 U.S.C. § 136 et seq. (1996), which regulate industrial chemicals and pesticides, respectively, in the United States, and Council Directive 67/548/EEC, which introduced common provisions on the classification, packaging and labelling of dangerous substances within the European Community and was amended in 1979 to introduce a notification system for new substances to be marketed in the Community (EC, *Council Directive 67/548/EEC 27 June 1967 on the Approximation of Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances*, [1967] O.J. L 196 at 1 and EC, *Council Directive 79/831/EEC of 18 September 1979, amending for the sixth time Directive 67/548/EEC*, [1979] O.J. L 259 at 10, online: <http://ec.europa.eu/environment/dansub/home_en.htm>).

⁷ See Barrios, *supra* note 2 at 684-688; The Pesticides Trust, *The Pesticide Hazard: A Global Health and Environmental Audit*, compiled by Barbara Dinham (London: Zed Books, 1993) at 38-63; and Karen A. Goldberg, "Efforts to Prevent Misuse of Pesticides Exported to Developing Countries: Progressing Beyond Regulation and Notification" (1985) 12:4 *Ecology Law Quarterly* 1025 at 1025-1031.

⁸ See Ruth Norris, ed., *Pills, Pesticides and Profits: the International Trade in Toxic Substances* (North River Press: NY, 1982) at 1.

pesticides and industrial chemicals) from developed to developing countries rose nearly five hundred percent, partly as a result of the introduction of large-scale western agricultural technologies to many traditional farming societies in developing countries in the 1960s.⁹ In 1973, the World Health Organization (WHO) estimated that about five hundred thousand cases of accidental poisoning by pesticides occurred every year, half of them in developing countries.¹⁰ A 1990 study by WHO based on hospital data indicated that there were about one million accidental poisonings and twenty thousand deaths due to pesticides every year, primarily in developing countries.¹¹ Agricultural reviews calculated considerably higher numbers.¹² A 1990 survey by WHO in the Asian region, for instance, concluded that there could be as many as twenty-five million agricultural workers in the developing world suffering from an episode of poisoning each year.¹³ More recently, in 2002, the Food and Agriculture Organization of the United Nations (FAO) reported that although more than eighty percent of the world's pesticides are applied in developed countries, about ninety-nine percent of all poisonings occur in developing countries, where regulatory, health and education systems are weakest.¹⁴

⁹ See *ibid.* at 1-2 and 7.

¹⁰ See WHO, "Safe Use of Pesticides," 20th report of the WHO Expert Committee on Insecticides, Technical Report Series No. 513 (1973), Geneva.

¹¹ See J. Jeyaratnam, "Acute Pesticide Poisoning: A Major Global Health Problem" (1990) 43 *World Health Statistics Quarterly* 139 at 143. While the pesticide market in developed countries is dominated by herbicides, most developing countries are greater consumers of insecticides, which are generally more toxic. The great majority of accidental intoxications can be attributed to two groups of insecticides: organophosphates and carbamates, which inhibit the action of an enzyme that is essential to the proper functioning of the nervous system. Organochlorines are usually not acutely toxic, but many of them persist in the environment for a long period of time and accumulate in the food chain (i.e., they are POPs) and can thus affect the environment or health over time. For details see Barrios, *supra* note 2 at 686-688.

¹² This is because hospital data usually record only the gravest cases and many poisoning incidents in developing countries are not reported. See World Resources Institute, UNEP, UNDP, World Bank, *World Resources 1998-1999* (N.Y.; Oxford: Oxford U. Press, 1998) at 44. Several developing country representatives raised the problem of under-reporting of pesticide poisoning incidents at the fourth session of the Intergovernmental Forum on Chemical Safety (IFCS), held in Bangkok, Thailand from 1-7 November 2003 (notes taken by the author during the meeting).

¹³ The basis for this estimate was that on average 3% of farmers among 830 million agricultural workers in developing countries suffered an episode of pesticide poisoning each year. See Jeyaratnam, *supra* note 11 at 141 and 143.

¹⁴ See FAO Newsroom, "New Code of Conduct on Pesticides adopted," (4 November 2002), online: <<http://www.fao.org/english/newsroom/news/2002/10525-en.html>>.

2. Multilateral Responses

a) The International Register of Potentially Toxic Chemicals

The issue of international trade in hazardous chemicals was first addressed within the United Nations system in the early 1970s, when the 1972 United Nations Conference on the Human Environment (UNCHE) recommended the development of plans for an international register of data on chemicals in the environment, based on the collection of available scientific data.¹⁵ Following this recommendation, in 1974 the Governing Council of the United Nations Environment Programme (UNEP GC) decided that a chemicals register and an information exchange network on chemicals should be created.¹⁶ The decision brought about the convening of two meetings of experts in 1975 in which the elements of the proposed register on chemicals were formulated.¹⁷ This work culminated with the establishment of the International Register of Potentially Toxic Chemicals (IRPTC) by the UNEP GC at its fourth session in 1976.¹⁸ It was decided that the register would form part of Earthwatch,¹⁹ the environmental assessment component of the action plan adopted by UNCHE, which UNEP had been coordinating since 1973.²⁰

The main purpose of the IRPTC was to reduce the health and environmental hazards posed by certain chemicals by facilitating universal access to existing

¹⁵ See "Report of [UNCHE]," UN Doc. A/Conf.48/14/Rev.1, Stockholm, Sweden (5-16 June 1972), Recomm. 74(e), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97>>.

¹⁶ See UNEP GC decision 8A (II) (24 March 1974), section I, para. I (k).

¹⁷ See UNEP, "The State of Information on Potentially Harmful Chemicals in Int'l Trade," UN Doc. UNEP.WG.96/2, Noordwijkerhout, the Netherlands (20 January 1984) [State of Information] at 3.

¹⁸ See UNEP GC, Decisions 50 (IV) and 52(IV) of 13 April 1976. At its third session, the UNEP GC had approved among the objectives for the IPRTC to facilitate access on a global basis to scientific and administrative data concerning potentially toxic chemicals and to provide information concerning: national, regional and global policies; regulatory measures; criteria studies; and international standards and recommendations; and to "serve as a basis for draft model legislation." See UNEP GC, Decision 29 (III), para. 8 and UNEP, "Environment Programme," *supra* note 5 at 50.

¹⁹ See UNEP GC, Decision 50 (IV) (13 April 1976), para. 8.

²⁰ See Goldberg, *supra* note 7 at 1041 and UNEP, "Earthwatch 1972-1992," online: <<http://earthwatch.unep.net/about/docs/annrpt92.htm>> (last visited July 29, 2006).

scientific and regulatory data on chemicals.²¹ Emphasis was made on the latter in 1978, when the UNEP GC asked the Executive Director of UNEP to give priority to providing countries with information on legal and administrative limitations, bans and regulations placed on potentially toxic chemicals in the countries where they were produced.²² Because it focused exclusively on information exchange, it can be argued that the view underlying the IRPTC was that the problem was not the production, use or trading of certain hazardous chemicals, but the fact that developing countries did not have access to sufficient information on those chemicals to make proper decisions on their importation and use. The efforts that followed can also be said to reflect this basic view and, to a lesser extent, the idea that another key part of the problem was the very limited capacity of developing countries to ensure the safe handling of chemicals that they knew to be hazardous.

b) Regulatory Efforts: From Information Exchange to PIC

Soon after the establishment of the IRPTC, a number of developing countries started calling for regulatory measures to control trade in hazardous chemicals at various UN forums.²³ In 1977, at the fifth session of the UNEP GC, the representative of Kenya said that developing countries would no longer tolerate seeing their nations as the “dumping grounds” for products that had not been adequately tested in the countries where they originated.²⁴ Thus, he

²¹ See Goldberg, *ibid.* In 1978, the UNEP GC approved among the objectives of the IRPTC to facilitate access to existing data on the effects of chemicals on human health and the environment, to identify gaps in existing knowledge on the effects of chemicals and to improve awareness on chemical hazards. See “State of Information,” *supra* note 17 at 3-4; UNEP GC, Decision 6/3, “Environmental Assessment: Earthwatch” (24 May 1978), section B, para. 6, online:

<<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=60&ArticleID=613&l=en>> and UNEP, “Environment Programme,” *supra* note 5 at 60.

²² See UNEP GC, Decision 6/3, *ibid.*

²³ See Marc Pallemarts, “Developments in International Pesticide Regulation” (1988) 18:3 *Env’tl Pol. & L.* 62 [Pallemarts, “Pesticide Regulation”] at 65.

²⁴ See Norris, *supra* note 8 at 88.

called for international rules and procedures to prohibit such dumping.²⁵ In response to that statement, the UNEP GC adopted a decision that, rather than calling for bans on the export of products not adequately tested or unacceptable for use in the country of export, urged governments “to take steps to ensure that potentially harmful chemicals, in whatever form or commodity, which [we]re unacceptable for domestic purposes in the exporting country, [we]re not permitted to be exported without the knowledge and consent of appropriate authorities in the importing country.”²⁶ In accordance with the principle of international trade that states should adopt the “least trade-restrictive” measures necessary to protect the environment and human health,²⁷ the decision suggested that countries should be allowed to export chemicals banned for domestic use so long as the recipient country had been informed of the risks involved and consented to the import. It also implied that the production, use and trading of those chemicals were not, in and of themselves, part of the problem.

A year later, the UNEP GC adopted a decision appealing to exporting countries to prevent the export of potentially harmful chemicals that were restricted or unregistered for domestic use until they had “ascertained that the results of tests and evaluations on the effects of these chemicals on the health of people and the environment [...] had been provided to the designated authorities in the recipient counties, so as to make it possible for these authorities to make fully informed decisions on the import and utilization of the products.”²⁸ Again, the instrument sanctioned international trade in

²⁵ See *ibid.* and UNEP, “Report of the Governing Council on the work of its fifth session,” UN GAOR, 32nd Sess., Supp. No. 25, UN. Doc A/32/25 (19 December 1977), para. 56, online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=65>>.

²⁶ See UNEP GC, Decision 85(V), in UN Doc. A/32/25 (15 May 1977), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=65&ArticleID=1275&l=en>>.

²⁷ See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1948), Art. XX(b), online: <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> and UNEP-IISD, “Environment and Trade: A Handbook” (2000), online: <http://www.iisd.org/pdf/envirotrade_handbook.pdf> at 27-29.

²⁸ See UNEP GC, Decision 6/4 “Health of People and of the Environment” (25 May 1978), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=60&ArticleID=614&l=en>>.

products the use of which had been banned or restricted in the country of export. It relied heavily on the notion of national sovereignty, according to which the importing country had the right to decide whether it would use chemicals banned or restricted elsewhere.²⁹ Rather than suggesting the possible need for export bans to protect the environment and human health in importing countries, the emphasis was put on giving relevant information to those countries so that they could make “informed” import decisions.

A similar approach was taken by the UN General Assembly (UNGA),³⁰ which every year, starting in 1979, adopted a stronger resolution advocating controls on exports of products banned or severely restricted in developed countries, as well as greater information exchange on hazardous chemicals.³¹ Finally, in 1982 the UNGA adopted a resolution entitled “Protection Against Products Harmful to Health and the Environment,” based on a proposal by Venezuela.³² The resolution asserted that products banned for domestic use and/or sale because of the risks they posed to health and the environment should be sold only when a request for such products was received from an importing country or their consumption was officially permitted in that country. It also stated that “all countries that ha[d] severely restricted or ha[d] not approved the domestic consumption and/or sale of specific products, in particular pharmaceuticals and pesticides, should make available full information on these products with a view to safeguarding the health and environment of the

²⁹ This was perhaps unsurprising, given that many developing countries had recently gained independence from their colonial rulers and were empowered by the discussions on a new international economic order at the UN Conference on Trade and Development (UNCTAD) and other UN forums, where they demanded fundamental changes in the international economic order to bring meaning to their newly found sovereignty. See Marc Williams, *Third World Cooperation: The Group of 77 in UNCTAD* (London: Pinter Publishers; New York: St. Martin's Press, 1991) and Sandra Blanco, “The 1960s and 1970s: The World Bank Attacks Poverty; Developing Countries Attack the IMF” (1999) 9 *Transnat'l L. & Contemp. Probs.* 35 at 109-118.

³⁰ See David G. Victor “Learning by Doing in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides,” in David G. Victor et al., eds., *The Implementation and Effectiveness of International Environmental Commitments. Theory and Practice* (Laxenburg, Austria: Int'l Institute for Applied Systems Analysis; Cambridge, Mass.: MIT Press, 1998) at 231-232.

³¹ See *ibid.* at 232.

³² See UNGA, Res. 37/137 (1982), “Protection Against Products Harmful to Health and the Env't,” UN Doc. A/37/51 (December 1982) at 112-113 and Pallemmaerts, “Pesticide Regulation,” *supra* note 23 at 65.

importing country.” Consequently, it called for the creation of a list of products whose consumption and/or sale had been banned, withdrawn or severely restricted.³³ Although the list was intended to merely provide information on certain chemicals to warn countries about their risks, such information could persuade countries to eventually ban those chemicals. For that reason, the agrochemicals industry and some industrialized countries saw the list with suspicion. Among them was the United States, who opposed it on the basis that it was an unscientific “blacklist” detrimental to the legitimate interests of industry.³⁴

The 1982 resolution was supported and encouraged by consumer and environmental groups preoccupied with the negative effects of pesticides used in developing countries. Among the most prominent was the Pesticide Action Network (PAN), a worldwide coalition of NGOs established in May 1982 that called for “a halt to indiscriminate sale and misuse of hazardous chemical pesticides throughout the world.”³⁵ Although PAN organizations emphasized the need to work towards a world free of synthetic pesticides and to “break the pesticide habit,” they did not advocate immediate withdrawal of all hazardous chemicals from the world market, because they were persuaded that that would impose an unacceptable hardship on farmers and public health programmes.³⁶ PAN representatives also voiced a frustration with North-South relations and the way in which multinational corporations based in the North

³³ See UNGA, Res. 37/137 (1982), *ibid*, Art.3.

³⁴ See Pallemarts, “Pesticide Regulation,” *supra* note 23 at 64. Industry made a similar argument during the first session of the *ad hoc* working group of experts on PIC and other modalities to supplement the London Guidelines, held in 1988. At that meeting, the representative of GIFAP said that “the pesticide industry was unhappy with establishing a list of banned and severely restricted chemicals, which could easily assume a “black-list” character.” See UNEP, “Report of the first session of the Ad Hoc Working Group of Experts on PIC and Other Modalities to Supplement the London Guidelines for the Exchange of Information on Chemicals in Int’l Trade,” UN Doc. UNEP/WG.188/5, Dakar, Senegal (10 October 1988) [WG on PIC 1st session report] at 10. For details on GIFAP see *infra* note 100.

³⁵ In Goldberg, *supra* note 7 at 1047. PAN was established at a conference on global pesticide trade held in Penang, Malaysia from May 28 to 31, 1982. The meeting was sponsored by the International Organisation of Consumer Unions (IOCU), which had an office in Penang, and Friends of the Earth, which had a branch in Malaysia. See *ibid.* and “Speaking Out: of PAN, Passion and Vision for our Future,” Interview with Anwar Fazal, *Pesticide Monitor*, Vol.9, No.1, April 2000 [Interview with Fazal], online: <<http://anwarfazal.net/interview-PAN.php>>. Fazal was the president of the IOCU from 1978 to 1984.

were emerging as a “whole new power in the global game, running and even ruining people’s lives.”³⁷ This stance gave PAN credibility among developing country leaders³⁸ and the opportunity to create alliances with governments to influence the outcome of international efforts to address the problem of hazardous chemicals.

Rather than call for efforts to prevent agrochemical corporations from exporting certain chemicals to developing countries or to work towards the elimination of the use of pesticides in agriculture, PAN decided to embrace the concept of prior consent that some developing country leaders were demanding and to encourage all developing countries to insist that it be applied to pesticide exports.³⁹ It is apparent that PAN’s support for PIC was a strategic decision to fight for something that could be achieved in a given framework where support for stronger measures was lacking. Not only were most developing countries calling for PIC rather than export bans, but also major pesticide-exporting countries had expressed their opposition to any controls on international trade in chemicals banned or restricted for domestic use, including PIC. Because PIC was consistent with international trade law, however, it was predictable that under enough pressure its opponents might eventually accept it.⁴⁰ Since PIC was arguably a more achievable goal, it is possible that PAN organizations felt that it would not be productive to present proposals that contradicted it. In this way, an unspoken agreement started to build up around the notion that international trade in hazardous chemicals should be controlled rather than banned.

³⁶ See Goldberg, *supra* note 7 at 1047.

³⁷ See “Interview with Fazal,” *supra* note 35.

³⁸ See Robert L. Paarlberg, “Managing Pesticide Use in Developing Countries,” in Robert M. Haas et al., eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (The MIT Press: Cambridge, Mass.; London, England: 1993) at 316.

³⁹ See Paarlberg, *ibid.* at 317.

⁴⁰ According to one commentator, the fear of stronger alternatives (e.g., an outright prohibition of the export of certain chemicals being considered by the U.S. Congress in 1991-1992) led the agrochemicals industry to eventually support PIC, as it represented the “lesser of two evils.” Peter Hough “Institutions for Controlling the Global Trade in Hazardous Chemicals: The 1998 Rotterdam Convention” (2000) 10:2 *Global Environmental Change* 161 [Hough, “Institutions”] at 162.

i) The OECD's Pre-emptive Move

Given the political declarations in favour of the principle of prior consent at the UNEP GC and the UNGA and increasing evidence of the negative effects of pesticides and other chemicals traded internationally in both developed and developing countries,⁴¹ some pesticide-exporting countries⁴² took the lead within the framework of the OECD in elaborating guidelines that would tackle the problem through information exchange rather than trade restrictions. According to some commentators, this was a strategy to prevent the development of more stringent international regulations.⁴³ At the initiative of the United States and Canada, the OECD set up a special group to prepare guidelines on information exchange concerning the export of hazardous chemicals in 1980.⁴⁴ The work of the group resulted in the "Recommendation Concerning Information Exchange related to the Export of Banned or Severely Restricted Chemicals," ready in draft in 1982 and adopted by the OECD Council in 1984.⁴⁵

⁴¹ While the use of acutely toxic pesticides (imported by multinational corporations) by farmers was a major concern in developing countries, the use of persistent pesticides in the developing world was the main concern of developed countries. This was because persistent chemicals banned or severely restricted in industrialised countries were returning to them in the form of pesticide residues in agricultural products imported from the developing world. This phenomenon is known as the "circle of poison." For details see Norris, *supra* note 8 at 25-28; Peter Hough, "Prior Informed Consent – A Long Haul to Gain Accountability," *Pesticides News* No. 42 (December 1998) at 10, online: <<http://www.pan-uk.org/pestnews/pn42/pn42p10.htm>>; and Robert Boardman, *Pesticides in World Agriculture: the Politics of International Regulation* (London; McMillan, 1986) at 100-101; and Barrios, *supra* note 2 at 689-691.

⁴² At the time, the major pesticide exporting countries were the U.S.A., the Federal Republic of Germany, Switzerland, the U.K., France, Japan and Italy. See Goldberg, *supra* note 7 at 1037. For an account of more recent developments in the agrochemicals market see Barrios, *supra* note 2 at 691-696.

⁴³ See Pallemmaerts, "Pesticide Regulation," *supra* note 23 at 65 and Paarlberg, *supra* note 38 at 322. A PIC system was considered and rejected by the OECD in 1982-1983. See Victor, *supra* note 30 at 230.

⁴⁴ See Pallemmaerts, *ibid*. The initial work of the OECD was focused on harmonizing national legislation on hazardous chemicals (testing, pre-market data requisites, information exchange, etc.) to facilitate trade in chemicals and eliminate trade barriers. See Victor, *supra* note 30 at 224-225 and Robert A. Wynman, "Control of Toxic Substances: the Attempt to Harmonize the Notification Requirements of the U.S. TSCA and the EC Sixth Amendment" (1980) 20 *Virginia J. of Int'l L.* 417 at 417-458 (The leadership role of Canada in defending international trade in hazardous chemicals is somewhat puzzling, as Canada was not a major producer or exporter of such chemicals. Considering its eagerness to defend international trade principles in the other negotiations examined in this study, it is possible that Canada simply wanted to protect the principle of free trade. See *supra* note 42).

⁴⁵ See OECD, *Council Recommendation Concerning Information Exchange related to Export of Banned or Severely Restricted Chemicals* (4 April 1984) C(84)37/Final (Australia abstained), [OECD

Consistent with the OECD's overt commitment to trade liberalisation,⁴⁶ the Recommendation failed to restrict international trade in hazardous chemicals and implied that information exchange was sufficient to protect human health and the environment from such chemicals.⁴⁷ While affirming the responsibility of OECD member countries to "safeguard and improve the quality of the environment, both nationally and in the global context,"⁴⁸ the instrument justified the export of banned and severely restricted chemicals on the basis that importing countries had "the primary responsibility for the protection of health and the environment from risks associated with imports of chemicals which ha[d] been banned or severely restricted for use in exporting countries."⁴⁹ The role of exporting OECD member countries was thus to "take steps to assist importing countries in making timely and informed decisions."⁵⁰ One such step was to inform importing countries of control actions to ban or severely restrict chemicals, as well as to provide them with relevant information to "alert" them when an export of a banned or severely restricted chemical was "expected or about to occur."⁵¹ Not only did the Recommendation fail to require exporting countries to obtain the consent of importing countries before exports could proceed, but it also failed to require that export notifications be made prior to export. While it declared as its "intention that, in so far as possible, the alert information should be provided prior to export," it stated that "this may not always be possible" and that the

Recommendation] online: <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(84\)37](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(84)37)> and Paarlberg, *supra* note 37 at 322.

⁴⁶ Since 1961, the OECD's vocation has been "to build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development." OECD, "History," online: <http://www.oecd.org/document/63/0,2340,en_2649_201185_1876671_1_1_1_1,00.html>.

⁴⁷ See "OECD Recommendation," *supra* note 45, Appendix, para. 13.

⁴⁸ See *ibid.*, Pmbl., para. 8.

⁴⁹ See *ibid.*, Appendix, para. 1 (this is also stated in Pmbl., para. 10).

⁵⁰ See *ibid.*

⁵¹ See *ibid.*, Appendix, para. 5. The minimum information to be provided by the exporting member country was: that an export was "expected or about to occur;" the chemical identification/specification; a summary of any control action taken (which could include the rationale for the control action); and a contact point from which additional information could be requested. See *ibid.*, Appendix, para. 6.

procedures for the exporting country “should not be such as to delay or control the export.”⁵²

The pre-emptive move of the OECD proved very successful in limiting the scope of the multilateral endeavours of UNEP and the FAO to regulate trade in hazardous chemicals, which resulted in the adoption of the “International Code of Conduct on the Distribution and Use of Pesticides” (Code of Conduct) by the FAO in 1985 and the “London Guidelines for the Exchange of Information on Chemicals in International Trade” (London Guidelines) by UNEP in 1987. First, the OECD Recommendation framed the problem of international trade in hazardous chemicals as being primarily about insufficient information, something that was reflected in the London Guidelines and, to a lesser extent, in the Code of Conduct. Second, it incorporated key norms of international trade that were also included in the Guidelines and the Code. Lastly, by ruling out PIC, the OECD Recommendation sent a clear message to those who wished to impose restrictions on international trade in hazardous chemicals that PIC was all that they might possibly achieve. This was because, while being more onerous than mere information exchange, PIC was also premised on the assumption that international trade in chemicals banned in the country of export should be controlled rather than banned, premised on the “sovereign right” of countries to import chemicals banned or severely restricted for use in other countries.

ii) UNEP’s London Guidelines

About one year after the OECD created a special group to prepare guidelines on information exchange on the export of hazardous chemicals, a group of senior government officials expert in environmental law recommended that global guidelines should be adopted under the auspices of UNEP to “control trade in hazardous or inadequately tested chemicals, particularly those whose

⁵² See *ibid.*, Appendix, para. 5.

sale had been banned or restricted in the producing country” as a first step towards a global convention.⁵³ The UNEP GC considered the report of the experts (called the Montevideo Programme I) at its tenth session in 1982, where it decided to endorse the group’s recommendations.⁵⁴ As happened at the 1977 UNEP GC session, a number of participants expressed the view that developing countries should not be used as “dumping grounds” for dangerous chemicals banned in developed countries.⁵⁵ Despite these remarks and the fact that the Montevideo Programme had recommended the elaboration of guidelines to “control” trade in hazardous chemicals, the UNEP GC decided that a group of experts should convene to elaborate guidelines on “the exchange of information relating to trade in and use and handling of potentially harmful chemicals, in particular pesticides.”⁵⁶ In agreement with the work of the OECD, the group of experts was asked to focus on information exchange rather than trade controls.

The first meeting of the group of experts was held in the Netherlands in May 1984. As in the discussions held by the UNEP GC, the representatives of a number of developing countries and ENGOs argued that the guidelines should not be limited to information exchange but should also incorporate PIC, while other participants claimed that this went beyond the group’s mandate and might contradict international trade norms.⁵⁷ The Secretariat clarified that UNEP’s intention was not to establish a mechanism to control international

⁵³ See UNEP, *Montevideo Programme for the Development and Periodic Review of Environmental Law* (6 November 1981) [Montevideo Programme I] at 2(b)(v) and II(e), online:

<http://www.unep.org/law/PDF/Montevideo_Programme_I.pdf>. (The group of experts was established by UNEP in 1981 to develop a framework for the development and periodic review of environmental law, one of the primary functions of UNEP. See “Montevideo Programme I,” *ibid.*, para. 1).

⁵⁴ See UNEP GC, Decision 10/21, “Environmental Law” (31 May 1982), in UNEP, “Report of the Governing Council on its tenth session,” UN Doc. UNEP/GC.10/14 Nairobi, Kenya (15 June 1982), [UNEP GC 10th session report] Annex I, para. 1.

⁵⁵ See “UNEP GC 10th session report,” *ibid.*, para. 56.

⁵⁶ See UNEP GC, Decision 10/24, “Follow-up to the Ad Hoc Meeting of Senior Government Officials Expert in Environmental Law” (31 May 1982), in *ibid.*, para. 1(c).

⁵⁷ See UNEP, “Informe Sobre la Labor Realizada por el Grupo de Trabajo Ad Hoc de Expertos Sobre el Intercambio de Información Acerca de Productos Químicos Potencialmente Nocivos (Especialmente Plaguicidas) Objeto de Comercio Internacional,” UN Doc. UNEP/WG.96/5, Noordwijkerhout, the Netherlands (2 May 1984) [First session report] at 4 and 7 [translated by author].

trade but a system of information exchange for certain chemicals traded internationally.⁵⁸ In an attempt to conciliate both sides, however, the UNEP Secretariat proposed a limited form of notification. Rather than require prior consent from the importing country, the proposal was to subject exports of banned or severely restricted products to prior authorization by the authorities of the country of export, which would be granted only when “due notification” had been given to the authorities of the importing country.⁵⁹ Even though the proposed notification form did not require the consent of importing countries, experts from major pesticide-exporting countries and industry rejected it, with the latter arguing that any reference to mandatory controls on international imports or exports would be incompatible with information exchange and might constitute an “unjustifiable barrier” to international trade.⁶⁰ Thus, while the representative of one non-governmental organization said that pesticides banned in one country should be banned in all countries, “especially” when they had been prohibited because of their negative effects on human health,⁶¹ other consumer and environmental organizations failed to support bans and instead called for prior consent to be included in the guidelines.⁶² As discussed above, it is very possible that this was a strategic move on their part, since there was very little support for bans

⁵⁸ See “First session report,” *ibid.* at 7.

⁵⁹ See Pallemmaerts, “Pesticide Regulation,” *supra* note 23 at 66. The draft guidelines stated that the purpose of the notification was to give the DNA of the importing country “adequate advance notice and an opportunity to assess the risks associated with potentially harmful chemical products, taking into account local environmental, economic and administrative conditions.” See UNEP, “Draft Guidelines for the Exchange of Information on Trade and Management of Potentially Harmful Chemicals, in Particular Pesticides,” UN Doc. UNEP/WG.96/4, Noorderwijkhout, the Netherlands (15 November 1983), Art. 9 (Chemical Products Banned or Severely Restricted in the Country of Export).

⁶⁰ See “First session report,” *supra* note 57 at 4 and 7 [The industry organizations present at the meeting were GIFAP and the European Council of Chemical Manufacturers’ Federation (CEFIC)]. For details in GIFAP see *infra* note 101.

⁶¹ See “First session report,” *supra* note 57 at 7.

⁶² See *ibid.* at 7 and 13-14. Two ENGOs that attended the meeting were PAN and the International Organisation of Consumers Unions (IOCU). IOCU, now Consumers International, was founded in 1960 in the United Kingdom. Today, it is a world federation of over 220 member organizations in 115 countries. One of its key goals is to “secure a fair, safe and sustainable future for consumers in a global marketplace increasingly dominated by international corporations.” See Consumers International, “About Us,” online: <<http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89647>>. For PAN see *supra* note 35.

among governments and key OECD countries were voicing opposition even to PIC.⁶³

Indeed, owing to the resistance of a few OECD countries and industry to adopting any form of prior consent, experts could only agree to a “Provisional Notification Scheme” that was proposed by the United Kingdom and was modeled on the guiding principles of the OECD’s draft recommendation.⁶⁴ The provisional scheme, adopted by the UNEP GC at its twelfth session in 1984,⁶⁵ called on countries to notify the designated national authorities (DNA) of other countries⁶⁶ of measures taken to severely restrict or ban a chemical.⁶⁷ It also provided that, when exporting a banned or severely restricted chemical, exporting countries should “ensure that necessary steps [we]re taken to provide the [DNA] of the country of import with relevant information” so as to “alert it to the fact that an export [wa]s expected or about to occur.”⁶⁸ Like the draft OECD recommendation, the provisional scheme stated that the information regarding exports of banned or severely restricted chemicals should be given prior to export but that “this might not always be possible and ... the procedures of the country of export should not be such as to delay or control the export.”⁶⁹

The provisional scheme was intended to assist the group of experts as it continued working to finalise the guidelines on information exchange.⁷⁰ The

⁶³ See *ibid.*; Victor, *supra* note 30 at 233; Pallemarts, “Pesticide Regulation,” *supra* note 23 at 66; and Paarlberg, *supra* note 38 at 320-321.

⁶⁴ See Pallemarts, *ibid.* at 65-66 and UNEP, “First session report,” *supra* note 57 at 18.

⁶⁵ See UNEP GC, Decision 12/14 (28 May 1984), in UNEP, “Proceedings of the Governing Council at its twelfth session,” UN Doc. UNEP/GC.12/19 (12 June 1984), Annex I at 26.

⁶⁶ The scheme called on countries to provide the IRPTC with the name and address of their designated national authority. See UNEP, “Implementation of the Provisional Notification Scheme for Banned and Severely Restricted Chemicals,” UN Doc. UNEP/WG.155/4, Annex I (1986), Art. 5(c).

⁶⁷ It also asked them to nominate contacts from whom additional information could be requested. The declared purpose of the notification was to “give competent authorities in other countries the opportunity to assess the risks associated the chemical, and to make timely and informed decisions thereon.” See *ibid.*, Art. 3 and 5.

⁶⁸ See *ibid.*, Art. 4(a) and (b).

⁶⁹ See *ibid.*, Art. 6(b) and “OECD Recommendation,” *supra* note 45, Art. 5.

⁷⁰ See *ibid.* Art. 1 (Introduction).

second session of the group was held in Rome from 28 January to 1 February 1985, shortly before the adoption of the Code of Conduct on pesticides, and no agreement could be reached on the issue of notification and prior consent.⁷¹ The group's last session was held in London in February 1987,⁷² when industry representatives again rejected the inclusion of prior consent, arguing that it would entail an extension of the group's mandate.⁷³ At that meeting, the FAO joined PIC opponents by stressing the need for "consistency" between the guidelines being developed by UNEP and Article 9 of the Code of Conduct,⁷⁴ which essentially followed the OECD recommendation and failed to incorporate PIC.⁷⁵ The representative of the OECD also urged the group of experts to "work toward consistency among related notification schemes."⁷⁶

In response to the FAO statement, the representative of an environmental NGO (ENGO) said that PIC had in fact won "majority support" at the FAO Conference session where the Code had been adopted. He further claimed that PIC should be included in the guidelines because it would "guarantee developing countries' sovereignty in protecting their citizens from uncontrolled trade in banned and severely restricted chemicals."⁷⁷ This was also the position of several representatives of developing countries, who urged the inclusion of PIC in the guidelines to give importing countries the opportunity to decide in advance whether they wished to import specific

⁷¹ See Pallemmaerts, "Pesticide Regulation," *supra* note 23 at 66.

⁷² The Code was adopted in November 28, 1985 (see section 2(b)(iii) of Part II below).

⁷³ See UNEP, "Report of the third session of the Ad Hoc Working Group of Experts for the Exchange of Information on Potentially Harmful Chemicals (in Particular Pesticides) in Int'l Trade," UN Doc. UNEP/WG.155/6, London, England (10 February 1987) [Third session report] at 7.

⁷⁴ See *ibid.* at 5.

⁷⁵ Article 9 called on exporting countries to "alert" importing countries that the export of a banned or severely restricted pesticide was "expected or about to occur" by providing them with relevant information. See FAO, *International Code of Conduct for the Distribution and Use of Pesticides*, 23 FAO/CONF/RES 10/85 (28 November 1985), Art. 9.2, in UNEP, "Line-by-Line Comparison of the Second Revised Draft Guidelines with the FAO International Code of Conduct on the Distribution and Use of Pesticides and OECD Recommendation C(84)37 (Final) on Information Exchange Related to the Export of Banned or Severely Restricted Chemicals," Un Doc. UNEP/WG.155/5 (12 November 1986) at 18.

⁷⁶ *Ibid.* at 6.

⁷⁷ Statement by the Environmental Liaison Centre, which claimed to represent a "global NGO constituency." See "Third session report," *supra* note 73 at 6.

chemicals banned or severely restricted elsewhere.⁷⁸ These statements made it clear that, while being more trade restrictive than mere information exchange, PIC also sanctioned international trade in hazardous chemicals and was premised on the notion of national sovereignty that underlay the OECD recommendation.

The quest for consistency between different international instruments played to the advantage of those who wanted to protect liberal economic norms in the London Guidelines.⁷⁹ As adopted in 1987, the Guidelines essentially replicated the provisional notification scheme adopted in 1984, adding a few commitments to promote the sound management of chemicals.⁸⁰ They also incorporated a number of international trade principles found in the General Agreement on Tariffs and Trade (GATT),⁸¹ in particular the principle that governments should not restrict trade more than necessary to protect human health or the environment and the principle of non-discrimination.⁸² Following these norms, the Guidelines required states taking measures to regulate chemicals in order to protect human health or the environment to “ensure that regulations and standards for this purpose d[id] not create unnecessary obstacles to international trade” and to ensure that control actions with regard to an imported chemical for which information had been received under the

⁷⁸ See *ibid.* at 9 and Victor, *supra* note 30 at 233. When considering PIC modalities at a later session, however, some experts proposed that chemicals banned in a country should be neither produced in nor exported from that country, and that before being traded each potentially harmful chemical should be given a code number and registered in the IRPTC. See “WG on PIC 1st session report,” *supra* note 34 at 11.

⁷⁹ As suggested in Chapter 1, one of the key goals of state-directed modes of regulation is the construction of a unified, coherent legal order. This quest for consistency is an example of how legal norms (understood in the broad sense described in Chapter 1) were used by some actors to reinforce the hegemony of international trade norms first to oppose PIC in the context of the drafting of the Code of Conduct and the London Guidelines and later on to oppose control measures beyond PIC in the context of the Rotterdam Convention. See section 5 of Part II in Chapter 1 (Hegemony and the Law).

⁸⁰ See Victor, *supra* note 30 at 232-233, and UNEP, *London Guidelines for the Exchange of Information on Chemicals in International Trade*, UN Doc. UNEP/GC.15/9/Add.2/Supp. 3 and Corr.1, Appendix (as amended in 1989) [London Guidelines], Arts. 13 and 14.

⁸¹ Among those who attended at the third session of the working group where the London Guidelines were approved was a representative of the GATT. See “Third session report,” *supra* note 73 at 3.

⁸² See GATT, *supra* note 27, Arts. XX(b) and I. For a description of these articles see International Institute of Sustainable Development (IISD), “Environment and Trade: A Handbook,” 2nd ed., 2005, Chapter III, online: <http://www.iisd.org/trade/handbook/3_4_1.htm>.

Guidelines would “not [be] more restrictive than those applied to the same chemical produced domestically or imported from [another] state.”⁸³ The Guidelines also clarified that its provisions would not affect the obligations of states deriving from any relevant international agreement to which they were or might become parties.⁸⁴ This meant that if a provision in the Guidelines was found to be inconsistent with a norm of international trade, the latter would take precedence over it.

As a concession to those who had called for PIC, however, the group of experts agreed to include a provision in the Guidelines that called on states to consider other ways of meeting the objectives of the instrument through the development of “systems and alternative procedures with respect to banned and severely restricted chemicals, including, *inter alia*, [...] various forms of prior consent.”⁸⁵ This provision enabled PIC supporters to continue advocating PIC, and the unrelenting resistance by the United States, Germany and the United Kingdom to including PIC in the Guidelines at the UNEP GC 1987 session prompted the Group of 77 (G77), led by Senegal and stimulated by PAN, to demand its inclusion.⁸⁶ The result was that, in the same decision by which it adopted the London Guidelines, the UNEP GC requested the Executive Director of UNEP to set up a working group of experts to develop modalities of PIC to “supplement” the London Guidelines.⁸⁷ PIC was finally inserted in the instrument in May 1989.

⁸³ See London Guidelines, *supra* note 80, Arts. 2(c) and 2(d) (General Principles).

⁸⁴ See *ibid.*, Art. 4(b).

⁸⁵ See “Third session report,” *supra* note 73 at 11.

⁸⁶ Environmental and consumer groups, in particular PAN, were instrumental in mobilizing developing countries to call for PIC. See Paarlberg, *supra* note 38 at 323.

⁸⁷ See UNEP GC, Decision 14/27, “Environmentally Safe Management of Chemicals, in particular those that are Banned and Severely Restricted in Int’l Trade” (17 June 1987), paras. 10 and 11 (unnumbered), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=100&ArticleID=1660&l=en>>.

iii) The FAO Code of Conduct on Pesticides

The work on hazardous chemicals by UNEP was paralleled by efforts by the FAO to address pesticide-related problems. Given its role in the food production system, the FAO was the main UN organization carrying out activities related to pesticides, and in the 1970s consumer and environmental organizations started criticizing its role in developing countries, where it was accused of promoting over-consumption of pesticides.⁸⁸ These public interest groups, including the International Organisation of Consumers Unions (IOCU), OXFAM and PAN,⁸⁹ played a crucial role in raising international awareness on the problems caused by pesticides. In the 1980s, they dedicated themselves to urging the adoption by international institutions of minimum standards of conduct for all entities engaged in the distribution and sale of pesticides, particularly major corporations based in industrialised countries selling pesticides in developing countries.⁹⁰

The issue of pesticides sales in developing countries was first addressed by the FAO in October 1982, during the second “Government Consultation on International Harmonization of Pesticide Registration Requirements.” The FAO’s harmonization efforts were supported by the agrochemicals industry, as they sought to bring into line pesticide registration requirements in

⁸⁸ See Victor, *supra* note 30 at 231 and 234. According to Goldberg, the FAO and other international agencies such as USAID had been accused of being “co-opted” by pesticides companies, which meant that in practice developing countries could get financial assistance only from those interested in promoting the use of chemical pesticides. See Goldberg, *supra* note 7 at 1028. In a similar vein, Paarlberg claims that GIFAP wanted the Code of Conduct to be drafted by “industry’s friends at FAO, rather than by WHO ... or some other institution more hostile to pesticides,” and PIC was removed from the last draft of the Code “at GIFAP’s and FAO’s insistence.” See Paarlberg, *supra* note 38 at 320-321 and *infra* note 96.

⁸⁹ For IOCU see *supra* note 61 and for PAN see *supra* note 35. The Oxford Committee for Famine Relief (OXFAM) was established in the UK in 1943 as a charity to provide relief to Nazi-occupied Greece. In the 1960s, it started to address poverty issues in the developing world, supporting self-help schemes whereby communities would improve their own water supplies, farming practices and health. This gave it strong rural and antipoverty credentials in the developing world. See OXFAM, “A History of OXFAM,” online: http://www.oxfam.org.uk/about_us/history/index.htm and Paarlberg, *supra* note 38 at 316.

⁹⁰ See Peter Hough, “Poisons in the System: The Global Regulation of Hazardous Pesticides” (2003) 3:2 Global Environmental Politics 11 [Hough, “Poisons”] at 19 and Paarlberg, *supra* note 38 at 316-317.

different countries with the aim of facilitating trade in pesticides.⁹¹ The impact of pesticides on human health and the environment was barely mentioned at the first consultation in 1977, where concern about food shortages and increased grain prices made pesticides look more beneficial than harmful. The situation was reversed at the 1982 consultation,⁹² however, offering a chance to public interest groups to put their concerns on the agenda.⁹³ Following allegations by a representative of the IOCU of “dumping” of domestically banned pesticides by western chemical companies in developing countries, a debate ensued on the desirability of codes of conduct governing pesticide sales, particularly in developing countries.⁹⁴ Some participants argued that such a code would be redundant if all countries developed adequate and harmonized regulatory frameworks on pesticides,⁹⁵ which is what the FAO was aiming to do. However, they decided to avoid a strategy of outright confrontation, according to some commentators because they felt that it was preferable that the proposed code be drafted under the auspices of the FAO, which was more likely to protect industry’s interests than the World Health Organization or another institution more hostile to pesticides.⁹⁶ The meeting participants therefore agreed that the FAO should start working on a code of conduct on the distribution and use of pesticides. Following that request, the Director-General of the FAO engaged OXFAM’s David Bull, who had been actively involved in recommending safety standards for pesticides,⁹⁷ to prepare a first draft of the proposed code.⁹⁸ The decision to engage Bull was allegedly a tactic by the FAO to reassert its jurisdiction over

⁹¹ A primary concern that led to the efforts by the FAO to harmonize pesticide registration schemes was that about thirty-five percent of potential agricultural yields in developing countries were being lost to pests. Thus, one of the goals of the FAO government consultation was to assist developing countries to obtain pesticides, much to the delight of the global agrochemicals industry and industry organizations such as GIFAP. See Boardman, *supra* note 41 at 103-106, Paarlberg, *supra* note 38 at 314-315.

⁹² See Paarlberg, *ibid.* at 314-316.

⁹³ See *ibid.* at 316.

⁹⁴ See Boardman, *supra* note 41 at 103-104.

⁹⁵ See *ibid.*

⁹⁶ See *ibid.* at 109 and Paarlberg, *supra* note 38 at 320.

⁹⁷ In 1982, David Bull had published a document entitled “A Growing Problem –Pesticides and the Third World Poor,” which set out safety standards to be followed by governments, inter-governmental organizations and the agrochemicals industry. See Hough, “Poisons,” *supra* note 90 at 19.

pesticide-related issues and to demonstrate responsiveness to its many NGO critics.⁹⁹ Besides, it was decided that the draft prepared by Bull would be revised through consultations with various UN organizations and bodies, relevant international organizations and individual member countries.¹⁰⁰

Although the code of conduct was meant to address the wider issue of pesticides management, the discussion concerning possible restrictions on the export of pesticides banned or severely restricted in exporting countries mirrored that held by the experts who were devising the London Guidelines. While developing countries and environmental and consumer organizations insisted that PIC, which was included in the first draft code, should remain in the instrument, major OECD pesticide-exporting countries and industry groups, in particular GIFAP,¹⁰¹ argued that it should be removed. These actors claimed that the FAO code needed to be consistent with the OECD recommendation and the provisional notification system that had been adopted by the UNEP GC.¹⁰² In the end, the view of the second group prevailed and PIC was removed from the last version of the code, reportedly at the insistence of a few OECD countries,¹⁰³ the agrochemicals industry and the FAO.¹⁰⁴ Again, a fixation with the need for consistency between related international instruments played to the advantage of those who wanted to protect liberal economic norms in the context of regulatory responses to chemicals-related problems at the global level.¹⁰⁵ The decision to remove PIC from the FAO code also revealed that the statements expressed by different participants during the meeting did not carry the same weight, as the views of

⁹⁸ See Paarlberg, *supra* note 38 at 321.

⁹⁹ See *ibid.*

¹⁰⁰ See FAO, "Report of the Conference of FAO [at its] twenty-third session," Rome (9-28 November 1985), online: <<http://www.fao.org/docrep/x5562E/x5562E00.htm>> [FAO 23rd session report] at para. 299.

¹⁰¹ Groupement International des Associations de Fabricants de Produits Agrochimiques (GIFAP). In 1996, GIFAP became the Global Crop Protection Federation, and in 2000-2001 it evolved into Croplife International, which broadened its scope to include agricultural biotechnology. For more information visit their web site: <<http://www.gcpf.org/website/pages/background.aspx>>.

¹⁰² See Pallemerts, "Pesticide Regulation," *supra* note 23 at 66.

¹⁰³ These countries were the U.S.A. and the U.K. See Hough, "Poisons," *supra* note 90 at 15.

¹⁰⁴ See Hough, *ibid.* and Paarlberg, *supra* note 38 at 321.

a few actors prevailed over those of the majority. Thus, while the final report of the meeting recorded that the “majority” had expressed “deep concern” that the PIC principle did not appear in the final version of the code,¹⁰⁶ PIC supporters felt the need to compromise, persuaded that the code itself would be at risk if they insisted on their position.¹⁰⁷

In exchange for removing PIC from the Code, those who supported it asked that a clause stating that “the procedures of the country of export should not be such as to delay or control the export,” which had been copied from the OECD recommendation, be deleted.¹⁰⁸ This was accepted by the FAO Conference, which unanimously adopted the Code of Conduct in November 1985.¹⁰⁹ In addition to noting that most participants had supported PIC, the final report also noted that delegates in this group “urged that the [PIC] principle be considered for inclusion” at a future date.¹¹⁰ PIC was finally added to the Code of Conduct in November 1989, a few months after its incorporation in the London Guidelines.¹¹¹

iv) UNEP, FAO and Prior Informed Consent

Although PIC opponents initially succeeded in excluding PIC from the Code of Conduct and the London Guidelines, it was evident from the report of the FAO Conference session in 1985 and from the 1987 decision whereby the UNEP GC approved the London Guidelines that PIC would eventually be included in both instruments.¹¹² By opposing PIC until the end, however, the representatives of the agrochemicals industry and a few OECD countries

¹⁰⁵ See *supra* note 79.

¹⁰⁶ “FAO 23rd session report,” *supra* note 100 at para. 310.

¹⁰⁷ See Hough, “Poisons,” *supra* note 90 at 15.

¹⁰⁸ See Hough, “Institutions,” *supra* note 40 at 165.

¹⁰⁹ See FAO, Conference Resolution 10/85 (28 November 1985).

¹¹⁰ “FAO 23rd session report,” *supra* note 100 at para 310.

¹¹¹ See Victor, *supra* note 30 at 235 and Paarlberg, *supra* note 38 at 324.

¹¹² See “FAO 23rd session report,” *supra* note 100 at para. 310 and UNEP GC, Decision 14/27, *supra* note 87, paras. 9 and 10 (unnumbered).

ensured that in the worst-case scenario international trade in hazardous chemicals would be subjected to PIC rather than to trade bans or production phase-outs. The strong opposition to by these actors to PIC galvanized those who might have supported bans or phase-outs around the PIC principle, such that a consensus started building around the notion that the international trade of hazardous chemicals banned in exporting countries should be subjected to PIC rather than proscribed.

The voluntary PIC procedure, operated jointly by the FAO and UNEP beginning in 1991,¹¹³ asked governments to report any control action banning or severely restricting a chemical for environmental or health reasons to the designated body of the FAO or UNEP.¹¹⁴ That body was then required to disseminate that information to the designated national authorities (DNAs) of other participating countries,¹¹⁵ so that they could assess the risks associated with the chemical and decide on its future importation. The circulation of control actions also served as the primary way to identify chemicals for inclusion in the PIC procedure.¹¹⁶ Regarding the substances covered by PIC, each participating country was asked to inform the FAO or UNEP whether it wished to receive future imports of those chemicals, while exporters were asked to respect those decisions.

¹¹³ The Plant Protection Service of FAO was the lead office for pesticides, while the Chemicals Unit of UNEP was the lead office for industrial and consumer chemicals. See Paarlberg, *supra* note 38 at 327.

¹¹⁴ The IRPTC in the case of the London Guidelines (London Guidelines, *supra* note 80, Arts. 6 and 7) and the FAO in the case of the Code of Conduct (See FAO, “International Code of Conduct on the Distribution and Use of Pesticides” (as amended in 1989), Rome, 1990 [Code of Conduct] Art. 9 (a revised version of the Code was adopted in 2002. For details see *infra* note 120).

¹¹⁵ To participate in the PIC procedure, each country had to designate one or more national authorities to perform the administrative functions related to information exchange and the PIC procedure. See Code of Conduct, *supra* note 114, Art. 9.9 and London Guidelines, *supra* note 80, Art. 5.4.

¹¹⁶ Any substance banned or severely restricted by any single country through a final regulatory action would be subject to PIC, provided that the implementing body issued a “decision guidance document” asserting conformity of the control action with the definitions of banned or severely restricted of the Code of Conduct or the London Guidelines. See London Guidelines, *supra* note 80, Annex II, and Code of Conduct, *supra* note 114, Art. 9.8. and *infra* note 193.

v) London Guidelines (as amended in 1989)

As amended in 1989, the London Guidelines sought to enhance the sound management of chemicals through the exchange of scientific, technical, economic and legal information. To prevent overlaps with the Code of Conduct, the preamble referred to the Code as “the primary guidance for the management of pesticides internationally.” The Guidelines distinguished between three types of measures: information exchange; export notification in the case of banned or severely restricted chemicals; and the PIC procedure.¹¹⁷ Countries were required to implement these measures following key international trade norms, in particular the GATT principle that states should adopt the “least trade-restrictive” measures needed to protect the environment or human health and the principle of non-discrimination.¹¹⁸

In relation to information exchange, countries were asked to notify the IRPTC of any control actions to ban or severely restrict a chemical that they had taken. The IRPTC would then disseminate these notifications to the DNAs¹¹⁹ of other participating countries to give them the opportunity to assess the risks associated with the chemical (Art. 6). The DNA issuing the notification was asked, to the extent “practicable,” to provide information concerning alternative measures such as integrated pest management techniques, non-chemical alternatives and mitigation measures (art 6(d)). Export notification occurred when the export of a domestically banned or severely restricted chemical took place, in which case the country of export was asked to ensure that steps were taken to provide the importing country’s DNA with relevant information about the chemical to be exported or being exported (Art. 8). Lastly, the PIC procedure allowed participating countries to record

¹¹⁷ Countries could participate in the information exchange procedures without participating in PIC. However, all exporting countries were expected to participate in the PIC procedure by respecting the decisions of importing countries. See London Guidelines, *supra* note 80, Art. 7(1) (a) and (b).

¹¹⁸ See London Guidelines, *ibid.*, Arts. 2(c) and 2(d) and *supra* note 79.

their decisions, which exporting countries were asked to respect, regarding future imports of certain banned or severely restricted chemicals (Art. 7.1).

vi) The Code of Conduct (as amended in 1989)¹²⁰

Unlike the London Guidelines, the Code of Conduct tackled the wider issue of pesticides management and set forth standards of conduct for various actors engaged in the distribution and use of pesticides (Art. 1.1). The provisions concerning PIC, information exchange and export notification mirrored those of the Guidelines, however.¹²¹ The Code also included key international trade rules, even more overtly than the Guidelines. First, it articulated a justification for the export of pesticides banned for use in industrialised countries to developing countries. Stressing that the “climatic, ecological, agronomic, social, economic and environmental conditions” of developing countries were usually “quite different from those prevailing in countries in which pesticides [we]re manufactured and exported,”¹²² the Code affirmed that the importing country should be free to decide whether or not to allow the use of pesticides banned or restricted elsewhere. Second, in addition to

¹¹⁹ Both the London Guidelines and the Code of Conduct asked states to designate one or more national authorities to perform the administrative functions related to information exchange and the PIC procedure. See Code of Conduct, *supra* note 114, Art. 9.9 and London Guidelines, *supra* note 80, Art. 5.4.

¹²⁰ The FAO Council adopted a revised version of the Code of Conduct at its 123rd session in November 2002, among other things to delete references to the PIC procedure and information exchange, which are now regulated by the Rotterdam Convention. For details see Fleming Konradsen et al., “Reducing Acute Poisoning in Developing Countries—Options for Restricting the Availability of Pesticides” (2003) 192 *Toxicology* 249 at 251-252 and FAO Newsroom, “New Code of Conduct on Pesticides Adopted” (4 November 2002), online: <<http://www.fao.org/english/newsroom/news/2002/10525-en.html>>.

¹²¹ Under the first heading, governments that took action to ban or severely restrict the use of handling of a pesticide to protect health or the environment were asked to notify the FAO of the action taken. The FAO would then notify the DNAs in other countries of that action. In relation to export notification, if the export of a pesticide banned or severely restricted in the country of export occurred, the latter was to ensure that necessary steps were taken to provide the DNA of the country of import with relevant information, which was merely “intended” to be prior to the export. Lastly, pesticides that were banned or severely restricted for environmental or health reasons were subject to the PIC procedure and governments of pesticide exporting countries were to take suitable measures to ensure that no exports occurred contrary to the decisions of participating importing countries. See Code of Conduct, *supra* note 114, Arts. 9.1, 9.3, 9.5, 9.7, and 9.11.2 [Note: The PIC procedure applied to those chemicals for which the FAO had issued a guidance document, having ensured conformity of the control action with the definitions of banned and severely restricted given in Article 2. See *ibid.*, Art. 9.8].

¹²² Code of Conduct, *supra* note 114, Preface, para. 7.

developing a version of the GATT principle of non-discrimination,¹²³ the Code specifically required states to ensure that their decisions were “not used inconsistently with the provisions of the [GATT].”¹²⁴

Nevertheless, the Code included a few measures that suggested the need for restrictions on the production, use or trading of certain chemicals. It provided, for instance, that pesticides whose handling and application required the use of uncomfortable and expensive protective clothing and equipment should be “avoided” (Art. 3.5); that governments and pesticide industries should make a concerted effort to develop and promote integrated pest management systems (Art. 3.8); and that industry should make efforts to reduce hazards by, among other things, halting the sale of and recalling products when safe use did not seem possible under “any use, directions or restrictions.” (Art. 5.2.3).

Because the Code required countries to apply these measures in accordance with international trade law, none of the articles referred to above posed a real challenge to the continued production, use or international trading of most hazardous chemicals. Had those articles or similar measures been discussed in the context of the negotiations of the Rotterdam Convention, however, they could have opened the door for other proposals on chemicals management, some of which could have conflicted with liberal economic norms. Chemicals management issues were not addressed at all during the negotiations of the Rotterdam Convention, however. This was because, as discussed below, the mandate of the negotiators was to make the voluntary PIC procedure legally binding rather than to draft a chemicals management treaty.

¹²³ Specifically, it asked importing countries to ensure that their import decisions and actions regarding pesticides for which information had been received through the PIC system were “not more restrictive” than those applied to the same pesticide produced domestically or imported from a country other than the one that had supplied the information. See Code of Conduct, *supra* note 114, Art. 9.10.2.

¹²⁴ Code of Conduct, *ibid.*, Art. 9.10.3. Although the London Guidelines incorporated key international trade principles, unlike the Code of Conduct they did not explicitly mention the GATT.

III. The Rotterdam Convention Negotiations

1. Antecedents

Not long after the FAO and UNEP started operating the voluntary PIC procedure, delegates from developing countries, some European countries (notably Belgium and the Netherlands), the European Community (EC)¹²⁵ and public interest groups started to claim that a binding PIC procedure would be more effective than a voluntary one.¹²⁶ Developing countries had supported prior consent since the late 1970s, when they began pushing for resolutions within the UN system to reject imports of banned and severely restricted chemicals that were not expressly consented to by the importing country.¹²⁷ Since a voluntary PIC system was hard enough to achieve, however, the legal status of the PIC procedure was not seriously debated before the 1990s.¹²⁸

The interest of the EC in making the PIC procedure binding became apparent in June 1986, when the European Commission put before the EC Council of Ministers a proposal for a regulation on exports of certain dangerous chemicals. The proposal was prompted by a 1983 resolution of the European Parliament that called for PIC to be introduced in Community legislation and by the government of the Netherlands, which held the presidency of the EC in the first half of 1986 and had enacted national legislation in 1985 providing

¹²⁵ The European Community (EC) was established by the Treaty of Maastricht, which in 1993 created the European Union to replace the former European Economic Community (EEC). Among its tasks is to develop a common policy in the sphere of the environment. See *Treaty on European Union*, 7 February 1992, [1992] O.J. C 191, 31 I.L.M. 247 (1992) (entered into force 1 November 1993), Title II Art. G, online: <http://www.uni-mannheim.de/users/ddz/edz/doku/vertrag/engl/m_engl.html>.

¹²⁶ The EC's support of PIC was prompted by the leadership of the Dutch and Belgian governments. See Victor, *supra* note 30 at 257 and 277.

¹²⁷ See, for instance, UNEP GC, Decision 85(V), *supra* note 26; UNGA, Res. 34/173 (1979) "Exchange of Information on Banned Hazardous Chemicals and Unsafe Pharmaceutical Products," UN Doc. A/RES/34/173 (17 December 1979); UNGA, Res. 35/186 (1980) "Exchange of Information on Banned Hazardous Chemical and Unsafe Pharmaceutical Products," UN Doc. A/RES/35/186 (15 December 1980); and UNGA, Res. 36/166 (1981) "Exchange of Information on Banned Hazardous Chemicals and Unsafe Pharmaceutical Products," UN Doc. A/RES/36/166 (16 December 1981).

¹²⁸ See Victor, *supra* note 30 at 277 (footnote 100) and Hough, "Institutions," *supra* note 40 at 162.

for a voluntary PIC procedure.¹²⁹ Although the Commission did not go that far, it stated that “dangerous chemicals should be exported only to states which ha[d] previously agreed to allow their importation”¹³⁰ and proposed a diluted version of PIC called the “prior informed choice.” The idea was that export permits would not be granted if the government of the importing country informed the Commission that it objected to the import within 60 days of the date of export notification. Importing countries could therefore prevent the export if they wished to do so, but their consent would be presumed if they failed to respond within the signaled period of time.¹³¹

Even though this was a weak version of PIC, it was strongly opposed by Germany, the United Kingdom and France, three major EC chemical exporters that advocated a scheme along the lines of the OECD and UNEP guidelines and succeeded in weakening the Commission’s proposal.¹³² The resulting instrument, Council Regulation (EEC) No. 1734/88, included provisions on notification and information exchange similar to those of the original London Guidelines, with no reference to PIC. Nevertheless, the preamble noted that the Council would consider, before July 1990, the possibility of introducing the principle of “prior informed choice” into the regulation.¹³³ PIC was finally introduced in EC law through Council Regulation 2455/92.¹³⁴ Once it became

¹²⁹ See Pallemmaerts, “Pesticide Regulation,” *supra* note 23 at 67; Victor, *supra* note 30 at 229; and Cyrus Mehri “PIC: an Emerging Compromise for Hazardous Exports,” 21 *Cornell Int’l L.J.* 365 (1988) at 379-380.

¹³⁰ See Mehri, *ibid.*, at 382.

¹³¹ The proposal also included restrictions on the export of certain chemicals, including 14 organochlorine and mercury-based pesticides. See Pallemmaerts, “Pesticide Regulation,” *supra* note 23 at 67 and Marc Pallemmaerts, “Regulating Exports of Hazardous Chemicals: the EU’s External Chemical Safety Policy,” in Jonathan Golub, ed., *Global Competition and Environmental Policy* (Routledge: London, NY, 1998) [Pallemmaerts, “EU Policy”] at 64-65.

¹³² See *ibid.*

¹³³ See EC, *Council Regulation 1734/88 of 16 June 1988 Concerning Export From and Import Into the Community of Certain Dangerous Chemicals*, [1988] O.J. L 155/2 (no longer in force), Pmb1.

¹³⁴ Council Regulation EEC No. 2455/92, adopted in July 1992, allowed the export of pesticides that were banned or severely restricted in the EC to non-member states, as long as the exporter complied with certain requirements such as prior notification to and consent by the importer and certain standards of packaging and labelling. (EC, *Council Regulation 2455/92 of 23 July 1992 Concerning the Export and Import of Certain Dangerous Chemicals*, [1992] O.J. L 251/13 (*Note: The regulation was replaced by EC, *Regulation 304/2003 of the European Parliament and of the Council of 28 January 2003 Concerning the*

mandatory for all EC members, it was in the interest of those exporters who initially opposed it that it be transformed into a legally binding instrument so that agrochemicals manufacturers outside the EC would also have to comply with its onerous provisions.¹³⁵

The resolve of developing countries, the EC and some European countries led the UNEP GC to adopt a decision in 1991 to explore the possible use of a legally binding instrument for PIC.¹³⁶ This decision was reaffirmed in 1992 by the United Nations Conference on Environment and Development (UNCED), which established as an objective in the field of toxic chemicals “to achieve by the year 2000, as feasible, full participation in and implementation of the PIC procedure, including possible mandatory applications through legally binding instruments contained in the [London Guidelines and the Code of Conduct], taking into account the experience gained with the PIC procedure.”¹³⁷ The proposed objective reaffirmed the principle that the export of chemicals banned or severely restricted for use in the country of export should be allowed as long as the importing country had consented to the import. Following a key principle of GATT, UNCED also agreed that, “should trade policy measures be found necessary for the enforcement of environmental policies, ... the trade measure chosen should be the least trade-restrictive necessary to achieve the [desired] objectives.”¹³⁸ As discussed below, this principle later served to justify the adoption of a PIC procedure rather than global bans or phase-outs to deal with hazardous chemicals traded internationally whose effects were not clearly “global.”

Export and Import of Dangerous Chemicals, [2003] O.J. L 063/1, which implements the Rotterdam Convention within the EU). See Barrios, *supra* note 2 at 691.

¹³⁵ See Pallemarts, “EU Policy,” *supra* note 131 at 78 and 80.

¹³⁶ See UNEP GC, Decision 16/35, “Toxic chemicals” (31 May 1991), para. 8 and Victor, *supra* note 30 at 257.

¹³⁷ See *Agenda 21*, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) Annex II (14 June 1992) [*Agenda 21*], Chapter 19 para. 38(b).

¹³⁸ See “*Agenda 21*,” *ibid.*, Chapter 39, para. 39.3(d).

2. The Mandate

Following the instructions of UNCED, at its 107th meeting in 1994 the FAO Council decided that the FAO Secretariat should develop a draft PIC Convention in cooperation with UNEP. Likewise, at its 18th session in 1995 the UNEP GC authorized the Executive Director of UNEP to prepare and convene, together with the FAO, an intergovernmental negotiating committee (INC) with a mandate to prepare an international legally binding instrument on PIC, to be completed and adopted before the end of 1997.¹³⁹

The INC met for the first time in Brussels, Belgium from 11 to 15 March 1996. Subsequent negotiating sessions were held in Nairobi, Kenya, from 16 to 20 September 1996; Geneva, Switzerland, from 26 to 30 May 1997; Rome, Italy, from 20 to 24 May 1997; and Brussels again from 9 to 14 March 1998. The process culminated with the adoption of the “Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade” by a diplomatic Conference that met in Rotterdam, the Netherlands, from 10 to 11 September 1998. The Conference also agreed that the FAO and UNEP would continue to operate the voluntary PIC procedure –as amended by the Rotterdam Convention—during the interim period, i.e., between the date of adoption of the Convention and the date of its entry into force.¹⁴⁰

3. Scope (and the Mandate of the INC)

According to the 1995 UNEP GC decision that initiated the negotiations on the Rotterdam Convention, the INC’s mandate was to prepare a treaty “for the application of the [PIC] procedure for certain hazardous chemicals in

¹³⁹ See UNEP GC, Decision 18/12 (26 May 1995), para. 1.

¹⁴⁰ See UNEP/FAO, “Resolution on Interim Arrangements,” UN Doc. UNEP/FAO/PIC/CONF/5, Rotterdam, the Netherlands (17 September 1998) Annex I.

international trade.”¹⁴¹ The decision, however, left open the possibility of widening the INC’s mandate at a future date. It called for the establishment of a government-designated group of experts to discuss the need to develop further measures “within or beyond” PIC to reduce the risks from a “limited number” of hazardous chemicals. The group was asked to report back to the UNEP GC at its nineteenth session, to be held in Nairobi from January 27 to February 7 1997, where the UNEP GC would consider extending the mandate of the INC on the basis of the group’s recommendations.¹⁴²

The decision to leave open the possibility of expanding the scope of the PIC convention at a future date was the result of a compromise between those who wanted a treaty limited to PIC and those who wished to discuss the possibility of including additional measures, in particular export bans. The second group was led by the developing countries (G77), which at the 1995 UNEP GC submitted a proposal stating that the future PIC instrument should include provisions banning the export of domestically prohibited chemicals, including pesticides.¹⁴³ A similar sentiment had been expressed during the second session of the Commission on Sustainable Development, held in May 1994, where some participants called for a legally binding PIC procedure and for the “subsequen[t] ban[ning of] the export of domestically prohibited chemicals from countries that [we]re members of the [OECD] to other countries.”¹⁴⁴ Although the calls for a ban on the export of certain hazardous chemicals from OECD to non-OECD countries mirrored a decision concerning hazardous waste exports that had been adopted two months earlier by the Conference of the Parties to the Basel Convention,¹⁴⁵ there was an important difference

¹⁴¹ See UNEP GC, Decision 18/12 (26 May 1995), para. 1.

¹⁴² See *ibid.*, para. 3.

¹⁴³ See Pallemmaerts, “EU Policy,” *supra* note 131 at 75.

¹⁴⁴ See UN ECOSOC, “Report of the Commission on Sustainable Development on its second session,” UN Doc. E/1994/33 (12 July 1994) at 53 (Chapter II, para. 11) and Pallemmaerts, *ibid.* at 75-76.

¹⁴⁵ Decision II/12 of the Conference of the Parties to the Basel Convention recalled the “request of the G-77 countries at the first meeting of the [COP], for the total ban on all exports of hazardous wastes from OECD to non-OECD countries” and decided, among other things, to “prohibit immediately all transboundary movements of hazardous wastes destined for final disposal from OECD to non-OECD states.” See [COP]

between the issues of hazardous waste and hazardous chemicals. First, as discussed in Chapter 2, the decision to ban hazardous waste exports from OECD to non-OECD countries was prompted in large part due to moral outrage at a number of international scandals involving the export of hazardous wastes from rich to poor countries. There were no such scandals in the context of the Rotterdam Convention negotiations and as a result the negotiations were not nearly as politicized. A considerably less politicized environment also meant that there was no pressure on donors to commit additional resources to ensure that, were certain chemicals to be banned, alternatives would be available. Second, unlike the widespread public perception of hazardous wastes as harmful, hazardous chemicals were generally seen as useful and even necessary. Developing countries relied on hazardous chemicals to sustain export agriculture and control vector-borne diseases such as malaria and yellow fever, and even some environmental non-governmental organizations agreed that in certain cases chemicals banned or severely restricted in a developed country could still be useful in the developing world.¹⁴⁶ In addition, some hazardous chemicals were being produced in developing countries by multinational corporations or, in a few cases, by national manufacturers.¹⁴⁷ These circumstances might help explain why the G77 did not reiterate the calls for export bans made at the CSD 1994 session and during the UNEP GC 1995 meeting in the context of the negotiations of the Rotterdam Convention.

a) INC discussions

Although at the UNEP GC 1995 session the G77 was in favour of incorporating export bans in the future PIC treaty, developing countries did not reiterate this position during the INC sessions, where the discussion on

to the Basel Convention, Decision II/12 (25 March 1994), in UNEP, "Report of the second meeting of the [COP] to the Basel Convention," UN Doc. UNEP/CHW.2/30, Geneva (25 March 1994) at 19-20.

¹⁴⁶ See Goldberg, *supra* note 7 at 1047.

¹⁴⁷ See Barrios, *supra* note 2 at 696-697.

the possible expansion of the PIC convention's scope moved from export bans to production phase-outs. At the first session of the INC, Belgium, the Netherlands and other EU countries called on delegates to interpret their mandate "generously," stressing the need to include provisions in the new convention that would allow some flexibility for the inclusion of additional elements, such as production phase-outs for certain particularly hazardous chemicals.¹⁴⁸ A statement made by Belgium hinted that behind this proposal was the desire to provide the legal basis within the PIC instrument for phasing out certain persistent organic pollutants (POPs), which were of increasing concern among several developed countries, given their long-range environmental transport patterns and truly "global" effects.¹⁴⁹ The EU was not as specific about what possible measures should be adopted, but it insisted that the scope of the future instrument should be flexible enough to accommodate future developments. The United States, Canada, Australia and other OECD countries cautioned against extending the mandate of the INC beyond PIC, however.¹⁵⁰ Together with Japan, these countries understood the mandate of the INC as being strictly limited to making the PIC procedure binding.¹⁵¹ According to this view, the inclusion of measures of the voluntary FAO/UNEP system that were not part of the PIC procedure, such as export

¹⁴⁸ This was the statement of the representative of Belgium, host government of the first session of the INC. See UNEP/FAO, "Report of the [INC] for an Int'l legally binding instrument for the application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade on the work of its first session," UN Doc. UNEP/FAO/PIC/INC.1/10, Brussels, Belgium (21 March 1996) [INC-1 report] at 2.

¹⁴⁹ See Pallemacerts, "EU Policy," *supra* note 131 at 76. At its 1995 session, the UNEP GC adopted a decision recognising that POPs posed "major and increasing threats to human health and the environment" and that many POPs were transported over long distances globally and existed in "measurable and increasing concentrations far from the site of origin." The decision stated the "urgent need" to improve scientific understanding of POPs and invited various bodies to initiate an assessment process, beginning with a list of 12 POPs being considered by the UN Economic Commission for Europe. Based on the results of this assessment and other forums, it asked the Intergovernmental Forum on Chemical Safety to develop recommendations, including on the possible adoption of an international legal mechanism on POPs, to be considered by the UNEP GC and the World Health Assembly "no later than in 1997." See UNEP GC, Decision 18/32, "Persistent Organic Pollutants" (25 May 1995), Pmb., paras. 1, 5 and 6 and paras. 1 and 2.

¹⁵⁰ "INC-1 report," *supra* note 148 at 6; Katharina Kummer, "Prior Informed Consent in International Trade: the 1998 Rotterdam Convention," (1999) 8:3 RECIEL 323 at 325; and Pallemacerts, "EU Policy," *supra* note 131 at 76.

¹⁵¹ The voluntary system operated jointly by UNEP and the FAO included: information exchange; export notification of domestically banned or severely restricted chemicals not subject to PIC; and prior informed consent for the chemicals listed in Annex III. See Barrios, *supra* note 2 at 714-716.

notification requirements for chemicals that were banned or severely restricted in exporting countries but were not subject to PIC and labelling requirements constituted an unjustified extension of the INC's mandate.¹⁵²

The representatives of UNEP and the FAO did not interpret the INC's mandate in this narrower sense,¹⁵³ but they also urged the INC to focus on PIC and the voluntary system, even as they recognised the larger dimension of the problem, in particular the need to make agriculture more sustainable and to ensure the safe management of chemicals to protect human health and the environment.¹⁵⁴ When the representative of Belgium urged the INC to consider the relationship between PIC and possible additional measures, UNEP Executive Director Elizabeth Dowdeswell highlighted measures that were being discussed in other forums to deal with related issues, in particular POPs, and urged the INC to "focus on achieving unanimity on the PIC convention itself."¹⁵⁵ Similarly, the FAO representative said that the task of the INC was "to review the voluntary PIC procedure and to determine elements to be retained in a legally binding procedure."¹⁵⁶

¹⁵² See "INC-1 report," *supra* note 148 at 7 and 10; UNEP/FAO, "Comments on the Possible Elements for an Int'l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade Identified by the Ad Hoc Working Group," UN Doc. UNEP/FAO/PIC/INC.1/3, Brussels, Belgium (8 December 1995) [Comments on Possible Elements] at 3 and 9; and Pallemmaerts, "EU Policy," *supra* note 131 at 77.

¹⁵³ At INC-2, for instance, the FAO representative called for PIC to "cover those pesticides that could not be handled safely by small farmers in developing countries." See UNEP/FAO, "Report of the INC for an Int'l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade on the work of its second session", UN Doc. UNEP/FAO/PIC/INC.2/7, Nairobi, Kenya (12 November 1996) [INC-2 report] at 2.

¹⁵⁴ See UNEP/FAO, "Report of the INC for an Int'l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade on the work of its fourth session," UN Doc. UNEP/FAO/PIC/INC.4/2, Rome (4 November 1997) at 1-2. At INC-2, the FAO representative declared that the FAO "strongly advocated an Integrated Pest Management approach in which farmers were provided with sufficient information to make their own informed decisions on plant protection systems and the possible applications of pesticides," and that it would "continue to participate in discussions on international agreements on chemicals to draw attention to the need for creating and maintaining sustainable agricultural systems that c[ould] provide sufficient food for generations to come." See UNEP/FAO, "INC-2 report," *supra* note 153 at 2.

¹⁵⁵ "INC-1 report," *supra* note 148 at 2-3. Dowdeswell reiterated this at the second session of the INC. See UNEP/FAO, "INC-2 report," *supra* note 153 at 1-2.

¹⁵⁶ See "INC-1 report," *supra* note 148 at 2.

As discussed above, developing countries did not articulate a unified position regarding the INC's mandate.¹⁵⁷ They failed to support the proposal of some EU countries to widen the scope of the future treaty to accommodate additional measures such as the phasing out of POPs, according to some commentators because they felt that the obligations of a convention of narrower scope would be challenging enough to implement.¹⁵⁸ It is also possible that, as the discussion on the scope of the PIC treaty moved from political forums to actual negotiations, some developing countries did not want to commit to halting the production or use of certain hazardous chemicals that were cheaper to produce or consume than safer alternatives.¹⁵⁹ Not only did developing countries fail to defend a wider scope for the PIC treaty, but at least one of them supported a limited scope for the convention and openly defended the interests of industry by supporting fewer obligations for exporters, which suggests that at least some of them might have desired to protect foreign investment by large agrochemicals corporations.¹⁶⁰

Still, the G77 argued that PIC alone was insufficient to deal with the problem at hand and that the future instrument should include a reference to the objective of promoting the environmentally sound management of hazardous chemicals, particularly in developing countries, in accordance with the

¹⁵⁷ Some developing countries, notably Colombia and Jordan, supported the position held by the U.S., Australia and others that the INC's mandate was to transform the voluntary PIC into a legally binding instrument. See "Report of the 3rd Session of the [INC] for an Int'l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade" *Earth Negotiations Bulletin* 15:2 (2 June 1997) at 3 [INC-3 ENB report] online: <<http://www.iisd.ca/linkages/download/pdf/enb1502e.pdf>>.

¹⁵⁸ See Jonathan Krueger, "Information in International Environmental Governance: the PIC Procedure for Trade in Hazardous Chemicals and Pesticides," Belfer Center for Science & Int'l Affairs, September 2000, online: <<http://www.ksg.harvard.edu/gea/pubs/2000-16.pdf>> at 10 and "INC-3 ENB report," *ibid.* at 11.

¹⁵⁹ These concerns were expressed by many developing countries in the negotiations over the Stockholm Convention on POPs, as some of them were still producing or using such pollutants. See section 2(a) of Part III in Chapter 4 (Intentionally Produced POPs) and Barrios, *supra* note 2 at 692-697.

¹⁶⁰ Such was the case of the Colombian delegation, which was made up of an official of the Ministry of Foreign Affairs and a representative of the global agrochemicals industry and consistently defended the interests of industry and exporters. Although Colombia has only one important national manufacturer, it is home to several major chemicals corporations. For further details see Barrios, *supra* note 2 at 722-725.

principle of common but differentiated responsibilities.¹⁶¹ Specifically, they asked that developed country parties commit to providing additional financial resources and technical assistance for the implementation of the PIC treaty in developing countries, implying that the convention's scope should take in chemicals management-related issues. Their plea was unsuccessful, however, and from the beginning of the negotiations donors made it clear that they were not prepared to commit additional resources for the implementation of a treaty that was expected to benefit primarily developing countries.¹⁶²

The issue of scope was still unresolved at the second INC session. While the EU proposed a formulation of the objective of the future convention that could accommodate additional control measures, the United States and others reiterated their opposition to expanding the scope of the PIC treaty.¹⁶³ Since all that participants in the second group had to do was oppose changing the INC's mandate, the issue was finally resolved in their favour. Before the third INC session, both the FAO Council and the UNEP GC decided to confirm that

¹⁶¹ See Pallemmaerts, "EU Policy," *supra* note 131 at 76-77. As articulated in the Rio Declaration, the principle of common but differentiated responsibilities dictates that "in view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." UNCED, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) Annex I (14 June 1992), Pple. 7, online: <<http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>>. For an analysis of the principle see Karin Mickelson, "South, North, International Environmental Law and International Environmental Lawyers" (2000) 11 Y.B. Int'l Env'tl. L. 52 at 69-77.

¹⁶² In the end, the INC could only agree to a provision that requires all parties to "cooperate in promoting" technical assistance for the development of the infrastructure and the capacity needed to manage chemicals to enable the implementation of the Convention "taking into account" the needs of less developed countries. The Convention also states that parties "with more advanced chemical management programs" "should" provide technical assistance and training to other parties, but it provides no financial mechanism to sponsor capacity-building activities or technical assistance (not even one of voluntary nature). See Rotterdam Convention, *supra* note 1, Art. 16 and Barrios, *supra* note 2 at 721-722.

¹⁶³ See "INC-2 report," *supra* note 153 at 5 and Pallemmaerts, EU Policy," *supra* note 131 at 77. The draft convention presented at the session by the Secretariat included a provision stating that, when agreed by the parties, certain chemicals could be prohibited or phased out. See UNEP/FAO, "Tentative Draft Key Articles for an Int'l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade," UN Doc. UNEP/FAO/PIC/INC.2/6, Nairobi, Kenya (30 July 1996), Annex II [Tentative Articles], draft Article 1 (objectives).

the mandate of the INC was to negotiate a PIC treaty.¹⁶⁴ The UNEP GC recognised, however, that the INC was discussing “additional elements relating to the PIC procedure,” which allowed the INC to continue addressing issues that were part of the FAO/UNEP voluntary system but not of the PIC procedure itself, such as labelling and export notification requirements.¹⁶⁵

One of the primary concerns of those who opposed extending the INC’s mandate was that by including additional measures the PIC convention might lead to undue restrictions on international trade. This was apparent at the 1996 FAO Council discussions, where those who strongly opposed extending the INC’s mandate beyond PIC supported the negotiation of a separate treaty on POPs.¹⁶⁶ While the voluntary PIC system covered a few POPs, it included a much wider and more diverse list of chemicals, including acutely toxic pesticides and other substances that were causing problems primarily in developing countries. In contrast, POPs were a small group of chemicals¹⁶⁷ whose phasing out was not expected to affect large agrochemicals corporations and whose effects were truly global.¹⁶⁸ Not only would a POPs treaty preclude the possibility that a much greater number of hazardous chemicals might be banned or phased out in the future, but it would also prevent the diversion of resources intended to address the POPs issue to chemicals that did not have “global” effects.

b) The 1996 Government-Designated Experts report on Further Measures

The preoccupation with trade was clearly reflected in the report of the

¹⁶⁴ See FAO, “Report of the Council of FAO at its hundred and eleventh session,” doc. CL 111/REP (1996) [1996 FAO Council report], *supra* note 141, para. 23.

¹⁶⁵ See UNEP GC Decision 19/13 A, “Chemicals Management” (7 February 1997), operative paras. 1 and 3.

¹⁶⁶ See “1996 FAO Council report,” *supra* note 164, para. 23.

¹⁶⁷ In addition to being a relatively small number of chemicals, many of the POPs to be initially regulated were older substances that were no longer protected by patents and were no longer being produced by large multinational corporations, while newer (and thus more lucrative) alternatives existed for most of their uses. For details see section 2(a) of Part III in Chapter 4 (Intentionally Produced POPs).

¹⁶⁸ For details see section 1 of Part II in Chapter 4 (What are POPs?).

meeting of the group of government-designated experts that was asked to consider the need to develop further measures “within or beyond” PIC to reduce the risks from certain hazardous chemicals. Predictably, experts from the countries who had opposed expanding the INC’s mandate since 1995, in particular the United States and Australia, rejected a proposal to ask the UNEP GC to even “consider” the possibility of expanding the scope of the PIC convention.¹⁶⁹ These experts also expressed the view that any measure to be adopted by the UNEP GC would need to be “consistent with the trade-related principles included in Agenda 21, in particular to be the least trade restrictive necessary to achieve the objective,”¹⁷⁰ and that “bans or phase-outs ran counter to the PIC principle that each country was to make its own decision in the light of local conditions of use and local requirements.”¹⁷¹

Like in the OECD 1984 Recommendation, the Code of Conduct and the London Guidelines, emphasis was placed on the sovereign right of importing countries to decide whether they wanted to use chemicals banned in other countries for environmental or health reasons. These statements reaffirmed that PIC was a suitable way to deal with such hazardous chemicals traded internationally and that the adoption of global bans or phase-outs was therefore unnecessary. At the same time, it was argued that a distinction should be drawn between those chemicals that caused “global problems,” such as ozone-depleting substances and POPs, and those PIC chemicals that “might cause problems under specific conditions of use in specific countries;” while

¹⁶⁹ During the meeting, experts from the Netherlands and Belgium presented a proposal that asked the UNEP GC, when considering the need to develop further measures on certain chemicals “within or beyond the PIC procedure,” to give “due consideration” to the option of integrating the international legal mechanisms for the implementation of the PIC procedure, measures on POPs and any further measures that the UNEP GC might adopt. The proposal received broad support but, according to one commentator, it was not agreed due to the opposition of Australia and the United States. See UNEP, “Report of the Government-Designated Group of Experts on Further Measures to Reduce the Risks From a Limited Number of Hazardous Chemicals on its work,” UN Doc. UNEP/PIC/EG/1/3, Copenhagen, Denmark (8 July 1996) [Government experts group report], Annex II and Pallemmaerts, “EU Policy,” *supra* note 131 at 76.

¹⁷⁰ “Government experts group report,” *ibid.* at 10.

¹⁷¹ *Ibid.* at 9.

the former might deserve global phase-outs and bans, the latter did not.¹⁷² The group agreed on these basic principles, although a few experts argued that certain local problems that had a “global dimension,” such as the use of products containing substances with estrogenic effects, might also justify the need for global bans and phase-outs.¹⁷³

In the recommendations that it forwarded to the UNEP GC for consideration at its nineteenth session, the group of experts helped to reaffirm the hegemony of key principles of international trade in the context of environmental agreements dealing with chemicals-related issues. First, it concluded that there was a variety of international options to help reduce risks from specific chemicals, which ranged from improved information access to “banning or phasing out over time all uses or production of the chemical.” The choice of a particular measure, however, should be “the least restrictive, meaning that which effectively reduce[d] the risk to an acceptable level... and which [wa]s consistent with the trade related principles identified in chapters 2 and 39 of Agenda 21.”¹⁷⁴ Second, the group established a clear distinction between chemicals that were used or emitted locally and led to regional or global exposure, such as POPs, and chemicals that were traded internationally but led to “local emissions or local exposures.” It was agreed that while the former might justify regional or global action, including “international agreements to control emissions, ban or phase out certain uses or ban or phase out all uses or production,” the latter would generally require “local action,” which might need to be supported by international action. Because the PIC procedure “should result in effective action to reduce risks” posed by the

¹⁷² See *ibid.* at 21-22.

¹⁷³ See *ibid.* at 10.

¹⁷⁴ Chapter 2 provides, among other things, that “the international economy should provide a supportive international climate for achieving environment and development goals by: a. Promoting sustainable development through trade liberalization; [and] b. Making trade and environment mutually supportive.” More concisely, Chapter 39 provides that “should trade policy measures be found necessary for the enforcement of environmental policies, certain principles and rules should apply. These could include, *inter alia*, the principle of non-discrimination [and] the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives[.]” See Agenda 21, *supra* note 137, Chapter 2, paras. 3(a) and 3(b) and Chapter 39, para. 39.3(d).

second group of chemicals to “acceptable levels,” the group also concluded that “concerted global action to ban or phase out all uses or production should not be necessary” to deal with those chemicals.¹⁷⁵ Still, it was recorded that the suggestion had been made that there might be “a limited number of instances” where chemicals leading to local emissions or exposures “require[d] concerted global action,” when the “patterns of problems across a number of countries indicate[d] that such action would be warranted.”¹⁷⁶

To sum up, the group of experts agreed that any measure taken to protect human health or the environment from hazardous chemicals should be consistent with international trade norms and be the “least-trade restrictive;” that the adoption of global bans or phase-outs of certain chemicals or uses should be considered only when those chemicals had clearly “global” effects; and that PIC should be deemed sufficient to deal with the risks of hazardous chemicals that did not have global effects. The fact that experts concurred on these principles even though they disagreed on the INC’s mandate suggests that even those who wanted to widen the scope of the PIC convention agreed that trade bans and production phase-outs should apply only to chemicals with “global” effects. In other words, there was no desire among experts to ban international trade in all PIC chemicals. Consistent with this approach, at its nineteenth session the UNEP GC agreed not only to confirm the initial mandate of the INC to negotiate a PIC convention, but also that a separate treaty on an initial list of twelve POPs should be drafted.¹⁷⁷

4. Bans and Phase-outs

The decision by the UNEP GC and the FAO Council to confirm the initial mandate of the INC precluded the prospect of including bans or phase-outs in the PIC treaty. When the scope of its mandate was still under review,

¹⁷⁵ See “Government experts group report,” *supra* note 169 at 21-22.

¹⁷⁶ *Ibid.* at 22.

however, the INC considered making reference to the possible adoption of prohibition of use or phasing out of certain chemicals in the objective of the future convention, a reference that had been proposed by an ad hoc working group of experts that met regularly to discuss issues concerning the implementation of the London Guidelines.¹⁷⁷ Predictably, the representatives of Australia, Canada and the United States objected to the incorporation of such references on the basis that they exceeded the INC's mandate, while others said that the objective should be formulated in a way that made it possible to consider measures "beyond PIC."¹⁷⁸ Those who supported the inclusion of measures concerning specifically the phasing out or banning of certain chemicals in the convention, however, suggested that "only [those] chemicals that [we]re the most toxic to human beings and the environment should be considered."¹⁷⁹

Despite the opposition of a few delegations to including any references to bans or phase-outs in the future convention, the Chair of the INC decided to leave them in for consideration by the INC. In a list of tentative draft articles that she presented to the INC at its second session, the Chair proposed that the treaty's objective should be "to promote shared responsibility ... among Parties in the international trade of certain hazardous chemicals ... by promoting information exchange... a decision-making process on the future import of these chemicals ... [and, when agreed by the Parties, [by] prohibiting the use of or phasing out of these chemicals]."¹⁸⁰ It is revealing that even those participants who wanted a wider scope for the PIC treaty failed to support retaining the text in brackets, which implied that any PIC chemical could be banned or phased out if so decided by the parties. This suggested that even those who argued that the scope of the PIC treaty should

¹⁷⁷ See UNEP GC, Decision 19/13C, "Chemicals Management" (7 February 1997), operative para. 2.

¹⁷⁸ See "Comments on Possible Elements," *supra* note 152 at 6 and 11.

¹⁷⁹ "INC-1 report," *supra* note 148 at 6-7; "Comments on Possible Elements," *ibid.* at 6 and Pallemmaerts, "EU Policy," *supra* note 131 at 76.

¹⁸⁰ See "Comments on Possible Elements," *supra* note 152 at 6.

¹⁸¹ See "Tentative Articles," *supra* note 163 at 3.

be expanded felt that the possibility of adopting bans or phase-outs should not apply to *all* PIC chemicals. The EU, for instance, did not support the bracketed text but proposed a more indefinite language that would simply allow parties to accommodate “further developments” and “additional” control measures. The United States, Canada, Australia and others strongly objected to the adoption of any control measure in the PIC convention,¹⁸² however, and the matter was resolved in their favour before the next INC session when, as noted above, both the UNEP GC and the FAO Council decided to confirm that the INC’s mandate was limited to PIC and related matters.¹⁸³

5. International Trade and PIC

One of the most interesting aspects of the negotiations of the Rotterdam Convention for the purposes of this study is the openness with which participants asserted the need for the treaty to be consistent with international trade norms. These statements revealed the degree to which key actors, including UNEP, are defending the liberal economic perspective in chemicals-related international environmental negotiations. At the very first INC session, UNEP Executive Director Elizabeth Dowdeswell said that the legally binding instrument on PIC “should be compatible with the 1994 [GATT] and related World Trade Organization (WTO) agreements, such as the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.”¹⁸⁴ The UNEP/FAO Secretariat expressed a similar view in a paper on trade-related matters that it presented for consideration by the INC at its first session, which listed in the

¹⁸² See “INC-2 report,” *supra* note 153 at 5 and Pallemmaerts, “EU Policy,” *supra* note 131 at 76-77.

¹⁸³ A similar development occurred regarding the incorporation of a provision on trade with non-parties, which essentially allowed parties to trade in PIC chemicals with non-parties that were in compliance with the substantive provisions of the convention. Although achieving universal participation in the PIC procedure was presented as the very justification for negotiating a legally binding PIC instrument and a provision on trade with non-parties was in sync with international trade norms according to an expert group that discussed the matter, at its fourth session the INC decided to delete the provision, on the basis that the draft convention no longer incorporated bans or phase-outs. For further details see “INC-2 report,” *supra* note 153 at 7 and Barrios, *supra* note 2 at 751-752.

¹⁸⁴ See “INC-1 report,” *supra* note 148 at 3.

annex a number of issues identified by an expert group on international environmental agreements and trade.¹⁸⁵ Noting that one of the objectives of Agenda 21 was to make trade and environmental policies “mutually supportive” in favour of sustainable development, the paper advised the INC to consider a number of principles that could establish such a supportive linkage, including the principle of non-discrimination and the principle that any trade-related measure adopted to protect the environment or health should be the “least trade-restrictive” necessary to achieve their objective.¹⁸⁶ In the ensuing discussion, emphasis was placed on trade and environmental policies being “mutually supportive” and complementary and several representatives said that the principles contained in GATT/WTO rules and agreements should be “carefully” considered. It was also stated that measures taken pursuant to the PIC instrument should be “least trade-restrictive and non-discriminatory,” with no one voicing the opposite view.¹⁸⁷

Calls for consistency between the PIC treaty and existing international trade norms were heard throughout the negotiations, both before and after the adoption of the Rotterdam Convention.¹⁸⁸ Most notably, with all but one

¹⁸⁵ See UNEP/FAO, “Trade-related Issues,” UN Doc. UNEP/FAO/PIC/INC.1/8, Brussels, Belgium (22 December 1995) [Trade-related Issues] at 5 (Annex).

¹⁸⁶ See *ibid.* at 1.

¹⁸⁷ See “INC-1 report,” *supra* note 148 at 12.

¹⁸⁸ At the third INC session, the representative of Switzerland said that one of the goals of sustainable development was to ensure that “free trade and the protection of the environment were mutually supportive” and that the PIC negotiations were a “major step towards solving the problems of trade and environment.” Similarly, UNEP Executive Director Elizabeth Dowdeswell called for further efforts to protect the environment and human health of chemical risks through international law and for those efforts to be linked to international trade rules, since “environmental protection and trade liberalization could be mutually supportive.” UNEP/FAO, “Report of the [INC] for an Int’l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade on the Work at its third session,” UN Doc. UNEP/FAO/PIC/INC.3/2, Nairobi, Kenya (26 June 1997) at 2 and 3. At the fourth INC session, the EU and Canada urged retaining an article on avoiding “unnecessary obstacles to international trade.” See “Report of the fourth session of the [INC] for an Int’l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade” *Earth Negotiations Bulletin* 15:3 (27 October 1997) [INC-4 ENB report] at 4. At COP-1, UNEP Executive Director Klaus Töpfer sent a message to the parties stating that the Rotterdam Convention represented a “notable success” and a “first step toward building a new global approach to chemicals” that “recognized the advantages of chemicals and demonstrated that economic development and concern for the environment were compatible, interdependent and necessary.” See UNEP/FAO, “Report of the [COP] to the Rotterdam Convention on the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l

exception,¹⁸⁹ no one voiced opinions that challenged the prospect or desirability of such consistency during the negotiations of the Convention. Also, as discussed above, even those who supported the expansion of the PIC convention before the third INC session to include additional measures suggested that bans and phase-outs should apply only to some PIC chemicals, consistent with the “least trade-restrictive” measure principle and the notion that chemicals whose effects were felt at the local level did not justify the adoption of global trade bans or production or use phase-outs.

Once it was confirmed that the INC’s mandate was to make the voluntary PIC system binding, the calls for consistency between the Rotterdam Convention and international trade agreements became almost superfluous. Not only were the Code of Conduct and the London Guidelines based on the idea that PIC was an effective way of dealing with the risks posed by hazardous chemicals traded internationally, but they also incorporated key international trade norms. As put by the group of experts on international environmental agreements and trade, both instruments were a “good example” of how environmental and trade policies could be made “mutually supportive.”¹⁹⁰

Nevertheless, there is one way in which the PIC convention could threaten the continued production, use and trading of hazardous chemicals. As pointed out by the United States back in 1982 when the IRPTC was established by the UNGA,¹⁹¹ the list of chemicals to be subjected to the PIC procedure (the PIC list)¹⁹² could come to be seen by governments as a “blacklist” of substances

Trade on the work of its first meeting,” UN Doc. UNEP/FAO/RC/COP.1/33, Geneva, Switzerland (22 October 2004) at 1.

¹⁸⁹ At the third INC session, Panama said that exporting countries that had banned or severely restricted a chemical should not have the moral right to sell it to others. See “INC-3 ENB report,” *supra* note 157 at 7.

¹⁹⁰ See UNEP/FAO, “Trade-related Issues,” *supra* note 185 at 5.

¹⁹¹ In 1982, the UN General Assembly adopted a resolution that called for the creation of a list of products whose consumption and/or sale had been banned, withdrawn or severely restricted. The resolution was regarded with suspicion by the agrochemicals industry and several developed countries, and the United States opposed it on the basis that it was an unscientific “blacklist” detrimental to the legitimate interests of industry. See section 2(b) of Part II above.

¹⁹² See *infra* note 207.

that should be avoided in all countries. If this perception became widespread and the PIC list became large enough, it could lead to de facto global trade bans and production phase-outs of a significant number of hazardous chemicals. Not surprisingly then, those who insisted that the scope of the Rotterdam Convention should be limited to PIC and who defended international trade norms in the context of the various international efforts to tackle the problem of hazardous chemicals also supported rules that would allow parties to control which chemicals were added to the PIC list. As discussed below, these actors succeeded in ensuring that individual parties would be able to prevent new chemicals from being added to the PIC list, thereby weakening the potential of the Rotterdam Convention to cover hazardous chemicals of commercial significance and to defy liberal economics.

6. The “PIC list” (Annex III)

Although its mandate was to transform the voluntary PIC procedure into a legally binding instrument, the INC had room to decide which particular rules would apply for adding new substances to the list of chemicals subject to the PIC procedure (PIC list). Under the voluntary PIC procedure, any pesticide, industrial or consumer chemical banned or severely restricted by any single government for health or environmental reasons was eligible for inclusion in the PIC list.¹⁹³ Eligible chemicals were added to the PIC procedure when the implementing body (UNEP or the FAO) had asserted conformity of the control action banning or severely restricting a chemical with the definitions of “banned” and “severely restricted” provided in the Code and the Guidelines.¹⁹⁴ In addition, an expert group was established to consider the problem of hazardous pesticide formulations causing problems under conditions of use in

¹⁹³ For control actions taken prior to 1 January 1992, a minimum of five notifications was required for the chemical to be eligible to enter the PIC list. See UNEP/FAO, “Overview of the [PIC] and Information Exchange Procedures,” UN Doc. UNEP/FAO/INC.1/4, Brussels, Belgium (19 December 1995) [Overview PIC] at 4-5. See Barrios, *supra* note 2 at 729 and “Overview PIC,” *ibid.* at 6.

developing countries and it was decided that, when there was evidence of risk to human health, those formulations should also be included in the voluntary PIC procedure.¹⁹⁵

Following the voluntary procedure, from the beginning of the negotiations it was understood that a group of experts (e.g., a subsidiary technical body of the conference of the parties) should be established to determine whether the convention's requirements had been met for a given chemical to be eligible for entry on the PIC list.¹⁹⁶ It was also agreed that, following the evaluation by the expert group confirming that the convention's requirements had been met for a given chemical, the conference of the parties should decide whether or not the chemical would be added to the PIC list.¹⁹⁷ Participants disagreed, however, about the particulars concerning the rules for adding new chemicals to the PIC list. Two matters proved particularly controversial. The first was the issue of how many notifications of a control action (banning or severely restricting a chemical for environmental or health reasons) should be required for a chemical to be eligible for inclusion on the PIC list. The second was whether the conference of the parties should decide to add new chemicals to the PIC list by consensus or via some kind of majority voting rule.¹⁹⁸

Concerning the first issue, Canada and New Zealand said that notifications by five countries from at least three different regions should be required for a chemical to be considered eligible for addition to the PIC list. According to the representative of Canada, this would ensure that any chemical listed constituted a truly international problem requiring international action. The

¹⁹⁴ See *supra* note 116.

¹⁹⁵ On the basis of the group's recommendations, five pesticide formulations were included in the PIC procedure in 1997. See Barrios, *supra* note 2 at 729.

¹⁹⁶ See "INC-2 report," *supra* note 153 at 6.

¹⁹⁷ See *ibid.* at 6 and 17.

¹⁹⁸ Canada also advocated a consensus voting rule for the technical body that would be in charge of determining whether a chemical could be considered a candidate for addition on the PIC list by the COP. Most participants disagreed, however. Among them was the representative of the United States, who suggested that the members of the technical body should strive for consensus but otherwise decide by a three-fourths majority rule. See "INC-4 ENB report," *supra* note 188 at 4.

representatives of the EC, several developing countries and the Pesticides Trust (now PAN U.K.) disagreed, stressing that Canada's proposed approach would make it very difficult to add new chemicals to the PIC list, since countries in many regions lacked the technical capacity to perform the rigorous assessments that would be required to nominate a new chemical. These participants argued that one notification should be sufficient for a chemical to be considered eligible to enter the PIC list.¹⁹⁹ In the end, it was agreed that one notification from each of two different regions of final regulatory actions banning or severely restricting a chemical should be required for that chemical to be considered eligible to enter the PIC list.²⁰⁰

Regarding the second issue, participants were divided among those who insisted that the decision by the parties to add a new chemical to the PIC list should be adopted by consensus and those who opposed the use of consensus on the basis that it might be used by parties to prevent relevant chemicals from being added to the Convention. At the third INC session, the first point of view was defended by Canada, Australia and the United States,²⁰¹ while Argentina, Zimbabwe, Mexico, Panama, Indonesia and the Pesticides Trust strongly opposed the adoption of a voting rule requiring consensus, stressing that it would constitute a *de facto* veto mechanism. At that point, the EC simply stressed the need for a mechanism to prevent parties having to ratify each amendment (i.e., each addition of new chemicals) to the PIC list.²⁰² Those who supported a consensus-based voting procedure reiterated their position at the next session, when they were joined by the EC, New Zealand, Jordan, Ukraine and the Gambia. The representative of the United States made it clear that it would only accept a consensus rule or otherwise the listing of new chemicals to the PIC list would require ratification by individual parties

¹⁹⁹ See "INC-3 ENB report," *supra* note 157 at 4.

²⁰⁰ At their first meeting, the parties established six regions. See *infra* note 207.

²⁰¹ See "INC-3 ENB report," *supra* note 157 at 5.

²⁰² See *ibid.*

of each amendment.²⁰³ Hence, despite the opposition of a few developing countries, at its fifth session the INC decided that decisions to add new chemicals to the PIC procedure should be adopted by consensus.²⁰⁴

a) Final outcome and recent developments

It is apparent that, as feared by the United States, a significant number of government representatives see the PIC list as a “blacklist” of chemicals that should be avoided by all countries. Thus, on several occasions, actors have felt the need to clarify that the aim of the Rotterdam Convention is not to ban international trade in the listed chemicals, but rather to warn parties about the risks of certain substances.²⁰⁵ As discussed above, this perception could eventually lead to de facto global bans of PIC chemicals, a development that is welcomed by the representatives of some environmental NGOs, who claim that that should be the ultimate purpose of the PIC list.²⁰⁶ The possibility that the Rotterdam Convention will threaten the continued production, use and international trading of hazardous chemicals is significantly constrained,

²⁰³ These countries were Ukraine, Jordan and the Gambia. See “INC-4 ENB report,” *supra* note 188 at 4.

²⁰⁴ At the fifth INC session, Argentina, Iran and India opposed the adoption of a consensus-based voting procedure for the listing of new chemicals on the PIC list. The representative of Iran argued that such a voting rule could lead to a situation whereby a party might use the consensus procedure to block the inclusion of a relevant chemical on the PIC list, to the detriment of human health and the environment. See “INC-5 report,” *supra* note 205 at 8 and 31 and “Report of the fifth session of the [INC] for an Int’l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade” *Earth Negotiations Bulletin* 15:4 (16 March 1998) at 8.

²⁰⁵ This point was raised by WWF at the last INC session, by Denmark at the first COP meeting and by FAO at the third COP meeting. See “PIC INC-11 highlights,” *Earth Negotiations Bulletin* 15:100 (20 September 2004) at 2; “Report of the eleventh session of the INC for an Int’l Legally Binding Instrument for the Application of the PIC Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade and the first COP [meeting] to the Rotterdam Convention,” *Earth Negotiations Bulletin* 15:105 (27 September 2004) at 3 and 10 [INC-11/COP-1 ENB report], at 9; and UNEP/FAO, “Report of the [COP] to the Rotterdam Convention on the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade on the work of its third meeting,” UN Doc. UNEP/FAO/RC/COP.3/26, Geneva, Switzerland (10 November 2006) at 2.

²⁰⁶ Interviews with the representatives of two environmental NGOs during the second COP meeting of the Rotterdam Convention, Rome, Italy, from 27 to 30 September 2005.

however, by the fact that the decision to add a new chemical to the PIC list must be made by consensus.²⁰⁷

The fear of those who opposed a consensus-based voting procedure on the basis that parties could use it to block the inclusion of new chemicals on the PIC list has also been confirmed.²⁰⁸ On two different occasions, the parties decided not to include chrysotile asbestos (an industrial chemical banned in many countries due to health reasons) to the PIC list, due to the opposition of Canada, the Russian Federation and a few other chrysotile asbestos producers or exporters, even though in both cases the technical body responsible for confirming that all the Convention's requirements had been met had recommended the chemical's inclusion.²⁰⁹ This occurrence has led to disillusionment among many participants, who have interpreted it as a demonstration that parties can use the consensus-based mechanism to prevent the listing of a hazardous chemical on the basis of economic and political

²⁰⁷ Annex III to the Rotterdam Convention lists the chemicals subject to the PIC procedure. In order for a chemical to be listed in Annex III, the Secretariat has to receive at least one notification from two different regions of final regulatory actions banning or severely restricting that chemical (six regions were established by parties at their first meeting). The Secretariat must then forward the notifications received to a group of experts, the Chemical Review Committee (CRC). The CRC has to review whether the notifications comply with the criteria listed in Annex II (criteria for listing banned or severely restricted chemicals), in which case it shall recommend the inclusion of the chemical and elaborate a decision guidance document (DGD) to be considered by the conference of the parties (COP). The COP must then decide, by consensus, whether to list the chemical in Annex III. This means that any party might veto the inclusion of a substance in Annex III. See Rotterdam Convention, *supra* note 1, Arts. 5, 7 and 22(5)(b).

²⁰⁸ See *ibid.* and Rotterdam Convention, *supra* note 1, Art. 22(5)(b).

²⁰⁹ During the interim period, i.e., between the date of adoption of the Rotterdam Convention and that of its entry into force, the Interim Chemical Review Committee recommended that the INC add chrysotile asbestos and other chemicals to the PIC list (Annex III), on the basis that all the Convention's criteria for inclusion had been met. Due to the opposition of Canada, the Russian Federation and a few other chrysotile asbestos producers or exporters, the chemical was not added to the interim PIC procedure. The listing of chrysotile asbestos was taken up by the Conference of the Parties (COP) at its third session. Again, due to the opposition of Canada and others, the COP decided not to list the chemical in Annex III despite the opinion of the Chemical Review Committee that all the Convention's requirements for the chemical to be listed had been met. See "INC-11/COP-1 ENB report," *supra* note 205 at 3 and 10; Asbestos Institute, "Chrysotile Asbestos: An Overview," online: <<http://www.asbestos-institute.ca/main.html>> (last visited June 7, 2007); and "Summary of the third meeting of the [COP] to the Rotterdam Convention," *Earth Negotiations Bulletin* 15:147 (16 October 2006) [COP-3 ENB report] at 4.

considerations, even if all the requirements of the Convention have been met for the substance to be listed.²¹⁰

IV. The Rotterdam Convention

As probably expected by those who wanted the initial mandate of the INC to be confirmed, the Rotterdam Convention essentially reproduced the voluntary PIC system and related provisions, including key principles of international trade law.²¹¹ Like the London Guidelines, the Convention provides that nothing in it “shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection.”²¹² Even though the next paragraph clarifies that the “above recital is not intended to create a hierarchy between [the] Convention and other international agreements,”²¹³ it is hard to see how such a hierarchy could be avoided if a provision in the Rotterdam Convention was found to contradict a pre-existing international trade norm.

As discussed in Chapter 2, the relationship between multilateral environmental agreements (MEAs) and WTO law remains unclear, so it is possible that a measure taken by a party to implement an MEA such as the Rotterdam Convention might be considered valid under the MEA but unlawful under WTO law.²¹⁴ This seems unlikely in the case of the Rotterdam Convention, however, since the Convention incorporates key principles of international trade and none of its provisions appear to contradict WTO law. Like the Code of Conduct, the Convention asks importing country parties that withhold consent to import a chemical to prohibit imports of that chemical

²¹⁰ See “INC-11/COP-1 ENB report,” *supra* note 205 at 3 and 10 and “COP-3 ENB report,” *ibid.* at 4 and 10-11.

²¹¹ For a review of the Rotterdam Convention’s main provisions see Barrios, *supra* note 2 at 725-735.

²¹² See Rotterdam Convention, *supra* note 1, Pmbl., para. 9.

²¹³ *Ibid.*, Pmbl., para. 10.

from any source as well as domestic production for domestic use,²¹⁵ following the principle of non-discrimination of the GATT.²¹⁶ Similarly, the Convention incorporates a key liberal economic principle agreed upon at the 1992 Rio Summit,²¹⁷ i.e., that “[t]rade and environmental policies should be mutually supportive with a view to achieving sustainable development.”²¹⁸ The implication of this provision is that international trade norms, premised on the continued production, consumption and trading of an ever increasing number and volume of chemicals, are inherently compatible with the protection of the environment and human health from those chemicals. If chemical safety can be achieved irrespective of the ever-increasing consumption of chemicals and chemical-containing products, then there is no need to confront over-consumption or to challenge the norms or forces that promote it.

Like its predecessors, the Rotterdam Convention covers three types of procedures: information exchange; export notification for domestically banned or severely restricted chemicals not subject to the PIC procedure; and PIC for the chemicals listed in Annex III.²¹⁹ In relation to PIC, the treaty requires parties to inform the Secretariat whether they will receive future imports of the chemicals listed in Annex III,²²⁰ and exporting state parties to take appropriate measures to ensure that exporters within their jurisdiction comply with the decisions of importing parties in relation to PIC chemicals.²²¹ As noted above, the decision of importing states must abide by the principle of non-discrimination, i.e., if a party decides to refuse an import or consents

²¹⁴ For an outline of the ongoing debate concerning the relationship between WTO law and trade-related obligations under MEAs within the WTO see pages 97-99 and footnotes 163 to 165 in Chapter 2.

²¹⁵ See Rotterdam Convention, *supra* note 1, Arts. 10.9(a) and 10.9(b).

²¹⁶ See GATT, *supra* note 27, Arts. I and III.

²¹⁷ See Agenda 21, *supra* note 137, Chapter 2, para 2.10(d).

²¹⁸ *Ibid.*, Pmbl., para. 8.

²¹⁹ See *supra* note 207.

²²⁰ A decision could consist of consent, no consent or consent to import under certain conditions, or contain an interim response. See Rotterdam Convention, *supra* note 1, Art. 10(4).

²²¹ For details on timing, etc., see *ibid.*, Art. 11.

to an import under certain conditions, the same restrictions must apply to domestic production and to imports of that chemical from any source.²²²

Although parties must ensure that no chemicals listed in Annex III are exported to parties that have failed to transmit a decision concerning their import, there are three important exceptions to this rule. These exceptions ensure that trade in PIC chemicals will continue unless the importing country impedes it through effective participation in the PIC procedure, which is why the norm is referred to as the “status quo” clause.²²³ To prevent the import of a PIC chemical it does not wish to receive, the importing country must give a negative response on the import of the substance concerned through the PIC system. In order to give that response, the country must be able to analyse the data received (which requires sufficient technical capacity, qualified staff and adequate laboratories), to study the possible effects of the substance under its own environmental conditions and to consider possible alternatives to the chemical in question. In addition, the importing country must make sure that its response (whether provisional or final) is consistent with the rules of international trade.²²⁴ This means that it must identify if it is currently importing the chemical, the history of imports from different sources and the extent of local production of the chemical in order to ensure that its decision, if it were negative, will not be challenged because it contradicts the principle of non-discrimination. Since many countries have very limited capacity to

²²² See *ibid.* Art. 10(9).

²²³ The export can still take place if: (1) the chemical to be exported is registered in the importing party; or (2) there is evidence that it has been used or imported into the importing party and no regulation to prohibit its use has been enacted; or (3) the exporter received explicit consent from the DNA of the importing party. Article 11 also provides that the obligations of exporting parties will end after a period of time, so continued failure by importing countries to provide import responses would entail that they are no longer protected by the clause. Because of this, concerns were expressed about the number of countries failing to send import responses at the tenth session of the INC and at the second COP meeting. See Rotterdam Convention, *supra* note 1, Art. 11(2); UNEP/FAO, “Report of the [INC] for an International Legally Binding Instrument for the Application of the PIC Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its tenth session,” UN Doc. UNEP/FAO/INC.10/24, Geneva (21 November 2003) at 6; and UNEP/FAO, “Report of the [COP] to the Rotterdam Convention on the PIC Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its second meeting,” UN Doc. UNEP/FAO/RC/COP.2/19, Rome (12 October 2005) at 5.

²²⁴ See Rotterdam Convention, *supra* note 1, Art. 10.9, which requires that the decision be “trade neutral.”

fulfil these requirements, they might prefer to register no decision at all, as the current record of failures to respond to the import of several PIC chemicals by a significant number of developing countries suggests.²²⁵

V. Conclusion

The Rotterdam Convention is the last stage in a succession of international efforts to address the problem of international trade in hazardous chemicals. This chapter has shown that, in the context of those international efforts, several key actors, including the OECD, the agrochemicals industry, Canada, the United States, Australia and Japan, were able to ensure that the problem would be framed and tackled in terms that were consistent with liberal economic norms.

The first such effort was undertaken by the OECD, whose mission is to “expand free trade”²²⁶ and which, in anticipation of possible regulatory restrictions on international trade in hazardous chemicals, adopted a recommendation that addressed the problem through information exchange rather than trade restrictions. The recommendation proved very influential in the subsequent development of related instruments by the FAO and UNEP, as the representatives of several OECD countries, the agrochemicals industry and other key actors, including the FAO, insisted on the need for consistency between related international instruments. First, the OECD recommendation framed the issue in terms of insufficient information, implying that the continued production, use and trading of hazardous chemicals banned for use in OECD countries was not, in and of

²²⁵ See Nancy S. Zahedi, “Implementing the Rotterdam Convention: The Challenges of Transforming Aspirational Goals into Effective Controls on Hazardous Pesticide Exports to Developing Countries” (1999) 11 *Geo. Int'l Envtl. L. Rev.* 707 at 727-729 and Secretariat for the Rotterdam Convention, “PIC Circular XXV - June 2007,” online: <<http://www.pic.int/en/Circular/CIRC%20XXV-English-June2007.pdf>>. The June 2007 circular lists, among other things, all importing country responses (and failures to transmit a response) received from parties as of 30 April 2007 (the Secretariat issues a PIC circular every six months, in June and December of every year).

²²⁶ See *supra* note 46.

itself, a problem. Premised on the notion of national sovereignty, which perhaps appealed to many developing countries that had only recently gained independence from their colonial powers, the recommendation also established that non-OECD countries should have the right to decide whether or not they wanted to use chemicals banned for use in OECD countries. At the same time, it failed to incorporate PIC, a procedure through which importing countries would not only receive information concerning hazardous chemicals but also have the possibility of rejecting such imports in advance. By ruling out PIC, the OECD sent a message to those that were hoping for export bans that PIC was all that they might be able to achieve to control trade in hazardous chemicals. This was because, while it was more trade restrictive than mere information exchange, PIC was also premised on the notion of national sovereignty and the idea that international trade in hazardous chemicals should be controlled rather than proscribed.

A similar message was conveyed in the context of the drafting of the London Guidelines and the Code of Conduct by UNEP and the FAO, respectively, where the representatives of some OECD countries and the agrochemicals industry insisted that the UNEP and FAO instruments should be in agreement with the OECD recommendation. Their refusal to accept anything other than information exchange prompted other participants to unite around the PIC principle, which seemed achievable because it was ultimately consistent with the liberal economic perspective. Once its opponents decided to embrace it, therefore, PIC became a widely accepted compromise on how the issue of international trade in banned and severely restricted chemicals should be addressed. A PIC treaty, therefore, seemed to be the logical next step in the sequence of endeavours to regulate such trade within the UN system.²²⁷

²²⁷ The guidelines to control the international trade in hazardous chemicals proposed by the Montevideo Programme were meant to be a “first step towards a global convention.” UNEP, “Montevideo Programme I,” *supra* note 53, Chapter II, para. (e).

When governments decided that a PIC convention should be negotiated, two proposals were presented that opened the possibility that the convention would unsettle that compromise. The first proposal came from representatives of developing countries, who suggested that the PIC convention should lead to export bans, in particular from OECD to non-OECD countries, of chemicals that had been banned or severely restricted in exporting countries. These political statements by developing countries did not translate into a negotiating position during the drafting of the Rotterdam Convention, however. There are at least three plausible explanations for this apparent change in positions. First, many developing countries depended on low-priced pesticides to sustain export agriculture and combat vector-borne diseases such as malaria and yellow fever. It is apparent that, as the discussions on bans moved from political forums to concrete treaty negotiations, these countries were not prepared to commit to halting the use of those chemicals. Second, a significant number of hazardous chemicals were being manufactured or formulated in developing countries by multinational corporations and in some cases by national producers. Third, it seems that at least a few developing countries felt the need to protect the chemicals industry and maintain a friendly climate for foreign investment in the chemical sector.²²⁸

Although developing countries did not call for export bans during the negotiation of the Rotterdam Convention, their initial calls for export bans prompted the convening of an expert group that was asked to consider the possible expansion of the scope of the PIC treaty. Ironically, the expert group contributed to reaffirming, rather than challenging, the idea that countries should be allowed to export hazardous chemicals even after banning them for domestic use because of the risks they posed to the environment or human health. It also reaffirmed key principles of international trade in the context of chemicals-related instruments. Most notably, the group established that any

²²⁸ This would explain why at least one developing country delegation not only supported the view that the convention should be limited to PIC but also defended the interests of the chemical industry by supporting

measure taken to protect human health or the environment from hazardous chemicals should be consistent with international trade norms and should be the “least-trade restrictive;” that global bans or phase-outs of certain chemicals or uses should be adopted only when those chemicals or uses had clearly “global” effects; and that PIC should be considered sufficient to deal with the risks of hazardous chemicals that did not have global effects.

The second proposal that could have upset the compromise that international trade in certain hazardous chemicals should be dealt with through a PIC system rather than bans or phase-outs came from the representatives of a few European countries. At the beginning of the negotiation of the Rotterdam Convention, these countries suggested that the convention should incorporate additional measures, including bans and phase-outs, to minimize the risks posed by certain hazardous chemicals. Because the adoption of bans and phase-outs was intended only for a small number of PIC chemicals that had clearly “global effects,” in particular persistent organic pollutants (POPs), this proposal did not challenge the continued production and trading of most PIC chemicals. Nevertheless, widening the scope of the PIC treaty in this way could have opened the possibility that bans and phase-outs might be adopted to deal with other PIC chemicals in the future. Not surprisingly then, the proposal to expand the scope of the PIC treaty was strongly opposed by those who defended international trade norms most eagerly and overtly, including the United States, Canada, Australia, Japan and the agrochemicals industry. By calling for a separate agreement on POPs, these actors reassured their European counterparts that the POPs issue would be properly addressed elsewhere and succeeded in reasserting the principle that hazardous chemicals that do not have clearly global effects such as POPs should be dealt with through PIC procedures rather than be subjected to global trade bans or production phase-outs.

lesser obligations for exporters throughout the negotiations.

The Rotterdam Convention embodies this principle and is essentially the binding version of the voluntary PIC system. Like its predecessors, the Convention incorporates key international trade norms and is premised on the idea that the problem of international trade in hazardous chemicals is one of inadequate information and, to a lesser extent, insufficient capacity. Because it is limited to managing information exchange and PIC procedures, the Convention precludes the discussion of wider chemicals management issues that might pose a challenge to the international trade in hazardous chemicals, such as the need to reduce or eliminate the use of hazardous chemicals in agriculture or to consider whether ever-rising levels of production and consumption of chemicals are sustainable. Thus, the Convention conforms to the liberal economic perspective not only because it incorporates key norms of international trade, but also because it implies that information exchange and PIC, and to a lesser extent enhancing the capacity of developing countries to implement its provisions, are sufficient to protect the environment and human health from the negative effects of hazardous chemicals. As a result, it not only sanctions the export by countries of domestically banned and severely restricted chemicals, but also encourages the acceptance of increasing production and consumption of toxic chemicals as unavoidable facts.

The fact that many government representatives see the PIC list as a “blacklist” of substances that should be avoided in all countries, however, means that the Rotterdam Convention could lead to de facto global phase-outs of PIC chemicals. In other words, even though the Convention sanctions international trade in PIC chemicals, it might eventually prompt an end to the production, use and trading of all PIC chemicals. Because the current PIC list includes only a small number of chemicals, many of which are no longer being produced or used in most countries or are of no commercial significance to major producers, the only way in which the Convention could truly challenge international trade in hazardous chemicals is if the PIC list were considerably

expanded. To the relief of those who want to protect international trade in hazardous chemicals, such an expansion of the PIC list is unlikely to be realized owing to the fact that the Convention gives parties a very effective mechanism for preventing chemicals of commercial significance from being added to the PIC list. Because the decision to add a new chemical must be made by consensus, parties can prevent the listing of a new chemical simply by opposing the listing. The importance of this limitation is confirmed by the fact that chrysotile asbestos has not been listed in the Convention due to the opposition of a handful of countries that still produce it or export it even though the technical body in charge of confirming that all the requirements of the Convention have been met has recommended its inclusion on two different occasions.

Even if all chemicals of commercial significance were included in the PIC list, it is unlikely that those countries that are still using those substances will decide to ban their use simply by virtue of the listing. In order for that to happen, access to alternatives, both chemical and non-chemical, will be required, as well as a shift to agricultural methods and health programmes that are radically less dependent on chemical inputs, in particular pesticides, which are by definition toxic. The Rotterdam Convention precludes debate on any of these issues, however, because it is limited to the PIC procedure and does not address the wider issue of chemicals management. This suggests that actors will need to look to other forums to push for alternative approaches to tackling the problem of the rising production and consumption of hazardous chemicals. Chapter 5 argues that the negotiations on the Strategic Approach to Chemicals Management (SAICM) offered such a forum, but environmental and other public interest non-governmental organizations by and large missed the opportunity of advocating or formulating alternatives to the liberal economic perspective.

Chapter 4

The Stockholm Convention on Persistent Organic Pollutants

I. Introduction

The subject of this chapter is the “Stockholm Convention on Persistent Organic Pollutants.” The treaty, which entered into force on May 17, 2004, was adopted in 2001 to regulate a group of chemicals that due to their special properties are known as “persistent organic pollutants” (POPs). The chapter argues that even though the Stockholm Convention contains a number of provisions that could be seen as having the potential to challenge the liberal economic perspective, that potential is not likely to be realised because of the very narrow field of application of those provisions. Besides the fact that the Convention regulates a very select group of hazardous chemicals, initially only twelve in number, that have clearly “global” effects, it only adopts strict measures to eliminate specified intentionally produced POPs, while significantly less stringent rules apply to those POPs that are unintentionally released in a myriad of industrial processes, including the manufacturing of some chemicals. This not only profoundly limits the treaty’s ability to rid the world of POPs, but also to curb the rising worldwide production, consumption and trading of the vast majority of hazardous chemicals.¹

Unlike the Rotterdam Convention, studied in the previous chapter, the Stockholm Convention assumes that the production, use and trading of the chemicals it regulates are a key part of the problem to be tackled. As a result, it adopts measures to reduce or eliminate those activities. This, it is argued, is because the special circumstances surrounding the POPs issue not only caused special concern among key industrialized countries but also made it possible

¹ In fact, stringent controls on POPs may lead to the increased use in developing countries of organophosphates and carbamates, two groups of pesticides that are less persistent but more acutely toxic than POPs. See Paula Barrios, “The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Towards Environmental Protection?” (2004) 4:16 *Georg. Int’l. Envtl. L. Rev.* 679 at 683-690.

for them to adopt strong measures on some POPs without undermining the continued production, consumption and trading of other hazardous chemicals. First, POPs could be clearly differentiated from the other chemicals covered in the Rotterdam Convention, for the most part acutely toxic substances causing problems in developing countries. Because they had very specific characteristics and truly “global” effects, POPs were perceived as justifying a strong global response similar to that taken on ozone-depleting substances. In particular, the tendency of some POPs to travel across the globe and accumulate in the colder settings and highest altitudes of the Earth preoccupied many developed countries situated in the Northern hemisphere. Second, because of the special properties of POPs (i.e., their chronic toxicity and persistence), there was a special sense of urgency to deal with them, as a few years of inaction could entail decades of problems. Third, unlike the much larger and more diverse group of hazardous chemicals that would be covered by the Rotterdam Convention, the initial number of POPs to be controlled was small and only chemicals exhibiting certain characteristics would be candidates for control under the global POPs treaty. Fourth, most of the POPs to be initially controlled were older substances no longer protected by patents that the major agrochemical corporations were no longer producing and for which newer (and thus more profitable) alternatives existed. As a result, the global chemicals industry supported the phase-out of those POPs to be initially controlled that were intentionally produced. Finally, although developing countries were still using and producing some of these POPs, they agreed to their phase-out because they understood that donor countries, many of which attached great importance to the POPs issue, would finance the use of pricier alternatives in less developed countries.

This particular set of factors led the negotiators to incorporate a number of seemingly counter-hegemonic norms in the Stockholm Convention, including bans and phase-outs on the production, use and trading of certain POPs. These norms, however, were purposefully limited to intentionally produced POPs so

that they would not apply to those POPs that are unintentionally generated in a variety of industrial activities, including the manufacture of chlorine-containing chemicals (e.g., polyvinyl chloride (PVC) plastic and organochlorines) and the incineration of chlorine-containing plastic and paper.² Since the elimination of the latter implied that some of the activities that released them might need to be reevaluated,³ as viable alternative processes and materials were not always available, it was widely agreed that it was impractical and that the parties should be required to eliminate them only if “feasible.” While those who supported the ultimate goal of elimination of these POPs said that it was a political aspiration toward which governments should aim, some environmental non-governmental organizations (ENGOS) suggested that the goal of elimination could be achieved through the widespread implementation of cleaner production methods and industrial processes. By failing to point out that the industrial processes themselves, and the consumption of the products that resulted from them, might need to be revisited in some cases, the position taken by these ENGOS arguably helped to reinforce the notion that the goal of elimination could be achieved within a liberal economic order and regardless of increasing consumption.

² Other processes that release POPs by-products are the bleaching of paper with chlorine, the refining of petroleum and the burning of fossil fuels. See Anne Platt McGinn, “Reducing Our Toxic Burden,” in *State of the World 2002*, Worldwatch Institute (2002) [Platt, “Toxic Burden”] at 78; Anne Platt McGinn, “Why Poison Ourselves? A Precautionary Approach to Synthetic Chemicals” (2000) Worldwatch paper 153 [Platt, “Poison”] at 8; Theo Colborn et al., *Our Stolen Future: Are We Threatening Our Fertility, Intelligence, and Survival? A Scientific Detective Story* (New York: Dutton, 1996) at 113; and *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, UN Doc. UNEP/POPS/CONF/2, 40 I.L.M. 532 (entered into force 11 May 2004) [Stockholm Convention], online: <http://www.pops.int/documents/convtext/convtext_en.pdf>, Annex C (Unintentional Production).

³ While there are alternatives to some of the activities that generate POPs by-products, such as the bleaching of paper pulp with hydrogen peroxide, oxygen or ozone (See Platt, “Poison,” *ibid.* at 25), the generation of dioxin shows the extent of the by-products challenge. According to a study by the Worldwatch Institute, chlorine is the basis of thousands of synthetic chemicals and about 60 percent of final products in the chemical industry involve chlorinated chemicals at some stage of production. (See Platt, “Toxic Burden,” *ibid.* at 79). Since dioxin formation appears to be endemic to the industrial use of chlorine chemistry, it has been argued that its elimination would require addressing the “entire class of industrial substances and technologies derived from the use of chlorine gas and organochlorine compounds.” John Thornton, “Beyond Risk: An Ecological Paradigm to Prevent Global Chemical Pollution” (2000) 6:3 *Int. J. Occup. Environ. Health* 316 at 323-324.

At the same time, environmental NGOs advocated an interpretation of the precautionary principle or approach that, had it been adopted, could have imposed significant limits on the production, use and trading of a large number of chemicals and could have required reconsideration of activities that generated POPs unintentionally. The fact that these actors interpreted precaution as an alternative method whose main purpose should be to avoid rather than simply “manage” chemicals-related risks in the face of scientific uncertainty reveals that the hegemony of liberal economic norms in the context of the Stockholm convention negotiations is not complete. The potential therefore exists, however small, to challenge liberal environmentalism in the context of the Convention.

Chapter 4 is divided as follows. Part II looks at the background of the Stockholm Convention, including the properties of POPs and the various discussions that led to the decision that a global POPs treaty should be drafted. Particular attention is paid to the negotiations concerning a regional POPs instrument held within the United Nations Economic Commission for Europe (UNECE), which decisively shaped how the POPs issue would be framed and tackled at the global level, and the work carried out by the Intergovernmental Forum on Chemical Safety (IFCS), which involved a wider spectrum of interests and sectors than the UNECE process, including UNECE, developed and less developed countries, public interest organizations and the agrochemicals industry. Part III examines the negotiations that led to the adoption of the Stockholm Convention, focusing on a few issues that opened the possibility for the negotiators to adopt norms that challenged liberal economic norms and ideas, and the outcome of those discussions. Concluding remarks and a summary of the main argument are set out in Part IV.

II. Antecedents

1. What are Persistent Organic Pollutants?

Persistent organic pollutants (POPs) are hazardous chemicals (including pesticides, industrial chemicals and chemicals generated unintentionally in a number of industrial processes)⁴ that share a number of characteristics. First, they are organic, i.e., carbon-based, compounds.⁵ The carbon chain is usually surrounded by hydrogen and oxygen atoms and a halogen such as chlorine or bromine. Because the chemical industry has strongly relied on chlorine, which presents countless structural possibilities, most known POPs belong to the chemical group of organochlorines (e.g., DDT, aldrin, endrin and chlordane).⁶ Second, POPs do not easily break down under natural conditions, so they persist in the environment for long periods of time, in some cases even decades. They are also biologically persistent, meaning that they are soluble in fat and tend to accumulate in the fatty tissue of animals. Furthermore, they concentrate exponentially up the food chain so the highest concentrations of POPs are usually found in top predators such as bald eagles and humans.⁷

Third, because of their ability to bioaccumulate, POPs are chronically toxic, i.e., they can cause serious long-term health effects on humans and wildlife over time.⁸ Although the most conclusive evidence relates to animals, POPs have been found to damage the liver and interfere with the immune, nervous, endocrine and reproductive systems of humans and with normal foetal and

⁴ See *supra* note 2.

⁵ Although some manufactured chemicals are inorganic (e.g., sulfuric acid), most commercially important inorganic chemicals occur in nature. Whether synthetic or not, only around 100,000 inorganic chemicals are known, while many millions of organic compounds are known. See Platt, "Poison," *supra* note 2 at 12.

⁶ There are around 11,000 organochlorines in commerce, including various pesticides, plastics and pharmaceuticals. See Platt, "Poison," *ibid.* at 14.

⁷ See Platt, "Poison," *ibid.* at 11 and Arctic Monitoring and Assessment Program, "Arctic Pollution Issues: A State of the Arctic Environment Report," Oslo (1997) [AMAP report] at 72, online: <http://www.eionet.europa.eu/seris/SoEReports/amap_1>.

⁸ See Platt, "Poison," *ibid.* at 12. A single exposure to some POPs, if the amount were large enough, could precipitate acute poisoning. See Rachel Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962) at 188.

child development.⁹ There is also evidence that some POPs can cause certain types of cancer, including of the liver, the kidneys and the thyroid gland.¹⁰ Lastly, POPs can move thousands of kilometres from the point of release through water currents and cycles of evaporation and deposition, and have a tendency to evaporate at tropical temperatures and to condense in the cooler upper latitudes, which causes them to concentrate near the poles.¹¹ In a series of relatively short jumps sometimes termed the “grasshopper effect,” some POPs move to higher latitudes in tune with seasonal temperature changes, so that even a single dose of a POP pesticide applied in the tropics may slowly move towards the poles. This does not mean all POPs will reach the poles, but concentrations in the polar regions can still be very high and ecologically significant because of the environmental conditions that prevail there.¹²

Public concern about POPs (although not yet referred to as POPs) started with the publication of Rachel Carson’s renowned “Silent Spring” in 1962.¹³ The

⁹ Continuous oral exposure to low levels of aldrin and dieldrin, for instance, can damage the liver of animals and decrease their ability to fight infections. Chlordane affects the nervous and digestive systems and the liver of people and animals. Exposure to low levels of dioxin in animals can cause liver damage, disrupt the endocrine and reproductive systems, weaken the immune system and cause birth defects. DDT has been found to mimic the action of natural hormones in rats and to affect the development of the reproductive and nervous systems. Exposure to endrin can cause severe central nervous system injury and death. Hexachlorobenzene (HCB) has been linked to liver disease and damages to the nervous system and the stomach in humans, while studies in animals show that continued exposure to HCB can harm the liver, the thyroid, the kidneys and the immune, nervous and endocrine systems. Tests on animals that ate small amounts of PCBs over several weeks or months developed anaemia, acne-like skin conditions, or liver, stomach or thyroid gland injuries. PCBs have also been associated with reproductive, behavioural and immune system disorders. See U.S. Department of Health & Human Services, Agency for Toxic Substances & Disease Registry, ToxFAQs for Aldrin/Dieldrin, Chlordane, Dioxin, Endrin, HCBs, PCBs, [Toxic Substances and Disease Registry] online: <<http://www.atsdr.cdc.gov/toxpro2.html>> (last visited 5 Sep 2006); “AMAP report,” *supra* note 7 at 72; Platt, “Poison,” *supra* note 2 at 12; and Colborn et al., *supra* note 2 at 21-25, 80-86, 106-109 and 113-121.

¹⁰ Studies suggest that PCBs, DDT, dioxins and HCB are possible carcinogens. See *supra* note 9.

¹¹ See Platt, “Poison,” *supra* note 2 at 11.

¹² These include the low organic matter content of Arctic and Antarctic soils, which allows POPs to be transferred more readily to the marine environment than in temperate ecosystems; food web structures that enhance the potential for bioaccumulation; and cold temperatures, which seem to create a sink for certain POPs. See Frank Wania and Donald McKay, “Tracking the Distribution of [POPs]” (1996) 30:9 *Environmental Science & Technology* 390 at 390-395 and “AMAP report,” *supra* note 7 at 72 and 76.

¹³ Rachel Carson was an American biologist and ecologist who worked with the U.S. Fish and Wildlife Service. First serialized in *The New Yorker* in June 1962, the book alarmed readers across North America and brought a howl of indignation from the chemical industry. Natural Resources Defense Council (NRDC), “The Story of Silent Spring,” online: <<http://www.nrdc.org/health/pesticides/hcarson.asp>>.

study documented the effects of a number of toxic chemicals on human health, the environment and wildlife. While she considered some acutely toxic pesticides,¹⁴ Carson paid special attention to organochlorines,¹⁵ warning about their persistence and ability to accumulate in the fatty tissue of animals, including humans.¹⁶ DDT, chlordane and other persistent chemicals, she claimed, not only polluted the soil, air and water but also were toxic to birds, fish and mammals and could interfere with the proper functioning of the liver, the kidneys, the nervous system and the chromosomes.¹⁷ She also pointed to evidence that DDT and other pesticides were possible carcinogens.¹⁸

Given the serious risks involved, Carson urged regulators in the U.S. to take preventive measures to protect the public and the environment from these chemicals, even if conclusive evidence about their effects on human beings was lacking.¹⁹ Her calls led to the banning of DDT in the United States in 1972,²⁰ while the production and/or use of other POPs were phased out in the 1970s and 1980s.²¹ Similarly, in 1978 the European Community decided to prohibit the use of a number of POPs²² on the basis that, even if properly used, they were “likely to give rise to harmful effects on human or animal health or to unreasonable adverse effects on the environment.”²³

¹⁴ Carson warned in particular about organophosphates. See Carson, *supra* note 8 at 27-34 and 196-198.

¹⁵ Carson argued that while the sudden illness or death of those exposed to appreciable quantities of pesticides were tragic, the delayed effects of absorbing small amounts of pesticides that invisibly contaminated the world constituted a “greater concern for the population as a whole.” See *ibid.* at 188.

¹⁶ See *ibid.* at 188 and 912-193.

¹⁷ See Carson, *supra* note 8 at 22-26, 39-51, 57-61, 93-96, 103-127, 130-152, 177, 191-193, 206 and 213.

¹⁸ See *ibid.* at 222-225.

¹⁹ Carson claimed that the ultimate answer was to use less toxic chemicals and non-chemical alternatives. She also called for the phase-out of organophosphates and other “highly toxic chemicals.” See *ibid.* at 183-184, 215-216 and 242-243.

²⁰ NRDC, *supra* note 13 and U.S. Environmental Protection Agency, “DDT Ban Takes Effect” (31 December 1972), online: <<http://www.epa.gov/history/topics/ddt/01.htm>>.

²¹ These included aldrin and dieldrin, chlordane, endrin and PCBs. See “Toxic Substances and Disease Registry,” *supra* note 9.

²² See EC, *Council Directive 79/117/EC of 21 December 1978 Prohibiting the Placing on the Market and Use of Plant Protection Products Containing Certain Active Substances plus its amendments*, [1979] O.J. L. 33 (amended several times), online: <<http://ecb.jrc.it/edex/legal.php#134>>, PmbL., paras. 11 and 12.

²³ See *ibid.*, PmbL., para. 13 and Annex (The banned substances included eight organochlorines, namely: aldrin, chlordane, dieldrin, DDT, endrin, hexachlor, heptachlor, hexachlorobenzene (HCB) and hexachlorocyclohexane (HCH). All of them, except for HCH, are included in the Stockholm Convention).

2. International responses

Even though by the mid-1980s most industrialised countries had banned the domestic use and/or production of many known POPs, POPs had yet to emerge as an international issue in their own right. A number of POPs were regulated alongside other hazardous chemicals in the International Code of Conduct on the Distribution and Use of Pesticides, adopted by the Council of the Food and Agriculture Organization of the United Nations (FAO) in 1985, and in the London Guidelines for the Exchange of Information on Chemicals in International Trade, adopted by the Governing Council of the United Nations Environment Programme (UNEP) in 1987. Both instruments were voluntary in nature and were amended in 1989 to incorporate “prior informed consent” (PIC), a procedure that allowed importing countries to decide whether they wanted to import a number of chemicals (including some POPs) that had been banned or severely restricted in other countries.

A number of POPs were also included in the Rotterdam Convention, which essentially made the voluntary PIC procedure legally binding. As discussed in Chapter 3, during the negotiations of the Rotterdam Convention a few European countries proposed expanding its scope to include additional measures for certain chemicals, in particular bans and phase-outs on POPs. Due to the opposition of the United States, Australia, Canada and others, however, it was decided that the treaty’s reach should be limited to PIC and that a separate POPs convention should be negotiated instead. The adoption of a POPs-focused convention offered a number of advantages for those who wanted to make sure that the PIC treaty would conform to liberal economic norms. First, it would preclude the possibility of even considering the adoption of bans or phase-outs for PIC chemicals that were not POPs. POPs were not only a much smaller group of chemicals, but their phasing out, at

least initially, was not expected to have a significant impact on trade or on large agrochemical corporations.²⁴

Second, a POPs treaty would reaffirm the need to distinguish between those hazardous chemicals that had “global” effects, such as POPs, and those that were traded internationally but the effects of which were felt at the local level, such as non-POP PIC chemicals. As the previous chapter explained, a group of government-designated experts that met in 1996 had concluded that there needed to be a distinction between these two groups of chemicals. Following the GATT/WTO principle that governments should adopt the “least-trade restrictive” measures necessary to achieve a desired objective (e.g., to protect the environment or human health from hazardous chemicals), the group established that only those hazardous chemicals that had confirmed “global” effects deserved the use of global trade bans or production or use phase-outs. In this way, bans would be restricted to a much smaller number of chemicals. As for hazardous chemicals traded internationally whose effects were “local,” it was determined that a PIC procedure provided a sufficient level of environmental and health protection.²⁵

Lastly, a separate treaty on POPs would ensure that the financial resources to tackle the POPs issue would not be diverted to activities involving the other chemicals covered by the existing PIC procedure, which were of primary concern to developing countries.²⁶ Given these considerations, it is not surprising that those who opposed expanding the scope of the PIC convention

²⁴ See section 1(a) of Part III below; Jennifer Clapp “Transnational Corporate Interests and Global Environmental Governance: Negotiating Rules for Agricultural Biotechnology and Chemicals” (2003) 12:4 *Environmental Politics* 1 at 11-12; and Peter L. Lallas, “The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on POPs” (2000) 19 *UCLA J. Envtl. L. & Pol.* 83 at 133.

²⁵ See UNEP, “Report of the Government-Designated Group of Experts on Further Measures to Reduce the Risks From a Limited Number of Hazardous Chemicals on its work,” UN Doc. UNEP/PIC/EG/1/3, Copenhagen, Denmark (8 July 1996); General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194, Art. XX(b); UNEP-IISD, “Environment and Trade: A Handbook” (2000), online: <http://www.iisd.org/pdf/envirotrade_handbook.pdf> at 27-29 and section 3(b) of Part III in Chapter 3.

²⁶ See FAO, “Report of the Council of FAO at its hundred and eleventh session,” doc. CL 111/REP at para. 23.

most strongly were those who called for a separate treaty on POPs.²⁷ Furthermore, as discussed below, those same countries, in particular the United States and Canada, opposed the inclusion of trade-related restrictions even in the context of the global POPs treaty, revealing the extent of their commitment to free trade as a philosophical principle, since trade bans on the specified POPs to be initially regulated were not expected to have material consequences for the global agrochemicals industry, which as discussed below was no longer producing them and supported their phase-out.

a) POPs as a Special International Issue

i) UNECE's Regional Protocol on POPs

The first international forum to address the POPs issue was the United Nations Economic Commission for Europe (UNECE), which “strives to foster sustainable economic growth among its member countries.”²⁸ UNECE’s interest in POPs was prompted by two Arctic countries, Canada and Sweden, which in the late 1980s had conducted studies suggesting that the high concentration of some POPs in the Arctic and the Baltic region was the result of long-range transport.²⁹ In addition to the fact that UNECE covered the

²⁷ UNEP/FAO, “Report of the [INC] for an Int’l Legally Binding Instrument for the Application of the [PIC] Procedure for Certain Hazardous Chemicals and Pesticides in Int’l Trade on the work of its first session,” UN Doc. UNEP/FAO/PIC/INC.1/10, Brussels, Belgium (21 March 1996) at 6; Katharina Kummer “Prior Informed Consent in International Trade: the 1998 Rotterdam Convention” (1999) 8:3 R.E.C.I.E.L. 323 at 325; and Jonathan Krueger, “Information in International Environmental Governance: The PIC Procedure for Trade in Hazardous Chemicals and Pesticides,” Belfer Center for Science & Int’l Affairs (September 2000) at 10.

²⁸ The UN Economic and Social Council (UNECE) was established in 1947 to give aid to the countries devastated by World War Two and in 1951 it became a permanent body of the United Nations. Today it groups 56 countries from Western, Central and Eastern Europe and former Soviet republics in Central Asia, as well as Canada, the United States and Israel (Israel was admitted on a temporary basis). See UNECE, “About,” online: <<http://www.unece.org/about/about.htm>>.

²⁹ Studies conducted in the Canadian Northern Territories in the late 1980s showed high levels of organochlorines in human breast milk and suggested that the most likely source of exposure was the food that the studied women had eaten; studies conducted by the Swedish government also showed increasing concentration levels of some hazardous organic substances in Sweden and the Baltic region. See “AMAP report,” *supra* note 7 at 72; Eric Dewailly and Christopher Furgal, “POPs, the Environment and Public Health,” in David L. Downie and Terry Fenge, eds., *Northern Lights Against POPs: Combating Toxic Threats in the Arctic* (Mc Gill-Queen’s U. Press, Montreal: 2003) at 3-4; Russel Shearer and Siu-Ling Han,

Northern Hemisphere, toward which many POPs seemed to be migrating, long-range transboundary pollution was a primary concern of UNECE's member states, which in 1979 had adopted the Convention on Long-Range Transboundary Air Pollution (CLRTAP) to cut air pollution in Europe and North America.³⁰ Hence, at Sweden's suggestion and following the presentation of two reports by Canada, an intergovernmental CLRTAP task force on POPs was established in 1991 to prepare an assessment report on the POPs situation in the UNECE region, including proposals for international action.³¹

At around the same time, the eight Arctic countries met at a ministerial conference³² to adopt the Arctic Environmental Protection Strategy,³³ in which they agreed to support the CLRTAP's work on POPs and to "address the problem of persistent organic contaminants under existing or proposed international agreements."³⁴ The Ministers also established the Arctic Monitoring and Assessment Program, which would prove instrumental in the development of the CLRTAP POPs scientific assessments.³⁵

"Canadian Research and POPs: the Northern Contaminants Program," in Downie and Fenge, eds., *ibid.*, at 41-46; and Henrik Selin, "Regional POPs Policy: the UNECE CLRTAP POPs Protocol," in Downie and Fenge, eds., *ibid.* at 113-114.

³⁰ See UNECE, *Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, UN Doc. ECE/GE 79-42960 (1979), 1302 U.N.T.S. 217, reprinted in 18 I.L.M. 1442 (1979) (entered into force 16 March 1983), online: <<http://www.unece.org/env/lrtap/>>.

³¹ For further details see Shearer and Han, *supra* note 27 at 43-46 and 56; Henrik Selin and Noelle Eckley, "Science, Politics and POPs: The Role of Scientific Assessments in International Environmental Cooperation" (2003) 3 *International Environmental Agreements: Politics, Law & Economics* 17 at 23; and Selin, *supra* note 29 at 114.

³² The eight Arctic countries are Canada, Russia, Sweden, Finland, Iceland, the United States of America, Norway and Denmark. See Lars-Otto Reiersen et al, "Circumpolar Perspectives on POPs: the Arctic Monitoring and Assessment Programme," in Downie and Fenge, eds., *supra* note 29 at 60-61.

³³ The Arctic Environmental Protection Strategy (AEPS) entailed commitments to co-operate in scientific research on, among other things, the sources, pathways, sinks and effects of Arctic pollution. See Arctic Environment, "Arctic Environmental Protection Strategy" Rovaniemi, Finland (14 June 1991) at 2 [Arctic Environment Strategy], online: <http://www.arctic-council.org/files/infopage/74/artic_environment.pdf>.

³⁴ See "Arctic Environment Strategy," *ibid.*, paras. 5.1(i), 5.1(iii) and 5.1(iv). The Arctic countries also agreed to implement measures to reduce or control the use of a number of POPs, stressing that "the elimination of the problem of persistent organic contaminants in the Arctic [could] require controls on the production of these substances." See *ibid.*, para. 5.1(v).

³⁵ The AMAP was asked to measure the levels of anthropogenic pollutants in the Arctic and assess their effects in relevant component parts of the Arctic environment. Although its first official report was issued in 1997, new information coming out of the AMAP was fed into the UNECE process as soon as it became

In 1994, the CLRTAP task force on POPs issued a detailed assessment report recommending the adoption of a POPs protocol to the CLRTAP.³⁶ The negotiations on the protocol started in 1997, after a preparatory process had generated more detailed policy alternatives than had previously been articulated. They culminated with the adoption of the “1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants” (POPs Protocol to the CLRTAP) in Århus, Denmark, on June 24, 1998,³⁷ shortly before the global POPs negotiations were launched. While it is beyond the scope of this chapter to provide a detailed account of the CLRTAP regional POPs negotiations, key decisions taken within it exerted a powerful influence over the global POPs agenda and are thus worthy of consideration. These decisions defined the way in which the POPs issue would be framed and tackled at the global level, owing to the efforts of influential actors who participated in both processes to achieve consistency between them, as well as to the fact that the CLRTAP produced a great amount of technical work that was fed into the global POPs process.

First, the CLRTAP assessments authoritatively framed the issue of POPs as one of persistence, toxicity, bioaccumulation and long-range transport. The reference to the latter was only logical, since the very purpose of the CLRTAP was to deal with long-range transboundary air pollution. What is interesting is that rather than being understood as an inherent characteristic of POPs, long-range transport was constructed as a scientific criterion that would help the parties determine which POPs deserved action under the Protocol.³⁸

available. In addition, Canada's David Stone was both the chair of AMAP and a co-chair of the CLRTAP's task force on POPs. See Reiersen et al., *supra* note 32 at 67-68.

³⁶ See Selin, *supra* note 29 at 116.

³⁷ See UNECE, *Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Persistent Organic Pollutants*, 24 June 1998, 37 I.L.M. 505 (1999) (entered into force 23 October 2003) [POPs Protocol to the CLRTAP], online: <http://www.unece.org/env/lrtap/pops_h1.htm>.

³⁸ This can be appreciated in the text of the Protocol. While the treaty affirms that the emissions of “many” POPs are transported across international boundaries, which implies that it is not the case for all POPs, it defines POPs as organic substances that possess toxic characteristics, are persistent, bioaccumulate, are “prone to long-range atmospheric transport and deposition” and are “likely to cause significant adverse

Because the long-range transport criterion fulfilled this essentially political function, those participating in the global POPs process were able to redefine it to pursue the goal of tackling only those substances that were of “global” concern,³⁹ thereby limiting the number of chemicals that could be subjected to the global POPs treaty and ensuring that bans and phase-outs would only be adopted for chemicals with global effects. This issue is considered further in section 3 below.

The CLRTAP process also determined how the POPs issue should be dealt with. First, it concluded that only a small and “manageable” number of substances should be initially controlled and that a procedure should be agreed on for adding new substances in the future.⁴⁰ Most importantly, the CLRTAP process established that a distinction should be drawn between intentionally and unintentionally produced POPs, and that a different approach should be taken on each category. It was decided that while production and use bans (with specific exemptions) should be adopted to deal with the former, unintentionally released POPs or “by-products” should be reduced through measures that were “feasible.” Following this practical approach, parties were requested to reduce their total annual emissions of specific by-products from the level of emissions in a reference year (as stipulated in an annex) by “taking effective measures, appropriate in [their] specific circumstances.”⁴¹ One such measure was the application of best available techniques (BAT) to each new stationary source of by-products

human health or environmental effects near to and distant from their sources.” See “POPs Protocol to the CLRTAP,” *ibid.*, Pmbl., para. 2 and Art. 1.7.

³⁹ I do not intend to suggest that science is divorced from politics. Consistent with the conception of law formulated in Chapter 1, I adopt the view that “scientific information is not simply a reflection of nature, but a complex social construction encompassing shared beliefs, discourses, practices and goals, where scientists interact with a number of other societal actors including colleagues, funding bodies and, not least, policy makers.” (Quoted in Selin and Eckely, *supra* note 31 at 20). Science is not value-neutral because scientists are social agents that must exercise their judgment to choose among alternative inferences from the available data. This is especially true in environmental policy making, where scientists are asked to answer questions that are regulatory in nature. See Dan Tarlock, “Who Owns Science?” (2002) 10 Penn. St. Envtl. L. Rev. 135 at 142-143.

⁴⁰ See Selin, *supra* note 29 at 116-117.

⁴¹ See “POPs Protocol to the CLRTAP,” *supra* note 37, Art. 3.5(a).

within a major source category identified in an annex and to existing stationary sources identified in an annex “insofar as it [wa]s technically and economically feasible.” Another measure concerned the application of specified emission limit values (ELV)⁴² to each new major stationary source of by-products within a category identified in an annex and to each existing stationary source within a category mentioned in an annex, again “insofar as this [wa]s technically and economically feasible.”⁴³

The implications of the distinction between intentionally and unintentionally produced POPs cannot be overstated. While phasing out the former was relatively unproblematic, as most of the substances to be initially controlled were older substances whose patents had expired and that big multinational corporations were no longer producing, even the progressive elimination of unintentionally produced POPs represented an enormous challenge. As discussed in Part I, these POPs were released in a myriad of industrial processes and activities, including the manufacture of chlorine-containing chemicals, the bleaching of paper with chlorine, the incineration of chlorine-containing plastics and paper and the burning of fossil fuels. Because the eradication of these POPs would require reconsidering industrial activities and processes (and the consumer products that resulted from them) for which there were no viable “POP-free” alternatives, it was essentially deemed unfeasible even in the developed countries of the UNECE region. As discussed later in this chapter, the need for a realistic approach that precluded even the consideration of potentially more radical measures was also emphasized in the context of global responses to the POPs issue.

Another aspect of the CLRTAP process that is worth mentioning is the discussion on trade restrictions for intentionally produced POPs. Even though

⁴² The key difference between ELV and BAT is that ELV applies to individual emission sources and pollutants and BAT sets limits for *overall* emission levels within a given area, allowing for flexibility in emission amounts from individual sources as long as the overall goal is achieved. See Selin, *supra* note 29 at 119 and Selin and Eckley, *supra* note 31 at 28-30.

⁴³ See “POPs Protocol to the CLRTAP,” *supra* note 37, Art. 3.5(b), subparas. (i) to (iv).

the phasing out of the POPs to be initially controlled was not expected to affect major chemicals corporations, which were no longer producing these POPs, trade bans were not incorporated in the POPs Protocol to the CLRTAP. This was mainly due to the opposition of representatives of Canada and the United States, who argued that imposing trade restrictions through a regional agreement would constitute a violation of WTO norms, which were global in scope.⁴⁴ Interestingly, these countries also opposed trade bans in the global POPs negotiations, showing the extent of their readiness to defend liberal economic norms and free trade.

Most Western European countries claimed that export bans were needed because the use of POPs outside the UNECE region could still have an effect on the environment and health inside the region. They also argued that export bans were desirable to avoid charges of “double standards,” stressing that if POPs were considered too dangerous to be used in the region they should not be exported to other countries.⁴⁵ It is revealing that no such concern was voiced during the negotiations of the Rotterdam Convention, which, aside from a few POPs, was expected to cover a diverse list of chemicals that were causing problems primarily in developing countries.⁴⁶ Consistent with the principle studied in Chapter 3 that governments should adopt the “least-trade restrictive” measures required to protect health and the environment from hazardous chemicals, double standards were not rejected in the case of those PIC chemicals that, unlike POPs, did not have global effects.

⁴⁴ Only the U.S. opposed introducing a ban on production of controlled substances, according to one commentator because it wanted to retain the right to produce and export regulated substances to non-UNECE countries. In the end, the U.S. agreed to production bans and western European countries agreed not to include trade restrictions in the POPs protocol, hoping that they could be discussed in the context of the negotiations of a global POPs treaty. See Selin, *supra* note 29 at 123-124.

⁴⁵ See Selin, *ibid.* at 124.

⁴⁶ While some European countries favoured extending the scope of the PIC convention to introduce bans and phase-outs of certain “particularly hazardous” chemicals such as POPs, double standards were generally accepted for the other chemicals to be covered by the convention. For details see Chapter 3.

ii) POPs as a Global Issue

While the CLRTAP process helped to consolidate the scientific and political basis of the POPs issue as a transboundary problem,⁴⁷ POPs were first framed as a global issue in the discussions on marine pollution from land-based activities.⁴⁸ The efforts to tackle land-based marine pollution at the global level had started in 1983, when an ad hoc working group of experts was convened by the Executive Director of UNEP to develop guidelines on the subject.⁴⁹ The group drafted the “Montreal Guidelines for the Protection of the Marine Environment against Land-based Sources of Pollution” (Montreal Guidelines), which incorporated voluntary recommendations to protect the marine environment⁵⁰ and were approved by the UNEP GC in May 1985.⁵¹

A few years later, participants of the 1992 United Nations Conference on Environment and Development (UNCED) declared that land-based sources were a major factor of degradation of the marine environment and that substances that exhibited “toxicity, persistence and bioaccumulation in the food chain” were “of particular concern.”⁵² The UNEP GC was thus invited to convene an intergovernmental meeting to address the matter⁵³ and, in 1993, it decided that an intergovernmental meeting should be held in Washington D.C. in 1995 to adopt a “global programme of action for the protection of the

⁴⁷ See, for instance, Eckley and Selin, *supra* note 31 at 24-26.

⁴⁸ See Christian Vanden Bilcke, “The Stockholm Convention on Persistent Organic Pollutants” (2002) 11:3 R.E.C.I.E.L. 328 at 328.

⁴⁹ The ad hoc working group was convened in 1983 on the basis of the recommendations of an ad hoc meeting of senior government officials expert in environmental law (known as Montevideo Programme I) that stressed the prevention, reduction and control of pollution of the marine environment from land-based sources as a key priority area of UNEP’s legal work. See *Montevideo Programme for the Development and Periodic Review of Environmental Law* (6 November 1981), para. 2(a)(i), online: <http://www.unep.org/law/PDF/Montevideo_Programme_I.pdf>.

⁵⁰ See UNEP, *Montreal Guidelines for the Protection of the Marine Environment against Land-based Sources of Pollution*, UN Doc. UNEP/WG.120/3, Annex (1985), 14 *Envtl L. & Pol.* 77 (1987) at 256-259.

⁵¹ See UNEP GC, Decision 13/18, “Environmental Law” (24 May 1985). The Guidelines were expected to serve as a basis for the development of global agreements to protect the marine environment from land-based pollution. See Omar Vidal and Walter Rast, “Land and Sea” (1996) 8:3 *Our Planet*, online: <<http://www.ourplanet.com/imgversn/83/rast2.html>>.

⁵² See *Agenda 21*, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) Annex II (14 June 1992), Chapter 17, para. 18, online: <<http://www.oceanlaw.net/texts/agenda21.htm>>.

⁵³ See *ibid.*, para. 26.

marine environment from land-based activities” (GPA).⁵⁴ The two preparatory meetings at which the GPA was drafted were held in Arctic countries, Canada and Iceland, and on both occasions delegates considered the need for global action on POPs.⁵⁵ Since the POPs issue fell within the broader chemicals agenda, however, the delegates who met in June 1995 to adopt the GPA decided that UNEP should begin negotiations on a global treaty on POPs, initially twelve in number.⁵⁶

By the time of the 1995 GPA meeting, the UNEP GC had already decided to take up the POPs issue and to deal initially with only twelve substances. In March 1995, stressing the “urgent need” to improve scientific understanding of POPs as a basis for the development of “effective and realistic” global and other measures, the UNEP GC adopted Decision 18/32, in which it called for a global assessment of an initial list of twelve POPs,⁵⁷ comprising nine pesticides (aldrin, dieldrin, DDT, endrin, chlordane, mirex, toxaphene, heptachlor and hexachlorobenzene (HCB), the last being also an industrial chemical and a by-product), one industrial chemical (PCBs, also produced unintentionally) and two unintentionally produced POPs or “by-products” (dioxins and furans). The decision invited the Inter-Organization Programme for the Sound Management of Chemicals (IOMC),⁵⁸ the International

⁵⁴ It was determined that three meetings would precede the Washington 1995 conference, namely an experts’ session in late 1993 to assess the effectiveness of selected regional agreements and two meetings of government-designated experts, to be held in June 1994 and in March 1995, to draft the guidelines. See UNEP, “Report of the [GC] at its seventeenth session,” UN Doc. A/48/25 (Suppl. 25), New York, U.S.A. (21 May 1993) at 13 and UNEP GC, Decision 17/20, “Protection of the Marine Environment from Land-based Activities,” in *ibid.* at 49-51, online: <www.unep.org/download_file.multilingual.asp?FileID=13>.

⁵⁵ While at the 1994 meeting the discussion focused on whether a new global POPs convention that reached the marine environment should be drafted, at the 1995 session proposals were advanced for the GPA to directly initiate the negotiations of a global legally binding POPs instrument. See UNGA, “Report of the Secretary-General: Law of the Sea,” UN Doc. A/49/631, (16 November 1994) at 20-21 and UNGA, “Report of the Secretary-General: Law of the Sea,” UN Doc. A/50/713, (1 November 1995) at 50.

⁵⁶ See *ibid.* and Beth Baker, “Washington Watch: Nations Coming to Agreement that Polluted Oceans Need a Cleanup” (1996) 46:3 *Bioscience* 183 at 183.

⁵⁷ Although the decision referred to this short list as the one that was being discussed by the UNECE in the context of the CLRTAP, the CLRTAP was considering 16, rather than 12, POPs. See UNEP GC, Decision 18/32 (25 May 1995), para. 1, online: <<http://www.chem.unep.ch/pops/indxhtmls/gc1832en.html>>.

⁵⁸ The IOMC was established in 1995 to strengthen cooperation and increase coordination in the field of chemical safety. It groups seven inter-governmental organizations: the FAO, the ILO, UNEP, UNIDO,

Programme on Chemical Safety (IPCS)⁵⁹ and the Intergovernmental Forum on Chemical Safety (IFCS)⁶⁰ to conduct the assessment with the assistance of an ad hoc working group.⁶¹

The assessment requested comprised five key tasks, including the examination of issues related to production and use, the evaluation of available and viable alternatives and the assessment of “*realistic* response strategies, policies and mechanisms for reducing and/or eliminating emissions, discharges and losses of [POPs].”⁶² Consistent with the practical approach adopted under UNECE’s CRLTAP, Decision 18/32 implied that radical solutions to tackle the POPs issue should be excluded from the analysis. On the basis of the assessment and the outcome of the 1995 GPA conference, the decision asked IFCS to develop recommendations and information on international action, including information for a possible decision on an international legal POPs instrument, to be considered by the UNEP GC and the World Health Assembly (WHA) “no later than in 1997.”⁶³ As examined below, at various points in the implementation of Decision 18/32 actors emphasized that the work to be carried out under the decision should be based on (i.e., be consistent with) that being carried out under UNECE’s CLRTAP.

UNITAR, the WHO (which is the administering organization) and the OECD. See IOMC home page, online: <<http://www.who.int/iomc/en/>>.

⁵⁹ The IPCS is a joint programme of three cooperating organizations, the WHO, the ILO and UNEP, which was established in 1980 to implement activities pertaining to chemical safety. See WHO, “About IPCS,” online: <<http://www.who.int/ipcs/en/>> (last visited October 13, 2006).

⁶⁰ The IFCS was created in 1994 in response to a recommendation in Chapter 19 of Agenda 21 (on the environmentally sound management of toxic chemicals), the global plan of action adopted at the 1992 United Nations Conference on Environment and Development. It is a non-institutional consensus-based arrangement that meets every three years to coordinate international activities on the sound management of chemicals and address the needs identified in the six priority-programme areas in Agenda 21’s Chapter 19. See John Buccini, “The Global Pursuit of the Sound Management of Chemicals,” prepared for the World Bank (February 2004) at 16-17 and 40.

⁶¹ See UNEP GC, Decision 18/32, *supra* note 57, para. 1.

⁶² Emphasis added. Very succinctly, the five tasks were: (a) to consolidate available information on the chemistry and toxicology of the 12 POPs; (b) to analyse the relevant transport pathways and the origin, transport and deposition of the 12 POPs on a global scale; (c) to examine the sources, benefits, risks and other considerations relevant to production and use; (d) to evaluate the availability, including costs and effectiveness, of preferable substitutes, “where applicable;” (e) and to assess realistic response strategies, policies and mechanisms for reducing and/or eliminating emissions, discharges and losses of POPs. See UNEP GC, Decision 18/32, *ibid.*, Art. 1.

⁶³ See *ibid.*, para. 2.

3. Towards A Negotiating Mandate: The IFCS Report

In June 1995, Canada again demonstrated its interest in the POPs issue by co-sponsoring an international experts meeting where more than one-hundred experts agreed that there was enough scientific information on the adverse human health and environmental impacts of POPs to warrant international action, including bans and phase-outs of certain POPs.⁶⁴ That same month, the six IOMC organizations met to discuss the implementation of UNEP GC Decision 18/32 and agreed that UNEP should convene an ad hoc working group on its behalf. The group was established in October 1995, with Canada's John Buccini as its chair. Other members included representatives of the six IOMC organizations, UNECE, four countries from each of the five UN regions, four industry organizations and four public interest groups.⁶⁵ At its first meeting, the group agreed that the criteria for the identification of new POPs should build on the work that was being carried out by UNECE's CLRTAP. The group also looked at a draft report on the twelve POPs listed in Decision 18/32, which had been prepared by a Canadian consultant on behalf of the IPCS⁶⁶ and was forwarded to a meeting of the Inter-Sessional Group (ISG) of the IFCS held in Canberra, Australia, in March 1996.⁶⁷

At the Canberra meeting, the ISG agreed that the available scientific evidence on the specified twelve POPs was sufficient to demonstrate the need for

⁶⁴ The meeting was co-sponsored by Canada and the Philippines in June 1995. Experts also agreed that the social, economic and political factors that contributed to the demand for the production and use of POPs had to be addressed in developing solutions to the POPs issue, which led to the convening of another expert meeting on POPs in Manila in June 1996. See IFCS, "POPs: Socio-economic Considerations for Global Action," doc. IFCS/EXP.POPs.2, Manila (28 May 1996), online: <<http://www.chem.unep.ch/pops/indxhtmls/manpops2.html>>.

⁶⁵ Additional participants attended as observers. See UNEP, "Final Report of the meeting of the IFCS Ad Hoc Working Group on POPs," UN Doc. UNEP/POPS/INC.1/INF/4 (30 April 1998) [IFCS Final Report] para. 8, online: <<http://www.pops.int/documents/meetings/inc1/inf4.htm>>.

⁶⁶ The report was prepared by the Canadian Network of Toxicology Centres. See "IFCS Final Report," *ibid.* at 4 and John Buccini, "The Road to Stockholm: View from the Chair," in Downie and Fenge, eds., *supra* note 29 [Buccini, "Road to Stockholm"] at 226.

⁶⁷ See Buccini, "Road to Stockholm," *ibid.* at 225-228.

international action on these substances,⁶⁸ but that further work was needed to complete the assessment required by UNEP GC Decision 18/32. The ISG also concurred that a process for the formulation of “science-based criteria” for adding new POPs to the list should be included in the IFCS recommendations to the UNEP GC and the WHA. Again, emphasis was put on the need to build on the work being carried out under UNECE’s CLRTAP in the development of such criteria.⁶⁹

In order to continue with the execution of Decision 18/32, the IFCS decided to adopt the IOMC ad hoc working group as an IFCS group, with John Buccini continuing as chair. The IFCS ad hoc working group met in Canberra immediately after the 1996 ISG session. It agreed that an experts’ meeting would meet in Manila in June 1996 to tackle socio-economic and other issues associated with the production and use of POPs and their alternatives, after which the IFCS ad hoc working group would meet again to review the results of the experts’ meeting, finalise the assessment report and develop its recommendations on international action. Once more, it was stressed that the IFCS should “build on” ongoing POP-related activities, in particular those being carried out under the CLRTAP. Consistent with the CLRTAP’s work, it was also emphasized that different approaches might be needed for the three POPs categories, i.e., industrial chemicals, pesticides and by-products.⁷⁰

The Manila experts’ meeting was co-chaired by Canada and the Philippines and attended by government, industry and ENGO experts. The experts considered the three POPs categories separately, drawing different conclusions and recommendations for each, and concluded that “separate consideration” should be given to these categories in the international

⁶⁸ IFCS, “Report of the second meeting of the Intersessional Group of the Intergovernmental Forum on Chemical Safety,” doc. ISG/96.R.1. Rev.3, Canberra, Australia (10 April 1996) [ISG-2 report] at 15-16.

⁶⁹ See “ISG-2 report,” *ibid.* at 16.

⁷⁰ See *ibid.*, Annex 9 at 2 and Buccini, “Road to Stockholm,” *supra* note 66 at 229-230.

responses to the POPs issue.⁷¹ The same approach was followed by the IFCS ad hoc working group, which convened shortly after the Manila meeting to finalise the report that would be forwarded to the UNEP GC and the WHA.⁷²

In its final report (hereinafter IFCS report), the IFCS ad hoc working group concluded that available information demonstrated the need for international action on the twelve POPs listed in Decision 18/32. In accordance with that Decision, which asked the IFCS to consider practical solutions to the POPs problem, it was clearly determined that any response strategy to be adopted, including a new global POPs treaty, should be “realistic.”⁷³ The report also made key suggestions regarding the substance of the future POPs treaty. First, it recommended the adoption of different approaches for the three categories of POPs. Like in the CLRTAP process, however, the most important distinction was drawn not between these categories, but between intentionally produced pesticides and industrial chemicals on the one hand and intentionally generated POPs by-products on the other.

For the listed intentionally produced POPs, the IFCS report concluded that they were, except for a few cases, no longer being manufactured or used and that, with a few exceptions, alternatives were available for all of them. Specifically, it noted that the pesticides aldrin, dieldrin, endrin and toxaphene were no longer [being] produced, mirex and HCB “appear[ed] to be out of production,” DDT was still produced for disease vector control and was “misused for other purposes,” and chlordane and heptachlor were still being produced for ant and termite control.⁷⁴ PCBs and HCB, the two listed industrial chemicals, were no longer being manufactured but were produced as

⁷¹ See UNEP, “IFCS: Final Report of the Experts’ Meeting on POPs,” UN Doc. UNEP/POPS/INC.1/INF/11 (15 June 1998), paras. 18 and 19, online: <<http://www.pops.int/documents/meetings/inc1/inf11.htm>>.

⁷² See “IFCS Final Report,” *supra* note 65, para. 16.

⁷³ See *ibid.*, paras. 14 and 15.

⁷⁴ See *ibid.*, para. 27.

“unintended by-products.”⁷⁵ PCBs were also still in use in PCB-containing equipment and quantities remained as stockpiles and in PCB-containing waste.⁷⁶ The report concluded that alternatives were available for all listed POP pesticides, although their use could sometimes be “limited in some parts of the world or in some situations.”⁷⁷ Similarly, substitutes for PCBs were said to be “well known and readily available.”⁷⁸

Given these findings, it is not surprising that all the members of the IFCS ad hoc working group agreed to conclude that, excluding the “small number of remaining recognized uses,” intentionally produced POPs posed “unreasonable and otherwise unmanageable risks to human health and the environment.”⁷⁹ Consequently, the group suggested that measures should be taken to “rapidly phase out” the remaining production and uses of the listed POPs pesticides as alternatives became available and that the listed industrial chemicals should be phased out over time on a global scale.⁸⁰

The conclusions regarding unintentionally produced POPs were less comprehensive and it was recognized that there were some gaps in what was known on the subject.⁸¹ Although it was stressed that PCBs and HCB were being generated as unwanted by-products, the report focused on dioxins and furans, the two by-products listed in Decision 18/32, noting that there were no stocks of these substances but that some materials could contain them as “micro-contaminants.” The improper combustion or disposal of chlorine and

⁷⁵ See *ibid.*

⁷⁶ See *ibid.*, para. 38.

⁷⁷ See *ibid.*, para. 31. Recognising the role of DDT in the control of malaria in some countries, the report accepted its use under certain conditions (e.g., in accordance with relevant WHO guidelines). However, it called for efforts to reduce the reliance on DDT for vector control and to make viable alternatives such as indigenous medicinal plants readily available. See *ibid.*, para. 34.

⁷⁸ See *ibid.*, para. 37.

⁷⁹ See *ibid.*, para. 46.

⁸⁰ See *ibid.*, para. 46.

⁸¹ See, for instance, *ibid.*, paras. 41, 43 and 44.

bromine-containing compounds was identified as a potential release source, as were soils and sediments in certain “highly contaminated sites.”⁸²

The overall conclusion for by-products was that there was less knowledge “and/or agreement” on the full extent to which “release reduction and/or source elimination” could be achieved by “currently available means.” It was also stressed that there could be “substantial differences” between developed countries and less developed countries regarding which means were “available, feasible and practical.”⁸³ Thus, while the report affirmed that the “appropriate” way to deal with dioxins and furans was to “ensure” the application of “techniques and/or materials policies that minimize[d] and/or eliminate[d their] releases,”⁸⁴ it also pointed out that such alternative materials or processes were not always viable. “Best technology” waste incineration facilities, for instance, were said to be “expensive to construct and sophisticated to operate” and their widespread deployment in many developing countries “unlikely in the near future.” As a result, the report recommended exploring other options and called on countries to identify domestic sources of dioxin/furan releases using the sources already identified by developed countries as guidance.⁸⁵

Predictably, the implausibility of significantly reducing by-products through “practical” means led to the conclusion that a significantly less ambitious approach should be adopted. Unlike the strong measures recommended for intentionally produced POPs, the proposed method to coping with by-products was the application of “available measures” that could achieve a “realistic and meaningful level of release reduction and/or source elimination” through “feasible and practical” actions.⁸⁶ Similar conclusions were drawn regarding obsolete stocks of the listed POPs. Two key conclusions regarding these were

⁸² See *ibid.*, para. 30.

⁸³ See *ibid.*, para. 42.

⁸⁴ See *ibid.*, para. 40(a).

⁸⁵ See *ibid.*, paras. 43 and 44.

⁸⁶ See *ibid.*, para. 47.

that better information on the amount of obsolete stocks was needed⁸⁷ and that some destruction technologies were available but that many developing countries and regions lacked adequate destruction facilities and could not afford to provide them “without technical and other assistance.”⁸⁸ It was therefore suggested that “realistic action” should be taken to destroy obsolete stocks of the listed POPs.⁸⁹

Another key recommendation of the IFCS report was that the negotiators of the future POPs treaty should convene at their first session an expert group to develop “science-based criteria and a procedure for identifying additional POPs as candidates for future international action.” The group, it advised, should include criteria regarding “persistence, bioaccumulation, toxicity and exposure in different regions.”⁹⁰ The allusion to exposure in different regions gave a new meaning to the long-range transport criterion, implying that inter-regional transport alone should no longer be deemed sufficient for a substance to qualify as a POP under the new POPs treaty.

a) The IFCS Proceedings and the Global POPs Treaty

The IFCS process was decisive in two ways. First, it consolidated the scientific and political consensus that a global POPs treaty was needed. Second, it conferred a significant degree of legitimacy and authority on the POPs work of the CLRTAP. Although it drew considerably on the CLRTAP’s work to delineate the key elements of the future POPs treaty, the IFCS ad hoc working group engaged a wider spectrum of participants, including developed and less developed countries, international organizations (including UNECE), public interest organizations and industry. The IFCS final report on POPs therefore represented a carefully worded compromise among key stakeholders,

⁸⁷ See *ibid.*, para. 48(d).

⁸⁸ See *ibid.*, para. 48.

⁸⁹ See *ibid.*

⁹⁰ See *ibid.*, para. 46.

many of whom attended the UNEP GC session where the report would be considered to ensure that its main conclusions and recommendations would not be altered.⁹¹ Their efforts proved successful; not only did the UNEP GC endorse all the conclusions and recommendations of the IFCS report, but it also drew on them to produce detailed instructions for the architects of the future global POPs treaty, including the need for “feasible and practical” actions on POPs by-products.

b) The Mandate

As requested, the IFCS ad hoc working group on POPs forwarded its final report to the governing bodies of the WHO and UNEP. The World Health Assembly considered the document at its fiftieth meeting in May 1997, when it adopted a resolution that endorsed its recommendations and requested the Director-General of the WHO to “participate actively” in the negotiations of the POPs treaty to ensure that relevant international commitments would be “realistic and effective” and “protect human health and the environment.”⁹²

The UNEP GC had examined the IFCS report at its nineteenth session in February 1997. At that session, the Council adopted Decision 19/13 C,⁹³ whereby it endorsed the conclusions and recommendations contained in the report⁹⁴ and concluded that a global legally binding instrument was required to “reduce the risks to human health and the environment arising from the

⁹¹ According to John Buccini, who chaired the IFCS ad hoc working group on POPs and the contact group on chemicals at the UNEP GC nineteenth session, those who attended the UNEP GC session and had also been part of the IFCS process “adamantly refused to alter the wording in the IFCS report and insisted on an electronic ‘cut and paste’ approach to use the report to develop the draft decision, with editing kept to an absolute minimum while transforming the recommendations into decisions.” See Buccini, “Road to Stockholm,” *supra* note 66 at 233 (Buccini was also the chair of the INC that negotiated the Stockholm Convention).

⁹² World Health Assembly, Resol. WHA50.13, “Promotion of Chemical Safety, with Special Attention to POPs” (14 May 1997), UN Doc. UNEP/POPS/INC.1/INF/6, Geneva (30 April 1998), paras. 1 and 3(1).

⁹³ See UNEP GC, Decision 19/13 C, “Chemicals Management” (7 February 1997).

⁹⁴ See *ibid.*, para. 1.

release of the twelve specified [POPs].”⁹⁵ Accordingly, the Council requested the Executive Director of UNEP to convene an intergovernmental negotiating committee (INC) with a mandate to prepare a treaty for international action to “reduce/eliminate releases” of the initial list of twelve POPs identified in Decision 18/32. The INC was asked to commence its work by early 1998 and finish it preferably by the year 2000,⁹⁶ and to give “due consideration” to the relevant work of the CLRTAP in the development of the global POPs treaty.⁹⁷

Besides giving this general instruction, the UNEP GC determined key aspects of the future POPs treaty by delineating the INC’s mandate in considerable detail, often in the exact same terms of the IFCS report. Most notably, the decision determined that different approaches were needed for the three categories of POPs in the framework of objectives to be negotiated by the INC.⁹⁸ This was further explained in the decision’s annex, which affirmed that aside from the “small number of remaining recognized uses,” the intentionally produced POPs listed posed “unreasonable and otherwise unmanageable risks to human health and the environment.”⁹⁹ Like the IFCS report, the decision called for measures to “rapidly phase out” the production and remaining accepted uses of intentionally produced pesticides as alternatives became available, and for the listed POP industrial chemicals to be phased out “over time” on a global scale and their remaining uses, storage and disposal to be “managed” in the transition to “complete elimination of use.”¹⁰⁰

A significantly less stringent approach was proposed for dealing with unintentional POPs by-products. With regard to these, the decision urged the expeditious pursuit of “currently available” measures that could achieve a “realistic and meaningful level of release reduction and/or source elimination”

⁹⁵ See *ibid.*, para. 2.

⁹⁶ See *ibid.*, paras. 8, 11 and 12.

⁹⁷ See *ibid.*, para. 10.

⁹⁸ See *ibid.*, para. 3.

⁹⁹ See *ibid.*, Annex, para. 1.

¹⁰⁰ See *ibid.*, Annex, paras. 1(a) and 1(b).

to be achieved through “feasible and practical” actions.¹⁰¹ An equally practical course was proposed for dealing with obsolete stocks of the listed POPs, which it was stressed should be eliminated “where necessary and feasible.”¹⁰²

Also as recommended by the IFCS report,¹⁰³ the UNEP GC called on the INC to establish, at its first session, an expert group to develop “science-based criteria” and a procedure for identifying additional POPs as candidates for future international action for consideration by the INC. The expert group was asked to include criteria about persistence, bioaccumulation and toxicity, as well as “exposure in different regions,” and consider the “potential for regional and global transport” of new POP candidates.¹⁰⁴ As discussed above, a reference to exposure in different regions implied that only those POPs that had global effects should be subjected to the POPs global treaty, which was expected to include global trade bans and/or production and use phase-outs. In this way, the treaty would respect the GATT/WTO principle that governments should adopt “least-trade” restrictive measures necessary to protect human health and the environment from hazardous chemicals and adopt global bans and phase-outs only for chemicals with “global” effects.¹⁰⁵

III. The Stockholm Convention Negotiations

The intergovernmental negotiating committee (INC) that drafted the global POPs convention met for the first time in Montreal, Canada from 29 June to 3 July 1998. Subsequent sessions were held in Nairobi, Kenya, from 25 to 29 January 1999; Geneva, Switzerland, from 6 to 11 September 1999; Bonn, Germany, from 4 to 10 March 2000; and Johannesburg, South Africa, from 4 to 10 December 2000. The process culminated with the adoption of the

¹⁰¹ See *ibid.*, Annex, para. 4. Again, the language of the IFCS report was used.

¹⁰² See *ibid.*, para. 5(c). The same language was used by the IFCS ad hoc working group.

¹⁰³ See IFCS, “IFCS Final Report,” *supra* note 65, paras. 17 and 56.

¹⁰⁴ See UNEP GC, Decision 19/13 C, *supra* note 93, para. 9.

¹⁰⁵ See *supra* note 25.

Stockholm Convention on Persistent Organic Pollutants by a conference of plenipotentiaries that met in Stockholm, Sweden, from May 22 to 23, 2001.

As discussed above, much had been defined by the time the negotiations began. It had been established that the convention would initially deal with the twelve POPs specified in Decision 18/32; that a group of experts would draft “science-based” criteria (including on persistence, toxicity, bioaccumulation, propensity for long-range transport and exposure in different regions) and a procedure for identifying new POPs, which the INC would then consider; that while a phase-out approach should be adopted for intentionally produced pesticides and industrial chemicals, feasible and practical measures should be adopted to “reduce and/or eliminate” the release of unwanted by-products; and that realistic action should be taken to destroy obsolete stocks of the listed POPs. Rather than comprehensively review the negotiations, the next section looks at a number of issues that gave delegates the opportunity to challenge liberal economic norms and the potential of the norms that resulted from those discussions to threaten the continued production, consumption and trading of POPs and other hazardous chemicals.

1. Scope of the Convention

The intention of negotiating a POPs treaty was, broadly speaking, to protect the environment and human health from POPs. Although the negotiators did not need to start by defining which properties would be required for a chemical to be considered a POP under the new treaty, as Decision 19/13 C had determined which POPs would initially be covered by it, the definition of these properties was vital to determine which substances could be added to the convention in the future.¹⁰⁶ The task of working out the criteria and procedure

¹⁰⁶ At the first INC session, the EU suggested that six additional substances listed in the POPs Protocol to the CLRTAP and two substances mentioned in a declaration on POPs of the fourth Ministerial Conference on the Environment for Europe should be considered for inclusion in the POPs global treaty. This was rejected by the INC due to the opposition of the African group, GRULAC, Australia, New Zealand and industry organizations, but the fact that six new potential candidates were already in view highlighted the

for adding new POPs to the convention was delegated to a “criteria expert group on POPs” (CEG), which the INC established at its first session.¹⁰⁷ The listing of new POPs is discussed later in this chapter because its relevance can best be appreciated after having considered the control measures that new POPs would be subjected to if they were to be listed in the POPs convention.

2. Control Measures

The discussion of what measures would be adopted to deal with the twelve POPs listed in Decision 18/32 took up much of the INC’s time and energy. From the beginning of the negotiations, there was widespread agreement that different approaches were required for the three different POPs categories,¹⁰⁸ even among those who expressed their support for the “elimination” of the twelve specified POPs.¹⁰⁹ This was rather unsurprising since, as noted before, the UNECE, the IFCS and the UNEP GC had all embraced the idea that different approaches were needed for the different POPs categories. As in those processes, the greatest distinction was drawn not among the three POPs categories but between intentionally produced POPs and unintentional

significance of the criteria and procedure to list new POPs under the treaty. See UNEP, “Report of the [INC] for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs on the Work of its first session,” UN Doc. UNEP/POPS/INC.1/7, Montreal, Canada (3 July 1998) [INC-1 report] at 8 and 17 and Annexes IV, VI and VII; “Report of the first session of the INC for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs” 15:10 *Earth Negotiations Bulletin* (6 July 1998) [INC-1 ENB report] at 3-5; and UNECE, “Report on the Fourth Ministerial Conference Environment for Europe,” UN Doc. ECE/CEP/41, Århus, Denmark (23-25 June 1998) Annex IV, online: <<http://www.unece.org/env/documents/1998/cep/cep.41.e.pdf>>.

¹⁰⁷ See UNEP, “INC-1 report,” *ibid.* at 15-16 and Annex II (CEG Terms of Reference), paras. 1 and 3.

¹⁰⁸ This was the official position of the African countries and of GRULAC. See “INC-1 report,” *ibid.*, Annexes IV and VII and UNEP, “Report of the [INC] for an Int’l Legally Binding Instrument For Implementing Int’l Action on Certain POPs on the work of its second session,” UN Doc. UNEP/POPS/INC.2/6, Nairobi, Kenya (29 January 1999) [INC-2 report], Annex III. The notion that different control measures for different substances might be required was supported by Canada, who also supported “release restriction provisions” for certain chemicals. See UNEP, “Government Submissions Pertaining to the Development of a Draft Discussion Text of an Int’l Legally Binding Instrument For Implementing Int’l Action on Certain POPs,” UN Doc. UNEP/POPS/INC.2/INF/1, Nairobi (3 November 1998) [Government Submissions] at 3.

¹⁰⁹ This was the case of the African countries, who expressed their support for “the elimination of the designated twelve POPs” just as they called for “separate, differentiated approaches to action on pesticides, industrial chemicals and unintentionally produced by-products and contaminants.” See UNEP, “INC-1 report,” *supra* note 106, Annex VII.

by-products. While everyone agreed on the need to phase out the production and use of the former, provided that a number of exceptions were granted, most participants concurred that “feasible” or realistic measures were required to deal with the latter, even if defining the nature and extent of the obligations regarding these POPs proved more challenging.

At its first session, the INC considered a document prepared by the Secretariat containing possible articles for the POPs treaty, which were based on relevant multilateral environmental agreements and on UNECE’s POPs Protocol to the CLRTAP.¹¹⁰ Among the proposed provisions was an article on “measures to reduce and/or eliminate releases of POPs into the environment,” which was divided into separate sections with different control measures for different sets of POPs, to be listed in three separate annexes. Regarding the POPs listed in annex A, parties would be obliged to stop their production and/or use by the dates specified in that annex; the POPs listed in annex B would have to be restricted and their production and/or use allowed only if certain conditions were met; as for the chemicals or “groups of chemicals” listed in annex C, it was recommended that parties could be either “oblige[d] or encourage[d]” to take certain actions to “reduce their release.”¹¹¹ While annexes A and B were meant to include intentionally produced pesticides and industrial chemicals, annex C was expected to include unintentionally produced POPs. The discussions regarding which control measures would apply to these two main categories are considered next.

¹¹⁰ See UNEP, “Possible Substantive Articles of an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs,” UN Doc. UNEP/POPS/INC.1/4, Montreal, Canada (30 April 1998) [Possible Articles], online: <<http://www.pops.int/documents/meetings/inc1/inc1-4.htm>>.

¹¹¹ The document listed as possible actions: undertaking national emissions inventories; establishing release reduction targets; promoting or enforcing release limit levels; and promoting the use of “best available technology.” More specific requirements or guidelines could be included in technical annexes, as provided in the CLRTAP POPs Protocol. See “Possible Articles,” *ibid.* at 2-3 (*Note: although the three annexes had no denomination at that point, the letters A, B and C are used here for the purpose of analysis).

a) Intentionally Produced POPs

Agreeing to use and production phase-outs for the listed intentionally produced POPs was relatively easy,¹¹² as even industry representatives supported this approach.¹¹³ The main reason for this was that most of these POPs were older substances no longer protected by patents that the major agrochemicals corporations were no longer producing¹¹⁴ and that newer (and thus more lucrative) alternatives existed for most of their uses. Thus, at the very first INC session the representative of the United States said that industry had developed alternatives to many of the POPs under consideration.¹¹⁵ Although some developing countries were still producing or using these POPs, most of them supported their elimination because it was understood that financial and technical assistance would be forthcoming from donor countries, which had a strong interest in the POPs issue, to finance the use of pricier alternatives in less developed countries.¹¹⁶

¹¹² Concerning intentionally produced POPs, Iceland summarized the outcome of the first INC session as follows: (1) with the specific exception for use of DDT, general consensus started to emerge on a total ban for the majority of the pesticides listed in UNEP GC Decision 18/32; and (2) there seemed to be widespread support for total ban on the production on PCBs, together with restrictions on their use and obligations regarding their destruction. See “Government Submissions,” *supra* note 108 at 10.

¹¹³ At the first INC session the International Council of Chemical Associations (ICCA), which claimed to represent the global chemicals industry, supported the use of production and use bans on intentionally produced POPs by affirming that the POPs Protocol to the CLRTAP, which included such measures, was generally supported by the chemical industries in North America and Europe. See ICCA, “Briefing Note on POPs” (6 February 1998) [ICCA Briefing Note] at 1, online: <<http://www.icca-chem.org/section06.html>>.

¹¹⁴ See Section 3 of Part II above and “IFCS Final Report,” *supra* note 65, para. 31. According to the ICCA, the uses of “most substances identified as POPs ha[d] been discontinued or extremely limited by chemical companies within the countries represented by ICCA member associations.” “ICCA Briefing Note,” *ibid.*

¹¹⁵ See “INC-1 ENB report,” *supra* note 106 at 4 and Clapp, *supra* note 25 at 12.

¹¹⁶ At the first INC session, for instance, Kenya, Gambia, Ethiopia and Jordan expressed their support for the elimination of specified POPs. (See “INC-1 ENB report,” *ibid.*) The African group also called for the “elimination of the designated twelve POPs,” but supported the adoption of “differentiated approaches” on the three POP categories and called for the phased implementation of obligations concerning specific substances that were essential for public health reasons, such as DDT, or that were generated through processes for which alternatives were not yet available to developing countries. See UNEP, “INC-1 report,” *supra* note 106, Annex VII and “Report of the second session of the INC for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs” 15:18 *Earth Negotiations Bulletin* (1 February 1999) [INC-2 ENB report] at 10.

Many delegates, in particular from developing countries and the health sector, were troubled by the initial calls by ENGOs and others to phase-out DDT by a specified date, as DDT was still needed in some countries to fight malaria.¹¹⁷ Ultimately, however, a consensus emerged that the elimination of POPs should not compromise public health,¹¹⁸ which alleviated the concerns of DDT advocates. There was also wide support for exemptions on the use of PCBs in existing electrical equipment, provided that they were destroyed in an environmentally sound manner once they were no longer in use.¹¹⁹ In brief, it was understood that exemptions would need to be granted to allow for the continued use of specific substances in certain cases, even if positions varied regarding the particulars of how exemptions should be framed and operated.¹²⁰

¹¹⁷ At the third INC session, a number of representatives called for technical and financial assistance in finding alternatives to DDT to combat malaria. They stressed that DDT should not be phased out until cost-effective alternatives were available and that priority should be given to protecting human health. Many supported an exemption for DDT, but said it should be use-and-country-specific and should be granted for a limited period of time. See UNEP, "Report of the INC for an Int'l Legally Binding Instrument For Implementing Int'l Action on Certain POPs on the work of its third session," UN Doc. UNEP/POPS/INC.3/4, Geneva (17 September 1999) [INC-3 report] at 9. The WHO was among those who strongly supported the continued use of DDT for malaria control, but opposed its use by the private sector and called for efforts to reduce reliance on DDT in health programmes. (See "INC-1 ENB report," *supra* note 106 at 4). The notion that the need to reduce and eliminate DDT releases should not be done at the expense of lives lost to malaria was also defended by the Executive Director of UNEP, Klaus Töpfer, who called for the further development of alternative methods to control the disease. (See "Summary of the third session of the INC for an Int'l Legally Binding Instrument for Implementing Int'l Action on Certain POPs" 15:27 *Earth Negotiations Bulletin* (13 September 1999) [INC-3 ENB report] at 3, online: <<http://www.iisd.ca/download/pdf/enb1527e.pdf>>.

¹¹⁸ "INC-1 report," *supra* note 106, at 9. Although some representatives, including a few environmental and health NGOs such as WWF and Physicians for Social Responsibility (PSR), called for the elimination of DDT in the fight against malaria and urged redirecting efforts to finding and implementing alternatives to control the disease, it was generally recognised that the banning of DDT should not be done at the expense of lives lost to malaria. This led WWF to retract its initial calls for a total phase-out of DDT by 2007 and to call instead for continued efforts to achieve its elimination (See "INC-3 ENB report," *ibid.* at 3). Similarly, at the second INC session PSR expressed the view that that the phase out of DDT should not compromise the battle against malaria (See "INC-2 ENB report," *supra* note 116 at 4).

¹¹⁹ At the second INC session, a contact group was established to place the ten intentionally produced POPs among the list of twelve POPs to be controlled initially into annexes A and B. During the meeting, all those present agreed that new uses and production of PCBs could be prohibited and that an exemption on existing uses of PCBs in electrical equipment was needed, but disagreed on the phase-out deadline for the use of PCBs. See "INC-2 report," *supra* note 108 at 39.

¹²⁰ See "INC-3 report," *supra* note 117 at 11. The EU, for instance, wanted exemptions to be precisely defined and granted on a case-by-case basis, for a limited period of time and when a need had been "clearly documented." It also opposed general exemptions, with the exception of research purposes. Others, including Canada, Japan and the United States, supported a number of general exemptions besides laboratory-scale research, such as health emergencies. The U.S. also called for specific exemptions, including for trace contaminants in products and chemical intermediates. See "Government Submissions," *supra* note 108 at 2, 6, 14-15 and 20, and "INC-3 ENB report," *supra* note 117 at 4.

One issue that prompted heated debate was whether the POPs convention should incorporate trade bans on certain POPs. As noted earlier in this chapter, trade restrictions were not included in the POPs Protocol to the CLRTAP primarily because of the opposition of the United States and Canada, who argued that a regional agreement was not the appropriate forum to discuss trade-related norms and persuaded their European counterparts, who supported trade bans, that the matter could be addressed in the global POPs negotiations.¹²¹ When the possibility of the global POPs treaty regulating trade was raised, however, Canada and the United States reiterated their resistance to including trade restrictions, joined by the other three countries of “JUSCANZ,” namely Japan, Australia and New Zealand.¹²²

Like Canada and the United States, the EU, Norway and Switzerland also reiterated the position they had held in the regional POPs negotiations. Together with Poland, the Republic of Korea, the Gambia, the Philippines, Bangladesh, Peru, Venezuela and others, these delegations supported the inclusion of import and export bans for POPs whose use and production had been banned, except for the purpose of their environmentally sound destruction.¹²³ Although their proposal was modified, most notably by substituting “destruction” for “disposal,” trade bans were eventually agreed upon by the INC.¹²⁴ Thus, the Stockholm Convention requires parties to “take

¹²¹ See section 2(a)(i) of Part II above (UNECE’s Protocol on POPs).

¹²² In comments provided to the Secretariat on possible articles of the future POPs treaty, Canada, Japan and the U.S. did not support the inclusion of trade restrictions. Japan rejected such provisions explicitly, on the basis that trade issues were already covered by the Rotterdam and Basel conventions. See “Government Submissions,” *supra* note 108 at 3, 5 and 20-21. At the second INC session, the EU and others called for the introduction of a provision to ban trade in certain POPs except for environmentally sound destruction. The U.S., New Zealand, Canada and Japan rejected the proposed provision on the basis that it was premature. See “INC-2 ENB report,” *supra* note 116 at 3; “POPs INC-2 Highlights,” *Earth Negotiations Bulletin* 15:15 (27 January 1999) at 2; and “INC-2 report,” *supra* note 108 at 8.

¹²³ See “INC-2 report,” *ibid.*, Annex VI (EU position), para. 4; “INC-2 ENB report,” *supra* note 116 at 3; “INC-3 ENB report,” *supra* note 117 at 4 and “Summary of the fifth session of the INC for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs” 15:54 *Earth Negotiations Bulletin* (12 December 2000) [INC-5 ENB report] at 4, online: <<http://www.iisd.ca/download/pdf/enb1554e.pdf>>.

¹²⁴ The EU, Norway and others supported exports for environmentally sound “destruction,” primarily because disposal included operations that could lead to the recycling and recovery of POPs wastes, which was deemed unacceptable in the case of POPs. Others, however, including New Zealand and Canada, preferred the word “disposal,” on the basis that destruction was not always feasible. While the final text

measures to ensure” that intentionally produced POPs (listed in annexes A and B) are imported only for the purpose of environmentally sound disposal or for a use permitted under the Convention; it also provides that intentionally produced POPs for which specific production and use exemptions exist may be exported only for environmentally sound disposal or to a party that is allowed to use them.¹²⁵ In addition, parties can only export intentionally produced POPs for which specific production and use exemptions exist to a non-party if the latter has provided an annual certification declaring, among other things, that it is committed to complying with the provisions regarding the environmentally sound management of POP wastes and stockpiles.¹²⁶

The initial opposition to trade bans by JUSCANZ is of particular interest to this study because it reveals the degree to which certain actors were committed to free trade as a philosophical principle in the context of chemicals-related international environmental negotiations. The position of Canada is particularly revealing, as Canada made it clear that it attached great importance to the POPs issue and played a leadership role in the regional and global efforts to address it. As discussed above, most of the intentionally produced POPs to be initially controlled were no longer being manufactured by large agrochemical corporations based in developed countries, which meant that trade bans on these POPs would have little or no economic impact in these countries. Even so, the countries of JUSCANZ opposed the

refers to “disposal,” the Stockholm Convention requires disposal of POP wastes to be done in such a way that the POP content is “destroyed or irreversibly transformed so that they do not exhibit the characteristics of POPs.” When the POP content is low or destruction or irreversible transformation do not represent the “environmentally preferable option,” however, the treaty simply requires “environmentally sound” disposal. See Stockholm Convention, *supra* note 2, Art. 6.1(d)(ii) and “POPs INC-3 Highlights,” *Earth Negotiations Bulletin* 15:23 (8 September 1999) [INC-3 highlights] at 1.

¹²⁵ See Stockholm Convention, *supra* note 2, Art. 3.1(a) and 3.2(a) and 3.2(b).

¹²⁶ See *ibid.*, Art. 3.2(b)(iii). At the fourth INC session, the U.S. rejected a draft of this provision, which had been proposed by the EU, arguing that all countries had the right to obtain the chemicals they needed for legitimate uses (e.g., public health) regardless of whether or not they had become parties to the convention. See UNEP, “Report of the [INC] for an Int’l Legally Binding Instrument For Implementing Int’l Action on Certain POPs on the work of its fourth session,” UN Doc. UNEP/POPS/INC.4/5, Bonn, Germany (25 March 2000) [INC-4 report] Annex VI (EU submission) and “Summary of the fourth session of the INC for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs” 15:34 *Earth Negotiations Bulletin* (27 March 2000) [INC-4 ENB report] at 4, online: <<http://www.iisd.ca/download/pdf/enb1534e.pdf>>.

introduction of trade restrictions in the POPs treaty,¹²⁷ suggesting that they simply wanted to uphold the ideal of free trade. The preoccupation of JUSCANZ with trade was also reflected in a number of proposals that sought to ensure that the POPs treaty would be consistent with international trade law and that, in case of conflict between a provision of the POPs treaty and a norm of international trade, the latter would prevail over the former.¹²⁸

The initial resistance of the countries of JUSCANZ to including trade bans in the POPs convention is consistent with the stance that they assumed during the negotiations on the Basel and Rotterdam conventions, where they defended key rules of international trade and the need to achieve consistency between those rules and environmental norms. In the case of the POPs treaty, however, these countries were prepared to compromise, as it was understood that trade restrictions would have a very narrow scope, allowing international trade in the vast majority of hazardous chemicals to continue.¹²⁹ Thus, the Stockholm Convention not only provides for trade restrictions on specified POPs but also “recognises” that its provisions “and other international agreements in the field of trade and the environment” are “mutually

¹²⁷ See *supra* note 122.

¹²⁸ At the second INC session, a JUSCANZ country proposed the introduction of an article stating that the provisions of the POPs convention would “not affect the rights and obligations of any Party deriving from any existing international agreements,” which was also supported by the ICCA and sought to ensure that existing international trade norms would prevail over any provision in the POPs treaty found to contradict those norms. The EU objected to this article, which was deleted from the draft convention at the fifth INC session. In response, Australia proposed the inclusion of three new paragraphs pertaining to trade in the preamble of the POPs treaty, which mirrored the Rotterdam Convention’s preamble. The first was very similar to the clause proposed earlier, while the second clarified that the intention of the first was not to create a “hierarchy” between the POPs convention and other agreements. The third was a reference to the “mutual supportiveness” between trade and environmental policies. Only the latter was approved by the INC. See UNEP, “INC-2 report,” *supra* note 108 at 27; UNEP, “Submissions by NGOs Pertaining to the Development of a Draft Discussion Text of an Int’l Legally Binding Instrument Implementing Int’l Action on Certain POPs,” UN Doc. UNEP/POPS/INC.2/INF/2, Nairobi (3 November 1998) [NGO Comments Draft Articles] at 2; “INC-3 report,” *supra* note 117 at 20; and “INC-5 ENB report,” *supra* note 123 at 12 and 4.

¹²⁹ At the third INC session, Australia expressed concern over the inclusion of import and export measures and the potential for inconsistency with WTO law, while Canada said that it could support import and export controls provided that they were consistent with trade agreements and other relevant treaties. See “INC-3 highlights,” *supra* note 124 at 1.

supportive,”¹³⁰ a formulation was proposed by JUSCANZ and the EU at the fifth INC session.¹³¹ This supportiveness is reflected in the fact that, following the principle of the “least-trade” restrictive measure of the WTO/GATT discussed in the previous two chapters, the Stockholm Convention adopts global bans and phase-outs only for a very specific group of chemicals with confirmed “global” effects.

b) Unintentionally Produced POPs

As suggested by the IFCS report, dealing with by-products would be a considerably more challenging task than coping with intentionally produced POPs. The elimination of by-products was generally seen as unfeasible and unrealistic because they came from multiple sources and because there were no viable alternative materials or processes for some sources, while release and source inventories were lacking in many countries. This led the UNEP GC to conclude that “currently available” and “feasible and practical actions” were needed to deal with these POPs.¹³² Still, there was disagreement on what the ultimate purpose of such actions should be, so the UNEP GC left the question open by asking the INC to consider measures that could achieve “release reduction and/or source elimination”¹³³ of POPs by-products.

Rather than describe the minutiae of the deliberations on by-products, some of which were highly technical, this section focuses on two matters that generated considerable debate and reveal the limitations and possibilities of using the Stockholm Convention to challenge the liberal economic perspective in the field of hazardous chemicals. The first is the issue of whether commitments on by-products should be aimed at the reduction or the elimination of these POPs; the second concerns the nature and extent of the parties’ commitments on by-products.

¹³⁰ See Stockholm Convention, *supra* note 2, Pmbl., para. 9 and *supra* note 125.

¹³¹ See “INC-5 ENB report,” *supra* note 123 at 4.

¹³² See UNEP GC, Decision 19/13 C, *supra* note 93, para. 4.

¹³³ See *ibid.*

i) Reduction vs. Elimination

At its first meeting, the INC considered a possible article on “release reduction measures” that would “oblige or encourage” parties to take actions on by-products,¹³⁴ which had been drafted by the Secretariat to facilitate the discussion. Since the draft article effectively established reduction as the goal of the actions to be taken on by-products, Greenpeace International objected to this language and suggested that the goal of elimination be introduced in the article.¹³⁵ This prompted the INC to amend provisionally the title of the proposed article to call for a reduction in the release of certain POPs “with the aim of their elimination.”¹³⁶ At the next session the goal of elimination was supported by Iran, El Salvador, the Philippines and the Gambia, as well as Greenpeace and WWF.¹³⁷ As a result, three different options were introduced in the draft article’s chapeau, requiring parties to “aim to reduce,” “reduce” or “take all necessary measures to reduce” their total annual releases of each specified POP by-product “with the aim of their elimination.”¹³⁸

¹³⁴ The possible actions included: undertaking national emissions inventories; establishing release reduction targets; promoting or enforcing release limit levels; and promoting the use of best available techniques. The specifics could be included in technical annexes, as provided in the CLRTAP POPs Protocol. See “Possible Articles,” *supra* note 110 at 2-3 (*Note: although the three proposed annexes had no denomination at that point, the letters A, B and C are used here for the purpose of analysis).

¹³⁵ See “INC-1 ENB report,” *supra* note 106 at 5. At the first INC session, some ENGOs argued that there was no acceptable level of POPs contamination and the aim of the convention should be their elimination. See “INC-1 report,” *supra* note 106 at 10 and Annex VIII.

¹³⁶ See UNEP, “Expanded Outline for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs,” UN Doc. UNEP/POPS/INC.2/2, Nairobi, Kenya (21 October 1998) [Expanded Outline] at 4 (draft Art. D.3). The outline was prepared by the Secretariat taking into account the comments made by participants at the first INC session and a number of submissions subsequently received from governments. Interestingly, none of the respondents (Canada, the EU, Japan, Iceland, Norway and the U.S.) directly addressed the issue of elimination (see *infra* note 148). Comments were also sent by two NGOs, the ICCA and Consumers International (CI). CI stressed the need to give priority to the elimination of dioxins and furans at source, and called for the use of new available technologies that minimized or eliminated the creation of dioxins and furans in industrial processes and incineration and for such technologies to be made readily available to less developed countries. It also called for the rapid phase-out of the use of chlorine in the pulp and paper industry and in industrial solvents, polyvinyl chloride and pesticides, and called for a ban on the export of outdated technology that produced high levels of dioxins and furans to less developed countries. See “Government Submissions,” *supra* note 108 at 3, 6, 15, 17 and 22 and “NGO Comments Draft Articles,” *supra* note 128 at 3 and 7.

¹³⁷ See “INC-2 report,” *supra* note 108 at 11 and “INC-2 ENB report,” *supra* note 116 at 5.

¹³⁸ See “INC-2 report,” *ibid.*, Annex 1, draft Art. D.3. (*Note: all of the terms included in quotation marks were in brackets to indicate a lack of consensus).

More delegates expressed support for the goal of “ultimate” elimination at the next two sessions, including the EU, Norway, Nigeria, the Gambia, Chad, the Philippines, Zambia, Malaysia and Algeria,¹³⁹ while JUSCANZ countries, the Republic of Korea, Thailand and Russia opposed it on the basis that it was unfeasible and unrealistic.¹⁴⁰ Even those who supported elimination goal hinted that they understood it to be no more than a political aspiration that should be achieved when feasible, however. The EU, for instance, argued that elimination was not the same as “reduction to zero” and supported the goal on the basis that it was a long-term political commitment toward which parties should aim.¹⁴¹ Even the International Council of Chemical Associations (ICCA), which represented the global chemicals industry, declared that it was prepared to accept the goal of “ultimate” elimination as an “aspirational” goal, provided that it was clarified that it would only apply “where technically and economically feasible.”¹⁴² Several governments held a similar position at the fifth INC session,¹⁴³ so the final compromise was that the goal of the reduction of POPs by-products releases would be their “continued minimization” and, “where feasible,” their elimination.¹⁴⁴ Since no specific reference was made to what “feasibility” entailed, one delegation expressed the view that the INC had agreed that the term feasible included both technical and economic considerations.¹⁴⁵

¹³⁹ See “INC-3 ENB report,” *supra* note 117 at 6 and “INC-4 ENB report,” *supra* note 126 at 4.

¹⁴⁰ See “INC-3 ENB report,” *ibid.* at 6 and “INC-4 ENB report,” *ibid.* at 4-5. According to the *Earth Negotiations Bulletin*, New Zealand would have changed its position at the fifth INC session, where it reportedly supported the goal of ultimate elimination with no qualifier. See “INC-5 ENB report,” *supra* note 123 at 6-7.

¹⁴¹ See “INC-4 ENB report,” *supra* note 126 at 4.

¹⁴² ICCA, “UNEP Global POPs treaty- INC-5: ICCA Statement on Key Issues” (31 August 2000) [ICCA Statement INC-5] at 5, online: <http://www.cefic.be/position/icca/pp_ic026.htm>.

¹⁴³ These countries included Colombia, the Russian Federation, South Africa, Brazil, Saudi Arabia and Malaysia, as well as Canada and the U.S. See “INC-5 ENB report,” *supra* note 123 at 7.

¹⁴⁴ See Stockholm Convention, *supra* note 2, Art. 5 (chapeau).

¹⁴⁵ See UNEP, “INC-4 report,” *supra* note 126 at 85; UNEP, “Report of the INC for an Int’l Legally Binding Instrument For Implementing Int’l Action on Certain POPs on the work of its fifth session,” UN Doc. UNEP/POPS/INC.5/7, Johannesburg, South Africa (26 December 2000) at 7, para. 42; and “INC-5 ENB report,” *supra* note 123 at 7.

ii) Control Measures

Regardless of whether the goal of elimination was explicitly mentioned in the POPs treaty, its potential fulfilment depended on the concrete obligations of parties regarding by-products. This was the second key issue addressed by the INC, which disagreed on a number of issues but generally concurred on the need to embrace a “practical and feasible” approach to deal with by-products, as instructed by UNEP GC Decision 19/13 C.¹⁴⁶ This was due to a number of factors that made dealing with by-products difficult. These factors were singled out by various participants and included the lack of information on emissions releases and source inventories in many countries, which made the establishment of baselines for setting commitments and measuring progress problematic; the variety of sources implicated in the release of by-products; and the difficulties that some countries would face in meeting the technical requirements of best available techniques (BAT), release reporting and reduction targets.¹⁴⁷

At its second session, the INC considered a draft article on by-products that had been prepared by the Secretariat bearing in mind relevant agreements, the

¹⁴⁶ Participants disagreed, for instance, on whether parties should be required to undertake concrete actions to reduce by-products releases, including the implementation of release reduction targets. While Australia, Japan and the U.S. opposed references to timetables for emissions reduction, on the basis that they were unrealistic and technically unfeasible, the EU said that countries should set concrete reduction targets with the aim of continuing minimization. Canada also expressed support for the adoption of release reduction targets and China called for concrete measures specifically on dioxins. See “INC-2 ENB report,” *supra* note 116 at 5 and “INC-3 ENB report,” *supra* note 117 at 5.

Another point of contention was whether parties should be mandated to “promote” or “require” the use of “substitute materials” to prevent the release of POPs by-products. A number of delegations, including those of the EU, Norway, South Africa and Malaysia, suggested that parties should promote the use of available substitute materials; Nigeria went further, saying that such use should be required (See “INC-4 ENB report,” *supra* note 126 at 5). Others felt that the term “substitution” limited the available management strategies for materials (See “INC-4 report,” *supra* note 126 at 86). This was the position of the U.S., as well as of the ICCA, which argued that “singling out” substitution restricted the provision on materials policy, which it argued should be considered “broadly.” See “INC-5 ENB report,” *supra* note 123 at 7 and “ICCA Statement INC-5,” *supra* note 142, para. 4.2.4. In the end, the INC agreed to require parties to “promote the development and, where it seems appropriate, require the use of substitute materials, products and processes to prevent the formation and release” of POPs by-products. See Stockholm Convention, *supra* note 2, Art. 5(c).

¹⁴⁷ See “INC-2 ENB report,” *supra* note 116 at 5; “INC-3 ENB report,” *supra* note 117 at 5-6; and “INC-3 report,” *supra* note 117 at 12.

comments made by participants at the first INC session and submissions subsequently received from governments.¹⁴⁸ Following key provisions of the POPs Protocol to the CLRTAP,¹⁴⁹ the proposed article requested parties to apply three measures on the listed by-products,¹⁵⁰ namely, to develop and maintain release inventories; to “reduce” their “total annual releases” from a base level of release in a reference year, which would be set in an annex; and to “promote the use of” BAT to reduce POPs releases.¹⁵¹

The discussion on the first two measures was relatively uncontroversial. Given the lack of source and emissions inventories in many countries and thus the practical difficulty of setting baselines for by-products, delegates quickly abandoned the idea of using a baseline approach.¹⁵² Similarly, although a few representatives initially entertained the idea that release reduction targets could be established,¹⁵³ it was soon decided that an action plan-based approach would be preferable. Under this method, each party would be

¹⁴⁸ See UNEP, “Expanded Outline,” *supra* note 136 at 2. In the intersessional period, comments had been received from a number of countries. Canada expressed support for “release restriction” provisions, while the EU called for the introduction of “effective measures to prevent and, where that [was] not practicable to reduce emissions of specified POPs from mobile sources.” (*Note: the majority of by-products sources identified in the POPs Protocol to the CLRTAP are stationary rather than mobile). Japan said that the parties should be “obliged to take measures to reduce” the emissions of by-products such as dioxins and furans. Norway called for effective measures to “eliminate and/or reduce” emissions from by-products, but called for an obligation to “reduce” the total annual emissions from major sources. The U.S. proposed a provision calling upon parties to “reduce releases of specified by-product POPs” and requesting them to develop national inventories for by-product POPs sources and emissions and to develop national strategies to “control or reduce emissions” of the listed POPs. Comments were also received from two NGOs, the ICCA and Consumers International (CI). While the ICCA proposed that the article on by-products request parties to develop a national action plan to identify and “reduce” their emissions and discharges, CI stressed the need to give priority to the *elimination* of dioxin and furans at source (For details see *supra* note 136). See “Government Submissions,” *supra* note 108 at 3, 6, 15, 17 and 22 and “NGO Comments Draft Articles,” *supra* note 128 at 3 and 7.

¹⁴⁹ See section 2(a)(i) of Part II above and “POPs Protocol to the CLRTAP,” *supra* note 37, Arts. 3.5(a), 3.5(b)(i), 3.5(b)(iv) and 3.8 (These provisions concern by-products and refer to, respectively: reduction emissions from the emission levels of a reference year determined in an annex; the application of BAT to achieve that goal; and the development and maintenance of emission inventories).

¹⁵⁰ The POPs by-products to be listed in Annex C were dioxins, furans, HCBs and PCBs.

¹⁵¹ UNEP, “Expanded Outline,” *supra* note 136, Appendix, draft Art. D.3. (Emphasis added)

¹⁵² At the third INC session, the EU said that it supported an effective and practical approach and, given the difficulties associated with setting baselines for by-products, it agreed with Australia that a baseline approach was unworkable. See “INC-3 ENB report,” *supra* note 117 at 6.

¹⁵³ Canada, for instance, expressed support for the adoption of release reduction targets. See “INC-2 ENB report,” *supra* note 116 at 5.

required to develop a national plan to “identify, characterize and address the release of” by-products and set its own reduction targets.¹⁵⁴ The Stockholm Convention adopts this more flexible approach and requires each party to develop an action plan on by-products after a specified period of time, which should include the development and maintenance of source inventories and release estimates, strategies to meet its obligations regarding by-products and an implementation schedule. The elaboration and implementation of the action plan is one of the measures that each party must undertake to reduce the total releases of the by-products listed in Annex C with the goal of their continued minimization and, “where feasible,” their elimination.¹⁵⁵

As for the “promotion” of BAT use for identified by-product sources,¹⁵⁶ it was agreed that this was an acceptable approach for dealing with existing sources. Positions diverged, however, over whether BAT use should be mandatory for new sources, something that Canada and Norway proposed at the fourth INC session.¹⁵⁷ Although at that point in time no agreement had been reached over whether BAT use should be “required” or “promoted,” those who commented on the matter said that they could accept mandatory BAT use, provided that the obligation only applied to major source categories and that the categories were listed in the annex on unintentional production (Annex C).¹⁵⁸ It was also stressed that the concept of BAT would need to be developed and the meeting generally concurred that it should be “broad and inclusive” and incorporate prevention strategies, feasibility, timing and cost considerations.¹⁵⁹

¹⁵⁴ See “INC-3 report,” *supra* note 117 at 12, 24-25 and 63.

¹⁵⁵ See Stockholm Convention, *supra* note 2, Art. 5 chapeau and 5(a).

¹⁵⁶ See “Expanded Outline,” *supra* note 136 at 4.

¹⁵⁷ See “INC-4 ENB report,” *supra* note 126 at 5. A new source would be, for instance, the construction of a new facility or the substantial modification of an existing facility falling into one of the major source categories of the listed POPs by-products. See Expert Group on BAT (best available techniques) and BEP (best environmental practices), “Draft Guidelines on BAT and Provisional Guidance on BEP Relevant to Article 5 and Annex C,” UN Doc. UNEP/COP.1/INF/7 (31 January 2005) [Draft BAT Guidelines] at 17, online: <http://www.pops.int/documents/meetings/cop_1/meetingdocs/en/inf_7/INF-7.pdf>.

¹⁵⁸ This was the position of the U.S. delegation (See “INC-4 ENB report,” *supra* note 126 at 5).

¹⁵⁹ See UNEP, “INC-4 report,” *supra* note 126 at 86 and “INC-5 ENB report,” *supra* note 123 at 7.

At the next INC session delegates considered two options that had been drafted in a contact group for consideration by the INC. In essence, the first option would have required parties to use BAT for specified new sources of POPs by-products, while the second would have asked them to promote and, “in accordance with their action plan[s], require” BAT for specified new sources of by-products. While the EU, Norway and Nigeria supported the first option, the latter alternative received greater support and was eventually agreed upon by the INC.¹⁶⁰ Thus, the Stockholm Convention asks parties to “promote” and, in accordance with the implementation of their action plans, “require” the use of BAT for those new sources that fall within a source category identified in their plans as requiring BAT. However, each party must require the use of BAT for new sources in specified categories (listed in Part II of Annex C) no later than four years after the Convention has entered into force for that party. In addition, when applying BAT each party should consider guidelines on BAT to be adopted by the parties.¹⁶¹

The fact that the use of BAT is mandatory in some cases does not mean that the most advanced technologies must be used, however. The Stockholm Convention affirms that the concept of BAT is not aimed at the prescription of any specific technique or technology, but at “taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions.”¹⁶² In addition, the Convention defines “available” techniques as those that are “accessible to the operator and are developed on a scale that allows implementation in the relevant sector, under economically and technically viable conditions, taking into account the costs and advantages.”¹⁶³ The draft guidelines on BAT,¹⁶⁴ which were endorsed by

¹⁶⁰ See “INC-5 ENB report,” *ibid.*

¹⁶¹ See Stockholm Convention, *supra* note 2, Art. 5(d) and Annex C (Unintentional Production), Part II.

¹⁶² See *ibid.*, Annex C, part B (BAT), chapeau.

¹⁶³ Stockholm Convention, *supra* note 2, Art. 5(f)(iii).

¹⁶⁴ At its first meeting, the COP provisionally accepted the draft guidelines on BAT and BEP relevant to Article 5 that had been developed in the interim period by an expert group on BAT and BEP established by the INC at its sixth session. See Conference of the Parties (COP) to the Stockholm Convention, Decision SC-1/19, “Guidelines on Best Available Techniques and Best Environmental Practices Relevant to Article

the COP at its first session, stress that the Convention is ambitious in that it “encourages a search for processes, techniques and practices that avoid the generation and release of POPs,” but notes that these provisions “cannot be interpreted to mean that facilities that have the potential to form and release [POPs by-products] should be avoided,” as “complete elimination may not be practical or feasible” and the specified sources may have “useful purposes.”¹⁶⁵

The points made above imply that BAT is not an absolute term and that what constitutes BAT in one country might not be BAT in another. This practical approach, which takes into account the difficulty of applying the cleanest technologies in developing countries, means that certain procedures and materials could constitute BAT even if an alternative that could enable achievement of the goal of elimination were available elsewhere. A concrete example may serve to clarify this point. During the negotiations, one of the claims made by the ICCA in opposing the inclusion of the elimination goal for by-products was that high temperature incineration for waste management, which inevitably released POPs by-products such as dioxins, was a widely applied practice throughout the world and was in many cases considered BAT by regulators.¹⁶⁶ Environmental NGOs (ENGOs) and other public interest groups, in contrast, argued that incineration and the other usual methods to treat POPs and hazardous wastes did not meet the BAT standard, as new technologies that achieved POPs destruction without emitting new POPs were available in industrialised countries. Consequently, they called for the widespread use of such technologies in developing countries and for donors to export these to less developed countries.¹⁶⁷ By suggesting that the BAT

5,” in UNEP, “Report of the [COP] of the Stockholm Convention on the Work of its first meeting,” UN Doc. UNEP/POPS/COP.1/31, Punta del Este, Uruguay (6 May 2005) at 75.

¹⁶⁵ See UNEP, “Draft BAT Guidelines,” *supra* note 157 at 17.

¹⁶⁶ See “ICCA INC-5 Statement,” *supra* note 141, para. 4.3.2.

¹⁶⁷ See Sierra Club and Basel Action Network (BAN), “Best Available Techniques for POPs Transport and Destruction” (2000) online: <www.oztoxics.org/research/pops/ipen/pop_pap/paper11.pdf>. According to the report, alternative technologies such as gas-phase chemical reduction and catalytic hydrogenation were already in use in some industrialized countries and had demonstrated 100% POPs destruction efficiency, the complete containment of all residues and no uncontrolled releases. See Sierra and BAN, *ibid.* at 2.

concept varies depending of where it is applied, the Stockholm Convention endorses the less ambitious interpretation of BAT advocated by the ICCA.

Even the calls for the widespread use of the cleanest available technologies, however, fail to question whether the consumption of goods whose production or disposal releases POPs is sustainable or truly necessary. Like the calls for the implementation of cleaner production methods by some ENGOs in the context of the Basel Convention, the demands by a number of ENGOs for absolute BAT in the negotiations on the Stockholm Convention focused on the need to apply substitute materials and processes to make production cleaner and more environmentally friendly. While cleaner production might indeed contribute to eliminating some POPs by-products, the focus on production seems likely to divert attention from the issue of whether the *quantity* of the products we consume that require, contain or release potentially hazardous chemicals is sustainable. This approach is reflected in the most ambitious BAT-related provision of the Stockholm Convention, which requires parties to consider approaches to preventing the formation and release of POPs by-products when considering BAT but relates exclusively to improving production.¹⁶⁸ The focus on production within the suggested prevention strategies makes it unlikely that parties will question whether the product resulting from the material or process that they are seeking to replace is truly necessary or is necessary in the quantities in which it is consumed. In other words, it sidesteps the issue of whether the consumption of an ever-increasing number of products that contain or release POPs at some point in their life cycles is consistent with the goals of the Stockholm Convention.

¹⁶⁸ The prevention measures proposed include the use of low-waste technology; the use of less hazardous substances; the promotion of recovery and recycling of waste and of substances generated and used in processes; the improvements in waste management with the aim of the cessation of open and often uncontrolled burning of wastes; and the minimization of POPs by-products as contaminants in products. See Stockholm Convention, *supra* note 2, Annex C (Unintentional Production), Part V (General Guidance on BAT and BEP), paras. A(a), A(b), A(c), A(f) and A(g).

3. The Listing of New POPs

The importance of the discussions regarding the procedure for adding new substances to the POPs convention cannot be overemphasized. As noted before, the main reason why the leading chemical manufacturers supported the global POPs treaty was that production and use phase-outs would be limited to a small list of POPs products whose elimination would not compromise their interests, while a less stringent approach was expected to be adopted to tackle specified by-products. The possibility that the list of POPs to be controlled would grow considerably, however, constituted a major cause of concern for the global chemicals industry.¹⁶⁹

The tasks of defining the “science-based criteria” that would determine which new substances would be considered POPs and of elaborating the procedure for adding new POPs to the convention were entrusted to a group of experts, the “criteria expert group on POPs” (CEG).¹⁷⁰ Theoretically, the CEG could have considered other parameters besides those pertaining to persistence, bioaccumulation, toxicity and exposure in different regions, which the INC requested it to include.¹⁷¹ These criteria, however, had long been established, framed initially in the CLRTAP process¹⁷² and further developed by the IFCS ad hoc group of experts.¹⁷³ The only important difference between the criteria framed in these two processes was that the IFCS group adapted the long-range transport criterion to fit the global POPs agenda. On the one hand, the

¹⁶⁹ See Clapp, *supra* note 25 at 9.

¹⁷⁰ The CEG met twice, in October 1998 and in June 1999, and presented its report to the INC at its third session. Over a hundred participants attended both CEG sessions. Industry NGOs included the Global Crop Protection Federation (now Croplife International), the ICCA, the World Chlorine Council, the European Chemical Industry Council (CEFIC), the Canadian Chemical Producers Association, the Chemicals Manufacturers Association (CMA) and the Indian Chemical Manufacturers Association; environmental NGOs included the Pesticide Action Network Asia and the Pacific, Greenpeace International and WWF. See UNEP, “Report of the first session of the [CEG] for POPs,” UN Doc. UNEP/POPS/INC/CEG/1/3, Bangkok, Thailand (30 October 1998) [CEG-1 report] at 3; UNEP, “Report of the second session of the [CEG] for POPs,” UN Doc. UNEP/POPS/INC/CEG/2/3, Vienna, Austria (18 June 1999) [CEG-2 report] at 4; and Buccini, “Road to Stockholm,” *supra* note 66 at 240 and 242.

¹⁷¹ See “INC-1 report,” *supra* note 106, Annex II, para. 2 (CEG’s mandate)

¹⁷² See “POPs Protocol to the CLRTAP,” *supra* note 37, Art. 1.7 and Selin and Eckely, *supra* note 31 at 26.

¹⁷³ See “IFCS Final Report,” *supra* note 65 at 5.

transport criterion was expanded to include not only atmospheric transport but also the movement of POPs in other environmental media (i.e., water currents and migratory species). On the other hand, the concept was narrowed down by making reference to “exposure in different regions” and the “potential for regional and global transport,” which would need to exist for a substance to be considered a POP under the new global treaty. Thus, when a participant of the CEG proceedings inquired whether regional transport of a POP would be considered sufficient for it to merit action under the new convention, the answer was that it would only as long as it had a “global impact.”¹⁷⁴ As mentioned before, ensuring that only those chemicals with known global effects could qualify as POPs was crucial to ensuring that the global POPs treaty would abide by the GATT/WTO principle of the least-trade restrictive measure, which has been interpreted as prescribing the adoption of PIC rather than global trade bans or production and use phase-outs of chemicals or uses that are hazardous unless such chemicals or uses have truly “global” effects.¹⁷⁵

Abiding by its mandate, the CEG concentrated its work on assigning numerical values to the criteria that it was asked to include so that it would be possible to determine when those criteria had been met. Recognising that a considerable degree of scientific uncertainty would be involved in the application of the criteria used to identify and assess potential new POPs,¹⁷⁶ the group concluded that some flexibility would be needed in the application of such criteria.¹⁷⁷ The problem of scientific uncertainty also prompted a discussion about the role of precaution in the identification and listing of new POPs that was left for the INC to decide, as it was a politically sensitive

¹⁷⁴ See “CEG-1 report,” *supra* note 170 at 5. This view was reaffirmed at the next CEG session, where the CEG considered three possible definitions of long-range transport, all of which reflected the notion that more than one region would need to be involved for a substance to merit global action. See “CEG-2 report,” *supra* note 170 at 13.

¹⁷⁵ See *supra* note 25.

¹⁷⁶ See UNEP, “Consideration of Possible Criteria for Identifying Further POPs as Candidates for Int'l Action,” UN Doc. UNEP/POPS/INC.1/6, Montreal, Canada (30 April 1998) [Possible Criteria] at 2.

¹⁷⁷ See “CEG-2 report,” *supra* note 170, Annex I, “Draft Science-Based Criteria and a Procedure for Identifying Additional POPs as Candidates for Future Int'l Action” [Draft Criteria and Procedure], Art. F (Listing of Substances in Annexes A, B or C), para. 4.

matter. Scientific uncertainty offered the INC an opportunity to make the POPs treaty more or less likely to cover a greater number of substances. The larger the number of substances covered and the lesser the degree of scientific certainty about their “global” effects and POP-like properties, the more the Stockholm Convention could be used to challenge international trade in hazardous chemicals and liberal economic norms.

a) Scientific Uncertainty and the Identification of New POPs

The notion that scientific uncertainty was implicated in the identification and evaluation of new POPs candidates was very much in the minds of delegates. At their first sessions, both the CEG and the INC had before them a document on possible criteria for identifying new POPs to be covered by the future convention, which had been prepared by the Secretariat based on comments received from governments and other actors.¹⁷⁸ The document listed possible numerical values to determine whether the criteria for identifying new POPs, including persistence, bioaccumulation, toxicity and tendency to long-range transport, had been met, but it signalled a number of “inherent problems in the application of [these] criteria.”¹⁷⁹ First, there were several “inherent deficiencies in the scientific database” and thus any kind of numerical criteria had to be applied with judgement. Second, there was “uncertainty related to any kind of scientific measurement,” which was of special relevance in cases where the database consisted of a single measurement. Third, the “lack of appropriate methods for predicting what actually happen[ed] in the environment” and the lack of “mutually agreed assessment procedures” were a “continuing problem.”¹⁸⁰

¹⁷⁸ See “Possible Criteria,” *supra* note 176 at 2 (*Note: as discussed before, the INC established the CEG at its first session; the first CEG meeting was held between the first and second INC sessions).

¹⁷⁹ See *ibid.* at 5.

¹⁸⁰ See *ibid.*

The document also made the point that uncertainties in the database frequently gave rise to different interpretations between stakeholders, and thus an important part of the criteria development process was to ensure that these divergences were eliminated “to the fullest extent possible” and that the reasons for any remaining differences were “thoroughly understood.”¹⁸¹ Most notably, it claimed that although numerical values could help determine whether the set criteria had been met, some criteria did not lend themselves to the assignment of “numerical cut-off values” and thus needed to be “qualitatively assessed.”¹⁸² The long-range transport criterion in particular was said to be “basically qualitative in character,” so that it would need to be evaluated on a case-by-case basis for each potential POP candidate.¹⁸³

The CEG proposed to address these problems via the procedure for listing new POPs in the future convention. The process it proposed was rather lengthy, starting with the submission of a proposal by a party nominating a substance and, if successful, ending in a decision by the COP to add the substance to the convention. The procedure would entail three technical reviews to be carried out by a “persistent organic pollutants review committee” or POPRC, and they would be based on three different types of information¹⁸⁴ and follow each

¹⁸¹ It was stressed that this would require a “clear understanding of how political considerations, particularly in the field of science policy, influence[d] assessments of hazard and risk,” i.e., of how different desired levels of protection often led to different assumptions in the interpretation of scientific data. For instance, while some risk assessments could interpret a “well-conducted” single lifetime study of a species as enough proof of the chronic effects of a chemical, others could require more data to reach that conclusion. See “Possible Criteria,” *supra* note 176 at 5.

¹⁸² See *ibid.* at 2.

¹⁸³ See *ibid.* at 4. Although there were a number of screening methods to identify probable POPs with a potential for long-range transport, it was concluded that the continuous development of predictive tools was needed. The “ultimate proof” was said to be the presence of POPs in remote environments, such as the Arctic, as evidenced by monitoring data, but it was acknowledged that monitoring programmes did not exist in some regions and those that existed needed to be further developed. See *ibid.* at 5.

¹⁸⁴ Annex D listed the screening criteria of persistence, bioaccumulation, toxicity and tendency to long-range transport. The data for the risk profile (Annex E) included information regarding exposure in local areas “and particularly as a result of long-range environmental transport,” as well as national, regional and international risk evaluations. The information for the risk management evaluation (Annex F) included the efficacy and efficiency of control measures in meeting “risk reduction” goals; the availability, cost and efficacy of alternatives; and the impact on society of particular control measures, including on health, agriculture and “economic aspects.” See “CEG-2 report,” *supra* note 170 at 17-25.

other with several steps in between.¹⁸⁵ The first review was to be an initial screening of the proposal according to set criteria (i.e., bioaccumulation, persistence, etc). If the POPRC found that these criteria had been met, it would proceed to do a risk profile to “evaluate whether the substance, *as a result of its long-range environmental transport*, [wa]s likely to lead to significant adverse human health and/or environmental effects, such that global action [wa]s warranted.”¹⁸⁶ If the POPRC decided that the proposal should proceed, a “risk management evaluation” would ensue to consider possible control measures and socio-economic matters. Parties and observers (e.g., the chemicals industry) would be directly involved in the elaboration of the risk profile and the risk management assessment by submitting information and technical comments that the POPRC would be required to consider.¹⁸⁷ Based on these two reviews, the POPRC would produce a report for the conference of the parties (COP) recommending whether the substance should be added to the convention.¹⁸⁸

The procedure proposed by the CEG dealt with scientific uncertainty in three ways. First, parties nominating a new substance could demonstrate that the screening criteria had been met not only by submitting numeric data but also by providing other types of evidence.¹⁸⁹ Second, the POPRC would be

¹⁸⁵ Consider the steps required between the screening of a proposal and the risk profile: first, the Secretariat would circulate a copy of the proposal to the parties and observers, asking them to provide input for the risk profile; it would then collect the information received and forward it to the POPRC; once the POPRC had prepared a preliminary report, the Secretariat would circulate it to the parties and observers and collect technical comments; lastly, it would submit the comments to the POPRC, which would have to take them into account in the elaboration of the risk profile. See “CEG-2 report,” *supra* note 170 at 15.

¹⁸⁶ “CEG-2 report,” *ibid.*, Annex I (Listing of Substances in Annexes A, B or C) and Annex E (Information Requirements for the Risk Profile), para. 1 (emphasis added).

¹⁸⁷ During the INC proceedings, a few countries (notably Argentina) expressed concern about giving a direct role to observers in the technical assessments to be carried out by the POPRC, presumably because they anticipated that the chemical industry, with superior resources and technical expertise, would play a bigger role than other actors. In fact, the ICCA insisted that the process and methods for assessments should recognise the participation of stakeholders, including industry experts. A similar view was expressed by the United States, which at the fourth INC session proposed developing language to ensure the participation of observers, highlighting the role of industry. See “ICCA Briefing Note,” *supra* note 113 at 2 and “INC-4 ENB report,” *supra* note 126 at 6-7.

¹⁸⁸ For further details see “CEG-2 report,” *supra* note 170, Annex I (listing of substances).

¹⁸⁹ To demonstrate the criterion of bioaccumulation, for instance, proponent parties would be asked to provide evidence that the substance’s half-life in water was greater than “two or six” months, or that its

required to apply the specified screening criteria in a “flexible, transparent and integrative manner.”¹⁹⁰ Because the POPRC would do a full technical review of a proposal only if it found that the screening criteria had been fulfilled, flexibility was essential at this preliminary stage.¹⁹¹ Lastly, the CEG recommended that the INC incorporate the precautionary approach “in an appropriate place in the future convention.”¹⁹² It did not recommend, however, what that place should be, as this was a highly sensitive political issue that would need to be addressed directly by the INC.

b) Precaution and the Listing of New POPs

Although there is some disagreement as to its legal status, in particular whether it constitutes a “principle” of international environmental law or merely an “approach,”¹⁹³ precaution is accepted as a concept that should guide environmental decision-making in the face of scientific uncertainty.¹⁹⁴ The most widely accepted formulation of precaution is that of Principle 15 of the Rio Declaration, which was adopted by over 170 states at the 1992 United Nations Conference on Environment and Development (UNCED).¹⁹⁵

Principle 15 of the Rio Declaration provides that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be

half-life in soils was greater than six months, or that its half-life in sediments was greater than six months; or “evidence that the substance [wa]s otherwise sufficiently persistent to be of concern within the scope of the Convention. See “Draft Criteria and Procedure,” *supra* note 177, draft Annex (Information Requirements and Criteria for the Proposal and Screening of POPs), paras. (b)(i) and (b)(ii).

¹⁹⁰ See “Draft Criteria and Procedure,” *supra* note 177, Art. F (listing of substances), para. 4.

¹⁹¹ See *ibid.*

¹⁹² See “CEG-2 report,” *supra* note 170 at 10-11.

¹⁹³ The debate over whether precaution is a legal principle or merely an approach is essentially a trade dispute between the United States and the European Union. If precaution were a principle, as maintained by the EU, it would be relevant to trade disputes, justifying measures that may be considered protectionist under WTO law. If, however, it were merely an approach, as suggested by the United States, then it would have no relevance beyond the treaties in which it is incorporated and it would not be relevant to WTO disputes, except to the extent it is explicitly articulated in WTO agreements (e.g., the WTO Agreement on Phytosanitary Measures). For details see Claudia Saladin, “Precautionary Principle in International Law” (2000) 6:3 Int. J. Occup. Env. Health 270 at 272.

¹⁹⁴ See Saladin, *ibid.* at 273.

¹⁹⁵ Principle 15 is included, for instance, in the *Convention on Biological Diversity*, 5 June 1992, Pmbl., para. 9 and the *Cartagena Protocol on Biosafety*, Pmbl., para. 4).

used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹⁹⁶ Some argue that this is a rather narrow formulation of the precautionary “approach,” among other reasons because a threat of “serious or irreversible” harm is required and because the measures to be taken should be “cost-effective.”¹⁹⁷ Following Principle 15, the precautionary approach can be understood as being simply a risk assessment tool within a risk assessment approach,¹⁹⁸ rather than an alternative overarching principle for dealing with scientific uncertainty.¹⁹⁹

During the negotiations on the Stockholm Convention, no one disagreed that precaution should be included in the treaty’s preamble, but there was some disagreement regarding which wording should be used. While the countries of JUSCANZ, as well as the global chemicals industry,²⁰⁰ supported a reference to the precautionary “approach” as formulated in Rio Principle 15, the EU and

¹⁹⁶ See *Rio Declaration on Environment and Development*, 14 June 1992, U.N. doc. A/CONF.151/26/Rev.1 (Vol. I) Annex I, Pp. 15.

¹⁹⁷ See Saladin, *supra* note 193 at 273.

¹⁹⁸ The European Commission, for instance, argues that “the precautionary principle should be considered within a structured approach to the analysis of risk,” in particular risk management, so that where there are “reasonable grounds” for concern that potential hazards may affect the environment or human, animal or plant health, the principle can be applied to reduce risks according to the “desired level of protection.” See European Commission, “Communication on the Precautionary Principle” [EC Communication on the Precautionary Principle], doc. COM(2000)1, Brussels (2 Feb 2000) at 3 and 10-11, online:

<ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf>. See also Tarlock, *supra* note 39 at 141.

¹⁹⁹ Although risk management and precaution (as understood by some environmentalists) are both rooted in science, they approach scientific uncertainty in significantly different ways, asking different kinds of questions that lead them to use considerably different methodologies. Risk management seeks to determine what level of risk by a particular substance or activity is acceptable, while precaution asks how much risk can be avoided by inquiring what are the alternatives or opportunities for prevention. As a result, the precautionary approach requires more comprehensive analyses that involve not only the risks of a substance or activity but also the feasibility of alternative technologies and products (as well as an analysis of whether the activity or product is necessary in the first place), emphasizing the multiple uncertainties involved. In addition, the precautionary approach shifts the presumptions used in decision making, placing the responsibility for demonstrating relative safety and analyzing alternatives on those undertaking potentially harmful activities. See Joel A. Tickner and Polly Hoppin, “Children’s Environmental Health: A case study in implementing the Precautionary Principle” (2000) 6:3 *Int. J. Occup. Env. Health* 281 at 284-285; Carolyn Raffensperger et al., “Precaution: Belief, Regulatory System, and Overarching Principle” (2000) 6:3 *Int. J. Occup. Env. Health* 266 at 267-268; and Gwynne Lyons et al., “An Environmentalist’s Vision of Operationalizing the Precautionary Principle in the Management of Chemicals” (2000) 6:3 *Int. J. Occup. Env. Health* 289 at 290-291. For an incisive critique of the risk management paradigm to deal with global pollutants such as POPs contamination see Thornton, *supra* note 3 at 318-326.

²⁰⁰ The ICCA made it clear that the global chemical industry was prepared to accept the inclusion of the “precautionary principle” in the convention, as long as it was *only* included in the preamble and the formulation of Rio Principle 15 was used. See “ICCA Statement INC-5,” *supra* note 142 at 2.

others wanted to refer to the precautionary “principle.”²⁰¹ In the end, the two sides agreed to use an alternative formula that avoided making references to either the precautionary principle or approach or to Principle 15.²⁰² The proposed wording, which was supported by the INC and is included in the Stockholm Convention’s preamble, “acknowledges” that “precaution underlies the concerns of all the Parties” and is “embedded within” the Convention.²⁰³

While affirming the central role of precaution in the preamble of the Stockholm Convention was important, preambles merely provide guidance for interpreting an instrument’s operative provisions by parties and other relevant actors (e.g., the POPRC).²⁰⁴ In effect, the real argument over precaution was whether, and how, to include precaution in the convention’s operative parts, in particular the provisions regarding the listing of new chemicals, where it could have a tangible effect.²⁰⁵ Again, the representatives of JUSCANZ were in disagreement with the representatives of the EU and many other countries, including Norway, Colombia, Argentina, the Dominican Republic, the Gambia, Cuba, Panama, Switzerland, Thailand, Togo, Tunisia, Mali and

²⁰¹ The preamble was not discussed until the last negotiating session, when the INC considered a draft prepared by the Chair based on comments received from delegates at the fourth INC session. In the draft preamble considered at INC-5, parties “reaffirm[ed] the precautionary approach as set forth in Principle 15 of the Rio Declaration.” See “INC-4 report,” *supra* note 126 at 7-8; UNEP, “Preparation of an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain POPs: draft text by the Chair,” UN Doc. UNEP/POPS/INC.5/5, Johannesburg (5 August 2000); and “INC-5 ENB report,” *supra* note 123 at 4.

²⁰² See Vanden Bilcke, *supra* 48 at 330. (*Note: Mr. Vanden Bilcke was a negotiator for Belgium. He was also actively involved in the negotiations of the strategic approach to international chemicals management).

²⁰³ Stockholm Convention, *supra* note 2, PmbI., para. 8.

²⁰⁴ See Saladin, *supra* note 193 at 274. Even if precaution were understood as a principle of the Stockholm Convention, principles operate at a higher level of abstraction than rules and, unlike rules, do not prescribe particular decisions or behaviour. See Nigel Bankes, “The Stockholm Convention in the Context of International Environmental Law,” in Downie and Fenge, eds., *supra* note 29 at 161-162.

²⁰⁵ During the negotiations there was also disagreement over whether the precautionary approach/principle should be included in the article on the convention’s objective. Again, the EU wanted to include a reference to the precautionary principle, which the U.S., Australia and others opposed. In the end, the INC decided that the treaty’s objective would be, “mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration, to protect human health and the environment from [POPs].” See UNEP, “Preparation of an Int’l Legally Binding Instrument For Implementing Int’l Action on Certain POPs,” Annex (Proposals Concerning Draft Art. B, “Objective”), UN Doc. UNEP/POPS/INC.5/2, Johannesburg (16 June 2000) at 2; “INC-5 ENB report,” *supra* note 123 at 4-5; and Stockholm Convention, *supra* note 2, Art. 1.

Ecuador.²⁰⁶ While the former maintained that the proper place for a reference to precaution in the POPs convention was the treaty's preamble,²⁰⁷ the group led by the EU wanted a specific reference to the precautionary "principle" in the article on the listing of new chemicals in the convention. ENGOs, including WWF, IPEN and Greenpeace International, were in the second group, while the global chemicals industry, represented by the ICCA, supported the position of JUSCANZ countries.²⁰⁸

The precautionary approach advocated by ENGOs was premised on the notion that there was no "known safe acceptable level" of POPs contamination and that the purpose of the convention was therefore to avoid, rather than manage, POPs-related risks. In contrast, the global chemicals industry supported the use of precaution within a "risk management approach," a method that followed the results of risk assessments to reduce the risks of POPs to "acceptable levels."²⁰⁹ Consistent with this approach, the ICCA argued that only those chemicals that had been subjected to a "full internationally accepted risk assessment and characterization" deserved to be called POPs.²¹⁰

²⁰⁶ See "INC-3 ENB report," *supra* note 117 at 7; "INC-4 ENB report," *supra* note 126 at 6; and "INC-5 ENB report," *supra* note 123 at 8. At the first INC session, Kenya also expressed support for the listing of new chemicals based on the precautionary principle (See "INC-1 ENB report," *supra* note 106 at 4).

²⁰⁷ See "INC-3 ENB report," *ibid.* at 7-8 and "INC-4 ENB report," *ibid.* At the fifth INC session, New Zealand presented a JUSCANZ proposal that deleted language proposed by the EU at the previous session concerning the listing of new chemicals, which referred to taking action despite a lack of scientific certainty, the precautionary principle and a limited role for the COP. See "INC-5 ENB report," *ibid.*

²⁰⁸ See "INC-5 ENB report," *ibid.* at 8-9.

²⁰⁹ See "INC-1 report," *supra* note 106 at 10 and Annex VIII (NGO Statements), and "INC-1 ENB report," *supra* note 106 at 5. The statements of some states also suggested that the choice was between risk-based analyses and precaution, understood as a different paradigm. At INC-1, when a number of delegates called for a precautionary approach to the listing of new chemicals, Chile argued that the inclusion of new POPs in the future treaty should be based on risk profiles based on scientific evidence. At the fifth INC session, when the EU and others suggested the inclusion of the precautionary principle in the article on listing new chemicals, India and Indonesia said they preferred an approach based on risk-based scientific research. See "INC-1 ENB report," *supra* note 106 at 4 and "ENB INC-5 report," *supra* note 125 at 8.

²¹⁰ See "ICCA Briefing Note," *supra* note 113 at 4. The ICCA argued that the nomination of a substance by a party had to include sufficient data to assess environmental transport, persistence and bioaccumulation, including data on measured environmental levels in areas remote from sources and "direct evidence" of long-range atmospheric or other environmental transport. See "NGO Comments Draft Articles," *supra* note 128 at 23. While at the fifth INC session the ICCA claimed that including the precautionary principle in the provisions dealing with the selection of additional candidate POPs "could leave the criteria for such selection wide open so that they would no longer be based on science," at the first session it had stated that, "in light of the precautionary principle," a substance should be proposed for "full risk assessment" if there

These statements clarified what was at stake. By prescribing the use of precaution in the listing of new chemicals, there was a prospect that the POPs convention would move from a risk management approach to a precautionary approach *as understood by ENGOs*.²¹¹ This meant that a candidate POP could not only move to the next stage of technical analysis despite the lack of conclusive scientific evidence that it fulfilled all the required criteria to do so but also that, in order to avoid suspected risks, it could be listed in the convention if at the end of the review process decisive scientific evidence that it was a POP was still lacking.

The interpretation of precaution advocated by ENGOs meant that a much larger number of POPs candidates might be included in the POPs treaty. Had it been articulated clearly in the Stockholm Convention, the understanding of precaution as a method to avoid risks supported by ENGOs would also have entailed a paradigm shift whereby POP-generating activities (and the products resulting from those processes) might need to be avoided or drastically reduced in order to avoid known and suspected risks. The position of ENGOs on precaution contrasted with their view that cleaner production was sufficient to achieve the goal of eliminating POPs by-products, revealing a fissure in the hegemony of liberal economic norms in the context of the negotiations on the Stockholm Convention. In other words, even though they failed to point out that the elimination of POPs by-products could require re-evaluating certain products and activities, ENGOs supported a principle that would require doing just that.

Once again, delegates worked out a compromise that instead of trying to define precaution sought to make it operational in the article on the listing of

was “potential based on toxicity data or field data for serious or irreversible damage” even if the “evidence that the substance [met] the criteria [wa]s not conclusive.” This showed that the chemical industry was prepared to accept the application of the precautionary approach in the procedure to list new POPs provided that the Rio Principle 15 formulation, which it interpreted as being part of a risk management approach, was used. See “ICCA Statement INC-5,” *supra* note 142 at 2.

²¹¹ See *supra* note 199.

new chemicals in the POPs treaty. Part of this compromise was to introduce an appeals process that would allow a proposal nominating a new chemical for the convention to move to the next review stage if so decided by the COP, even if the POPRC had determined that the technical thresholds for it to do so had not been met. As explained at the beginning of this section, the procedure for adding new chemicals to the Convention would start with the submission by a party of a proposal to add a new substance to the convention and three successive technical reviews of the proposal –a screening review, a risk profile and a risk management evaluation—by the POPRC. According to the appeals process that was agreed upon, a party nominating a new substance to be listed in the Convention could re-submit its proposal if the POPRC decided to reject it on the grounds that it did not fulfill the screening criteria to merit a risk profile. If the POPRC decided to set the proposal aside again, the party could then challenge that decision before the COP, which could mandate the POPRC to prepare the risk profile. A similar procedure would apply if the POPRC decided to set a proposal aside after having developed a risk profile.²¹² In such a case, the nominating party could again challenge the decision before the COP, which might require the POPRC to proceed with the risk management evaluation. The process that was agreed upon does not ensure that POP candidates will be listed in the POPs treaty in the absence of conclusive scientific evidence that they fulfill the required criteria for doing so. However, it gives parties the chance to decide that a POP candidate should be fully evaluated and possibly added to the Stockholm Convention in the absence of such evidence.

In addition to the appeals process, two references to precaution were introduced in the article on the listing of new chemicals. The first is addressed to the POPRC, which is instructed to consider that the “lack of full scientific

²¹² In that case, a party could request the COP to consider instructing the POPRC to require additional information during a period of up to one year. If the POPRC did so and confirmed its decision, the proponent could again challenge the decision before the COP, which could decide that the proposal should proceed to the risk management evaluation. See Stockholm Convention, *supra* note 2, Art. 8(8).

certainty” regarding whether a proposed chemical is likely, as a result of its long-range environmental transport, to result in adverse human health and/or environmental effects such that global action is warranted “shall not prevent the proposal from proceeding.”²¹³ This means that a proposal could move to the risk management evaluation despite a lack of conclusive evidence that it meets the requirements set by the Convention to be considered a potential POP.²¹⁴ The second reference to precaution instructs the COP, when considering whether to list a chemical in the Convention, to take into account “any scientific uncertainty” and to decide “in a precautionary manner.”²¹⁵

While the compromise reached by the INC asks parties and the POPRC to adopt a precautionary approach in specific cases, it remains to be seen whether these actors will interpret precaution as being a part of risk management or as an overarching principle that seeks to avoid POPs-related risks as much as possible. Three factors indicate that, at least for now, the adoption of the second interpretation is improbable. First, the chemicals industry, which strongly advocates a risk management approach, is expected to play a predominant role in the technical reviews to be carried out by the POPRC, given its superior technical expertise and financial and technical resources. Second, even the EU, the most fervent governmental advocate of the precautionary principle, interprets precaution as being essentially a risk assessment tool.²¹⁶ Lastly, the power to list a new POP in the Stockholm Convention ultimately rests with the COP, and the recent experience of the Rotterdam Convention shows that because it is a political body, the COP is more likely to be influenced by economic and political considerations than a technical review body such as the POPRC.²¹⁷

²¹³ See Stockholm Convention, *supra* note 2, Art. 8.7(a).

²¹⁴ See *ibid.*, Annex E (Information Requirements for the Risk Profile).

²¹⁵ See *ibid.*, Art. 8.9.

²¹⁶ See “EC Communication on the Precautionary Principle,” *supra* note 198.

²¹⁷ As discussed in Chapter 3, the parties to the Rotterdam Convention decided not to list chrysotile asbestos in the list of chemicals to be subject to the Convention even though the technical body in charge of verifying that all the Convention’s requirements had been met had recommended its inclusion. This was because Canada, the Russian Federation and a few other chrysotile asbestos producers or exporters opposed

The fact that the procedure for listing new chemicals in the Stockholm Convention promises to be cumbersome and time consuming also makes it unlikely that all relevant substances will be included in the Convention in a timely fashion.²¹⁸ According to the most optimistic estimates, the procedure for adding a single new substance to the Convention will take at least four years to complete and “any obstacle to the process, such as the lack of specific, critical data needed adequately to assess a certain substance, [will] delay it significantly.”²¹⁹ This practical issue is not insignificant, since a few years of inaction could cause decades of problems and not controlling some POPs could outweigh or delay the benefits of the action taken on those POPs that are regulated.

IV. Conclusion

Unlike the Rotterdam Convention, which can be said to accept the continued production, use and trading of certain hazardous chemicals, the Stockholm Convention presupposes that the production, use and trading of the chemicals that it regulates constitute part of the problem to be addressed. It therefore incorporates measures that aim to eliminate, rather than simply reduce or control, those chemicals. This chapter has argued that, although the

the listing. One important difference between the Rotterdam and Stockholm conventions, however, is that while the former requires consensus for a substance to be added to the PIC list, the latter requires a three-fourths majority vote to list a new POP in the relevant annexes if consensus cannot be reached.

²¹⁸ As noted before, three technical reviews must be carried out by the POPRC, with several steps in between. The listing of a new chemical in the Convention entails amending annex A, B or C, which requires a three-fourths majority vote if consensus cannot be reached among the parties present and voting. This has the advantage that no party holds a veto power to add a new chemical to the Convention (as it is the case with the Rotterdam Convention). The Stockholm Convention also has the advantage that it adopts an “opt-out” procedure for the entry into force of any amendments to annexes A, B or C, which means that no ratification is required from parties for an amendment to bind them unless they explicitly declare that they are unable to accept it within a specified period of time. There is, however, a loophole in this process, and a state or regional economic integration organization can declare, upon becoming a party, that it only wishes to be bound by those amendments that it has *explicitly* consented to via ratification or equivalent. See Stockholm Convention, *supra* note 2, Arts. 21(3), 24(4) and 25(4).

²¹⁹ See UNEP, “Estimated Time-Frames and Costs for a Proposed Procedure for Identifying Additional POPs as Candidates for Future International Action,” UN Doc. UNEP/POPS/INC.3/INF/11, Geneva, Switzerland (3 September 1999) at 3. Norway expressed concern over the projected timeframe at the fifth INC session.

obligations concerning the elimination of POPs could be interpreted in ways that undermine the hegemony of liberal economic norms in the field of chemicals management, the possibility of using the Convention in that way is significantly restricted because of the very narrow scope of those obligations. Indeed, if a relatively more stringent approach was adopted to deal with POPs it was because a set of particular circumstances made it possible for governments to adopt such obligations without undermining the continued production, use and trading of the vast majority of hazardous chemicals, including some POPs.

First, the special properties of POPs allowed a distinction to be drawn between POPs and other hazardous chemicals, which ensured that only those POPs that had global effects would qualify as POPs under the global POPs treaty. In other words, a POPs-focused convention served to reaffirm the notion that global bans and phase-outs should only be adopted to deal with chemicals that caused problems at a global level, a notion that was drawn by a government-designated group of experts from the international trade principle that states should adopt the “least-trade restrictive” measures necessary to achieve a desired level of environmental and health protection.²²⁰ Second, many developed countries had a strong interest in adopting stronger measures on specified POPs because they were located in the Northern hemisphere, to which many POPs appeared to be migrating. Third, the list of identified POPs to be initially controlled was small and consisted mostly of older substances no longer protected by patents and no longer being produced by large multinational corporations. As a result, the representatives of the global chemicals industry supported the phasing out of the intentionally produced POPs to be initially regulated, which would enable them to promote the use of newer (and pricier) alternatives. Lastly, even though a number of developing countries were still producing and using some POPs, they agreed to their phase-out because it was understood that, given their strong interest in the

²²⁰ See *supra* note 25.

POPs issue, many developed country donors would be willing to provide resources to finance the use of pricier alternatives in less developed countries.

While these circumstances prompted governments to adopt relatively stringent measures on POPs, a number of key actors, in particular the United States and Canada in the regional POPs negotiations and the countries of JUSCANZ and the chemicals industry in the global POPs negotiations, worked hard to ensure that the international regulatory efforts on POPs were consistent with international trade norms. This was first done in the context of the UNECE, whose mission is to promote “sustainable economic growth” and which exerted a powerful influence over how the POPs issue would be framed and tackled at the global level. As in the case of the Rotterdam Convention, repeated calls for consistency between the work of UNECE’s CLRTAP and that of the IFCS and UNEP were instrumental in ensuring that the Stockholm Convention would respect a number of key international trade principles and rule out measures that did not seem realistic or feasible in the context of a liberal economic world order. First, the UNECE CLRTAP’s process established that the list of POPs to be initially controlled should be small and manageable. Since large chemicals corporations were no longer producing most of the POPs to be initially controlled, their phase-out was not expected to affect international trade in any important way. Second, it was decided that specific criteria should be established for adding new POPs in the future. One such criterion was long-range transport, which would help establish whether a POP candidate could fall under the scope of the CLRTAP (on long-range atmospheric pollution) because it was prone to atmospheric transport. Because long-range transport was understood as fulfilling an essentially political function, the IFCS ad hoc working group redefined it to fit the global POPs agenda to ensure that, following the interpretation of the “least-trade restrictive” principle of GATT referred to above, only those POPs with confirmed global effects, rather than all POPs, would be covered by the global POPs treaty, restricting significantly the number of substances that could be

subject to trade bans or production phase-outs. Third, the CLRTAP process determined that the responses to the POPs problem should be realistic and that a distinction should be drawn between intentionally produced POPs on the one hand and unintentional POPs by-products on the other. This distinction enabled the adoption of stringent norms on intentionally produced POPs while a significantly less stringent approach was adopted for dealing with POPs by-products, whose elimination presented a considerable challenge and would have required revisiting a myriad of industrial activities and processes for which no viable alternatives existed.

During the negotiations of the Stockholm Convention, a number of actors, including the EU, several developing countries and environmental NGOs, supported the goal of elimination for POPs by-products. None of them, however, did so in terms that challenged liberal economic norms. While the EU clarified that it understood the goal of elimination as a political aspiration towards which governments should strive when feasible, the position taken by some ENGOs suggested that all that was required to fulfill that goal was the widespread implementation of cleaner production methods in all countries, failing to point out that it might also require avoiding or revisiting the processes and products that generated POPs by-products. This approach was reflected in the Stockholm Convention, which asks parties to prevent the release of POPs by-products exclusively through changes in production.

Even as they failed to challenge the amount of consumption, however, ENGOs insisted that there was no known acceptable level of POPs contamination and that the Stockholm Convention should therefore seek to avoid, rather than simply manage, the risks posed by POPs. Consistent with this view, ENGOs defended an interpretation of the precautionary principle or approach that suggested that precaution was not to be used as a risk assessment tool but a risk avoidance tool, an alternative paradigm for dealing with scientific uncertainty. This interpretation, had it been adopted by governments, would

have threatened liberal economics in two ways. First, it implied that POP candidates should be included in the Convention despite the absence of conclusive scientific evidence concerning their effects. The listing of a larger number of chemicals in the Convention would unlikely have a significant impact on the continued production and consumption of the great majority of hazardous chemicals, since POP candidates would still need to exhibit very unique characteristics to be considered for inclusion. . However, such an interpretation of precaution would have given leverage to ENGOs and other actors to push for a similar understanding of the precautionary approach/principle in the context of other chemicals-related international environmental instruments that covered a much more diverse and potentially very large number of chemicals, such as the Rotterdam Convention or the Strategic Approach to International Chemicals Management (SAICM). Indeed, even though the Stockholm Convention does not define precaution in the way proposed by ENGOs, as discussed in the next chapter during the negotiations on SAICM ENGOs and a few governments claimed that the concept of precaution had been “further developed” in the Stockholm Convention and that SAICM should reflect this development.²²¹ Second, the notion of precaution advocated by ENGOs suggested that those activities and processes that generated POPs by-products (and the products resulting from those processes) might need to be avoided or drastically curtailed in order to avoid known and suspected risks. The position of some ENGOs on precaution reveals that the liberal economic perspective was not uncontested in the negotiations on the Stockholm Convention and that a fissure exists in that hegemony that could be exploited by ENGOs to persuade states to use the Convention to challenge consumption.

Predictably, the Stockholm Convention does not articulate precaution in the way described above and thus fails to challenge either those activities and processes that release POPs by-products and for which no viable alternatives

²²¹ See section 6 of Part III in Chapter 5.

exist or the continued production, consumption and trading of the products that result from such activities. Nevertheless, the Convention makes the concept of precaution operational by requiring both the POPRC and the COP to base their decisions concerning the evaluation and listing of new POPs in the Convention on precaution. How precaution is interpreted, however, will depend on the parties and the POPRC rather than ENGOs and, as discussed in this chapter, it seems unlikely that the interpretation advocated by some ENGOs will be adopted by these actors any time soon. As a result, it seems improbable that new POP candidates will be listed in the Convention in the absence of conclusive evidence that they fulfill all of the Convention's requirements. Even if they were, however, as discussed above they will be few in number and the Stockholm Convention will continue to apply to a very select group of chemicals among the thousands that exist on the market today. Only the adoption of strong measures on by-products, therefore, could pose a real challenge to the liberal economic perspective and the ever-increasing levels of production and consumption of chemicals.

Chapter 5

The Strategic Approach to International Chemicals Management

I. Introduction

This chapter examines the “Strategic Approach to International Chemicals Management” (SAICM), an international instrument developed under the auspices of the United Nations following growing appeals for improved synergies and enhanced “coherence and efficiency among international chemicals-related activities and instruments.”¹ SAICM is made up of three non-legally binding instruments: a high-level declaration, an overarching policy strategy (OPS) and a global plan of action (GPA).

Although those who participated in the negotiation of SAICM decided that it would not constitute binding law, the SAICM process reveals, perhaps better than the conventions discussed in the previous three chapters, the extent to which liberal economics have become hegemonic in international chemicals-related negotiations. This is due to a number of factors that make SAICM somewhat unique. First, it was developed through an open, transparent and inclusive process that engaged not only many of the actors involved in the negotiations of the Basel, Rotterdam and Stockholm conventions, but also a wider spectrum of sectors and interests. Following the rules of procedure of the Intergovernmental Forum on Chemical Safety (IFCS), which bring together on the same plane a significantly diverse group of stakeholders, including representatives of governments, industry and international, intergovernmental and non-governmental organizations dealing with environmental, health, agricultural, labour and development issues, the SAICM negotiations gathered a myriad of sectors and interests and gave all actors the chance to participate in its substantive development. The process

¹ See UNEP GC Decision 19/13 D, “Enhanced Coherence and Efficiency Among International Activities Related to Chemicals” (7 February 1997), paras. 1 and 4.

therefore allowed a wide number of perspectives and approaches to international chemicals policy to emerge, some of which could have defied liberal economics, especially because non-governmental participants were able to present proposals directly.

Second, almost from the beginning of the process it was decided that SAICM would not constitute a legally binding instrument. Since government representatives usually see legal obligations as being more politically sensitive than moral or political commitments, in the minds of some participants this decision meant that governments should have been prepared to be more flexible and entertain relatively more ambitious goals for SAICM.² Lastly, unlike the treaty negotiations discussed above, the SAICM process had no predetermined outcome, which prompted participants to reflect on the adequacy of existing chemicals-related instruments and the overall direction of the international chemicals agenda and could have led some to try to set SAICM on a different path.³

Despite the considerable degree of openness and flexibility of the SAICM negotiating process, surprisingly few proposals were presented that directly challenged or undermined the norms underlying a liberal economic order. Perhaps more importantly, even though many participants saw the rising consumption and production of chemicals as one of the main reasons why SAICM was needed, virtually no one suggested that there was a need to contain that growth or even to reflect on whether it was consistent with the goals of SAICM. This chapter argues that the absence of a real debate or

² IPEN and Argentina, for instance, suggested that the U.S. should be flexible and accept a broad scope for SAICM, as SAICM was a voluntary instrument. For details see section 2 of Part III. It is important to note, however, that many international environmental treaties, including the Basel and Rotterdam conventions, emerged out of non-legally binding instruments, so the perception that governments could be more flexible in the case of SAICM was not necessarily shared by all participants.

³ In addition, unlike the processes studied in chapters 2 to 4, which I joined late as a participant observer, I had the opportunity to follow the entire SAICM process as a report writer for the *Earth Negotiations Bulletin*. This gave me a chance to engage with actors representing different interests and sectors to investigate the extent to which liberal economics were hegemonic not only at the level of organizations but also at the level of the individuals who represented them.

concrete proposals on how to face consumption can be attributed to a large extent to the fact that liberal economic norms, as embedded in existing international environmental instruments, were “hegemonic” both at the level of the organizations that participated in the process and at the level of the individuals who represented those organizations.

That liberal economic norms played a hegemonic role in the SAICM negotiations is demonstrated by the positions of participants during the negotiations and the personal views of a group of participants on a number of key issues. During the SAICM negotiations, actors from different camps, including representatives of governments, international organizations and industry, environmental and health non-governmental organizations, presented proposals that were explicitly grounded on liberal economics or that sought to protect international trade principles in SAICM. Similarly, the personal views of a representative group of participants reveal that even though most of them thought that the growing quantity of chemicals being consumed was environmentally unsustainable, virtually all of them proposed solutions that corresponded to the proposals presented during the SAICM negotiating process, which framed the problem of consumption in qualitative rather than quantitative terms. Furthermore, among the very few participants who suggested that consumerism was the problem and that there needed to be radical changes in the economic system, all but one expressed the view that such changes were not realistic for the time being.

The analysis shows that hegemonic discourses are not without contradictions, however, and that even those who upheld liberal economic (i.e., international trade) norms in SAICM made proposals that could have demanded a significant reduction in the amount of consumption of chemicals, had they been adopted. Specifically, some participants understood the precautionary principle or approach as an alternative method that should seek to avoid, rather than simply “manage,” chemicals-related risks. This chapter suggests

that this interpretation could have imposed important restrictions on the production and consumption of a large number of chemicals, given the considerable degree of scientific uncertainty regarding the health and environmental effects of most of the chemicals on the market.

Chapter 5 is divided as follows. Part II describes the antecedents of SAICM and investigates the preliminary ideas that were put forward by different actors regarding what the approach should –or should not– look like. This analysis shows the various attempts by a number of key actors to ensure that the proposed SAICM would be consistent with existing legal norms, in particular international trade norms and principles. Part III examines the SAICM negotiations, focusing on a number of issues that are of relevance to this study, in particular proposals that involved consumption issues and either the validation of or a deviation from liberal economic norms and principles. The study pays special attention to the role of law in making liberal economic norms hegemonic, showing that legal norms were frequently used by participants to validate their arguments, in particular those who defended international trade norms in SAICM most overtly. Part IV considers the personal views of fifty-two individuals who attended the SAICM negotiations and agreed to answer three questions regarding consumption and existing chemicals law and policy, and contrasts these views with the proposals considered in part III. Part V summarizes the argument of the chapter.

II. Antecedents

1. The need for a strategic approach

The development of SAICM was prompted by two different processes that were eventually drawn together by the Governing Council of the United Nations Environment Programme (UNEP GC). The first was an effort initiated

in the late 1990s to undertake reforms within the United Nations (UN) system to achieve greater coherence among related instruments and activities to better respond to the challenges of the new millennium, including those pertaining to environmental protection.⁴ The key elements of this endeavour were reflected in a report issued in 1997 by the UN Secretary-General entitled “Renewing the United Nations: a programme for reform,” which underlined the promotion of sustainable development as one of the key priorities of the UN,⁵ and in a subsequent report that considered how that goal could be advanced.⁶

The second event that drove SAICM was the progression of a discussion initiated by the UNEP GC in 1995, when it was decided that a government-designated group of experts should be established to consider and recommend further measures to reduce the risks from a limited number of hazardous chemicals, either “within or beyond” the scope of the PIC procedure.⁷ The group met in Copenhagen in April 1996, when experts from the Netherlands and Belgium presented a proposal that UNEP develop a treaty to integrate the international legal mechanisms for the implementation of the

⁴ In 1997, the United Nations General Assembly adopted a “Programme for the Further Implementation of Agenda 21” in which it affirmed that there was an “ever greater need for better policy coordination at the intergovernmental level” given the increasing number of bodies and instruments dealing with sustainable development. One of the recommendations of the programme was that “coherent interlinkages among relevant environmental conventions” should be developed. See UNGA, Res. S-19/2 (1997) “Programme for the Further Implementation of Agenda 21,” UN Doc. A/RES/S-19/2 (28 June 1997), paras. 117, 118 and 123, online: <<http://www.un.org/documents/ga/res/spec/aress19-2.htm>>.

⁵ See UNGA, “Reviewing the United Nations: A Programme for Reform. Report of the Secretary-General,” UN Doc. A/51/950 (14 July 1997) at 6-7 and 56-59.

⁶ The UN Secretary-General established a “task force on environment and human settlements” that was asked to review the structures and arrangements through which environment-related activities were being carried out within the UN, to evaluate their efficacy and to recommend changes to optimize their work. The task force was chaired by Klaus Töpfer, Executive Director of UNEP, and submitted its report on 15 June 1998. Among the report’s conclusions were that there were substantial overlaps in the environment-related activities of the UN and that strengthening the linkages between conventions so as to achieve “synergies” and promoting coherence of policies and actions should be a “long-term strategic goal of the international community.” See UNGA, “Environment and Human Settlements: Report of the Secretary-General,” UN Doc. A/53/463 (6 October 1998), Annex (Task force report) at 14 and 16.

⁷ See UNEP GC, Decision 18/12 (26 May 1995), para. 3. As discussed in Chapter 3, the decision to convene the expert group was the result of a compromise among those who wanted to limit the convention to PIC and a few European countries that wanted to extend its scope to incorporate additional measures (e.g., bans or phase-outs) on certain chemicals. For details see section 3 of Part III in Chapter 3.

PIC procedure, measures on persistent organic pollutants (POPs) and any further measures that the UNEP GC might adopt.⁸

The proposal received broad support⁹ but, according to one commentator, experts from Australia and the United States opposed it.¹⁰ As discussed in Chapter 3, the inclusion in the PIC instrument of bans and phase-outs as possible measures for dealing with certain chemicals would have opened the door to the adoption of bans on PIC chemicals that were not POPs; given the much greater diversity and number of PIC chemicals, this represented a serious threat to international trade in (and to the continued production of) hazardous chemicals. Thus, the meeting's report recorded that "some experts" rejected the notion of bans or phase-outs for PIC chemicals on the basis that it "ran counter to the PIC principle that each country was to make its own decision in the light of local conditions of use and requirements"¹¹ and that any measures beyond PIC to be proposed had to be "consistent with the trade-related principles included in Agenda 21, in particular to be the least trade restrictive necessary to achieve the[ir] objective."¹² This principle was reflected in the group's final report, which affirmed that there were multiple options for helping to reduce the risks posed by specific chemicals¹³ and recommended that the selection of any such option "be the least restrictive, meaning that which effectively reduce[d] the risk to an acceptable level, with due consideration to minimizing the overall socio-economic impact, and

⁸ See UNEP, "Report of the Government-Designated Group of Experts on Further Measures to Reduce the Risks From a Limited Number of Hazardous Chemicals on its work," UN Doc. UNEP/PIC/EG/1/3, Copenhagen, Denmark (8 July 1996) [1996 Group of Experts Report] at 19-23 (Note: At that time, neither the PIC nor the POPs negotiations had commenced).

⁹ See "1996 Group of Experts Report," *ibid.*, at 12.

¹⁰ See Marc Pallemarts, "Regulating Exports of Hazardous Chemicals: the EU's External Chemical Safety Policy," in Jonathan Golub, ed., *Global Competition and Environmental Policy* (Routledge: London, NY, 1998) at 76.

¹¹ See "1996 Group of Experts Report," *supra* note 8 at 9.

¹² See *ibid.* at 10.

¹³ The options ranged from "improving access to information, through restricting uses or exposure, to banning or phasing out over time all uses or production of the chemical." See *ibid.* at 20.

which [wa]s consistent with the trade-related principles identified in chapters 2 and 39 of Agenda 21.”¹⁴

As for the proposal that had been presented by Belgium and the Netherlands for a new treaty integrating different legal mechanisms and measures on hazardous chemicals, the group simply “took note” of it and invited the Executive Director of UNEP to seek the views of governments on the issue for consideration by the UNEP GC at its nineteenth session.¹⁵ UNEP Executive Director, Elizabeth Dowdeswell of Canada, sent a letter to governments in August 1996 to collect their views on the proposal, which she described as referring to the adoption of “an integrating mechanism or framework convention within which the PIC procedure could be embedded, along with other chemicals management measures [that might] be agreed subsequently.”¹⁶ Interestingly, the letter did not make a specific reference to measures on POPs, which Canada, the United States and others wanted to see addressed in a separate treaty that might incorporate trade bans and/or production and use phase-outs on certain POPs.¹⁷ Instead, Dowdeswell asked governments to consider, *inter alia*, whether they saw benefits in the concept of a framework chemicals management and how such a treaty could achieve those benefits.¹⁸

¹⁴ See *ibid.* Chapter 2 of Agenda 21 states that “the international economy should provide a supportive international climate for achieving environment and development goals by: a. Promoting sustainable development through trade liberalization; [and] b. Making trade and environment mutually supportive.” Chapter 39 provides that, “should trade policy measures be found necessary for the enforcement of environmental policies, certain principles and rules should apply. These could include, *inter alia*, the principle of non-discrimination [and] the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives [...]” See *Agenda 21*, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) Annex II (14 June 1992) [Agenda 21], Chapter 2, paras. 3(a) and 3(b) and Chapter 39, para. 39.3(d).

¹⁵ See “1996 Group of Experts Report,” *supra* note 8 at 12.

¹⁶ See UNEP, “Summary of the Responses to a Letter from the Executive Director to Governments Seeking Their Views on a Possible Integrated International Mechanism Concerning the Management of Hazardous Chemicals,” UN Doc. UNEP/GC.19/INF/21, Nairobi, Kenya (9 January 1997) [Summary of Responses Framework Convention] at 4-5.

¹⁷ In addition, in June 1995 a UNEP conference that met in Washington to adopt the “global programme of action for the protection of the marine environment from land-based activities” had recommended that UNEP begin negotiations on a global treaty on an initial list of twelve POPs. For details see section 2(a)(ii) of Part II in Chapter 4.

¹⁸ See “Summary of Responses Framework Convention,” *supra* note 16 at 2 and 4-5.

Thirty-three governments responded to the survey¹⁹ and many of them agreed that a framework convention on hazardous chemicals was desirable.²⁰ A few of them suggested that this could be achieved by expanding the scope of the PIC instrument to include additional measures on POPs and other chemicals.²¹ Australia, Canada, Italy, the United Kingdom and the United States said that they were not persuaded that such a treaty was needed, however, and suggested that non-legal, administrative approaches should be considered to simply improve the efficiency of and coordination among chemicals-related activities and instruments.²² Canada and Australia also advised that serious consideration should be given to building on the work of the Intergovernmental Forum on Chemical Safety (IFCS) or the Inter-Organization Programme for the Sound Management of Chemicals (IOMC),²³ two administrative arrangements that had been established in the post-Rio period to achieve, respectively, greater coordination of international efforts on sound chemicals management and among intergovernmental organizations involved in the assessment and management of chemicals.²⁴

The main objective of the initial proposal of a new framework chemicals management convention was to reduce the risks of hazardous chemicals by broadening the PIC treaty to incorporate additional measures on certain chemicals. The view that ultimately prevailed in UNEP, however, was that the principal goal of an umbrella treaty or broad strategy on chemicals should be to achieve greater efficiency and coherence in the execution of chemicals-

¹⁹ For details see *ibid.*, Annex III.

²⁰ Albania, Austria, Barbados, Belgium, Costa Rica, Cuba, Denmark, Finland, France, Mauritania, the Netherlands, Niger, Norway, Oman, the Philippines, the Republic of Korea, Sweden and Tunisia said they would consider adopting a framework convention on hazardous chemicals. See *ibid.* at 6-8, 10-12.

²¹ Belgium, Denmark, Austria, the Netherlands, Niger and Norway expressed this view. See *ibid.* at 6-8 and 10.

²² See *ibid.* at 6-7, 9 and 12.

²³ See *ibid.* at 6-7. The IOMC was established in 1995. Its members are seven organizations involved in chemical safety, namely the FAO, the ILO, the OECD, UNEP, UNIDO, the WHO and UNITAR; UNDP and the World Bank have an observer status. See "Paper Presenting the Views of the [IOMC]," UN Doc. SAICM/PREPCOM.2/INF/23, Nairobi, Kenya (1 October 2004) at 3; for the IFCS see *infra* note 72.

²⁴ See UNEP, "Strategic Approach to International Chemicals Management," UN Doc.

UNEP/GC.VII/INF/1, Cartagena, Colombia (29 October 2001) [SAICM UNEP GC SS.7] at 3.

related international instruments and activities, as had been suggested by Australia, Canada, the United States and others. This view, which was consistent with the task that was being pursued in the UN-wide system, was reflected in Decision 19/13 D of the UNEP GC.²⁵ Affirming the need to undertake chemicals-related instruments and activities “in a manner that ensure[d their] efficiency and coherence,”²⁶ the decision asked the Executive Director of UNEP to prepare a report outlining “legal and administrative options” for enhancing the efficiency and coherence of such activities²⁷ and evaluating the advantages and drawbacks of each option “in relation to environmental benefits [and] administrative and organizational aspects, including costs and effectiveness.”²⁸ One could infer from the decision that existing and projected international instruments on chemicals were an appropriate, albeit possibly imperfect, response to chemicals-related problems at the international level.

A consultant was entrusted with preparing the report mandated by Decision 19/13 D,²⁹ which was presented to the UNEP GC at its twentieth session. The report listed as possible options for furthering the goals of coherence and efficiency among chemicals-related activities the upgrading of voluntary activities to minimize overlaps, the creation or expansion of coordinating mechanisms, the co-location or merging of secretariats of related instruments and the development of a “legal umbrella mechanism” for related agreements, which could either be limited to new chemicals-related treaties or include existing ones.³⁰

²⁵ See UNEP GC, Decision 19/13 D, *supra* note 1, Pmbl., paras. 1 and 4.

²⁶ See *ibid.*, Pmbl., para. 4.

²⁷ See *ibid.*, para. 1(a).

²⁸ See *ibid.*, para. 1(b).

²⁹ The report was developed under contract with Ms. Francine Schulberg, an international consultant based in San Francisco. See UNEP Chemicals, “International Activities Related to Chemicals,” Geneva (2001), online: <<http://www.chemical.unep.ch/irptc/Publications/intact01.pdf>> at 2.

³⁰ See UNEP, “Enhanced Coherence and Efficiency Among International Activities Related to Chemicals,” UN Doc. UNEP/GC.20/INF/20, Nairobi, Kenya (27 January 1999) at 17.

The report started from the premise that coherence and efficiency were about “ensur[ing] the best use of very limited resources[,]avoid[ing] inconsistencies or overlapping activities and [m]inimiz[ing] burdens on governments.”³¹ From this narrow understanding of the goals to be achieved flowed an equally narrow analysis of each option. The report concluded, for instance, that an “umbrella” chemicals management convention would facilitate the coordinated implementation of chemicals-related conventions and other treaties, help avoid duplication of efforts and bring an “overall increase in efficiency through the sharing of information and experience and cost savings.”³² Since the reduction of risks from hazardous chemicals through new legal obligations was not addressed, the report concluded without difficulty that most of the advantages of an umbrella treaty could be achieved through administrative arrangements.³³ The report also argued that an umbrella treaty was unpopular among governments, could delay the implementation of the Rotterdam Convention and the negotiation of the POPs treaty, would require significant time and resources and, depending on its nature and scope, could be cumbersome to implement.³⁴ On balance, an umbrella chemicals convention was portrayed as a less than desirable option to be pursued.

Even so, at the twentieth session of the UNEP GC the representatives of Iceland, Denmark and the Netherlands expressed support for the adoption of a new global chemicals convention.³⁵ The United States, Australia and New Zealand argued that synergies among existing chemicals-related treaties could be improved instead.³⁶ Since everyone agreed that the POPs negotiations

³¹ See *ibid.* at 7.

³² See *ibid.* at 22.

³³ See *ibid.*

³⁴ See *ibid.* at 4-6.

³⁵ See “UNEP GC Highlights,” *Earth Negotiations Bulletin* 16:5 (5 February 1999) at 2, online: <<http://www.iisd.ca/vol16/enb1605e.html>> and UNEP, “UNEP GC Highlights” *Earth Negotiations Bulletin* 16:3 (3 February 1999) at 2, online: <<http://www.iisd.ca/vol16/enb1603e.html>>.

³⁶ See “UNEP GC Highlights” *Earth Negotiations Bulletin* 16:4 (4 February 1999) at 2 [UNEP GC 20 Highlights], online: <<http://www.iisd.ca/vol16/enb1604e.html>>.

should continue as scheduled,³⁷ it was decided that further discussion of chemicals management should be deferred until the next UNEP GC session.³⁸

A panel discussion on the chemicals agenda was accordingly held during the twenty-first session of the UNEP GC in 2001, where one of the panellists, the Minister of Environment of Sweden, suggested considering the development of a “global strategy” on chemicals management.³⁹ The proposal was supported by Iceland, Norway, the Netherlands and the Czech Republic but opposed by the representative of the United States, who argued that the Bahia Declaration on Chemical Safety, which had been adopted by IFCS in 2000, already provided such a strategy.⁴⁰ Ultimately, it was decided that the Executive Director of UNEP, in consultation with a number of stakeholders, should examine the need for a “strategic approach to international chemicals management” and prepare a report on the matter for the seventh special session of the UNEP GC in 2002.⁴¹

2. Preliminary thoughts about a strategic approach

In May 2001, UNEP sent a questionnaire to governments, the IOMC, the IFCS and other organizations asking them to consider whether there was a need for a strategic approach to international chemicals management and, if so, to

³⁷ See UNEP GC, Decision 20/24 (4 February 1999), para. 2, which called on the negotiators of the POPs convention to continue their work with a view to concluding the POPs treaty by the year 2000.

³⁸ While the EU wanted assurances that the issue of chemicals management would be discussed at the next UNEP GC session, the US said it should be only a possibility, as it was unclear what would need to be discussed. In the end, it was agreed that the Executive Director of UNEP should “consider preparing” for a general policy discussion on chemicals management, “if deemed appropriate.” See “UNEP GC 20 Highlights,” *supra* note 36 at 2 and UNEP GC, Decision 20/13 (4 February 1999), para. 2.

³⁹ See UNEP, “Proceedings of the Governing Council at its twenty-first session,” UN Doc. UNEP/GC.21/9, Nairobi, Kenya (14 February 2001) at 20.

⁴⁰ Although Canada said that the proposed chemicals strategy required further consideration (See “UNEP GC Highlights,” *Earth Negotiations Bulletin* 16:14 (8 February 2001) at 2, online:

<<http://www.iisd.ca/unepgc/21/>>), it failed to respond to a questionnaire UNEP sent to governments and other actors in 2001 to ask for their views on the proposed strategic approach (See *infra* note 43).

⁴¹ See UNEP GC, Decision 21/7, “Chemicals Management,” paras. 1 and 5, in SAICM, “Background and Mandate for the Development of a [SAICM],” UN Doc. SAICM/PREPCOM.1/2, Bangkok, Thailand (18 August 2003) [Background and Mandate SAICM], Annex VI.

identify the main issues that such an approach should address.⁴² Sixty-two actors responded to the survey, including forty-five governments, two IFCS focal points, six intergovernmental organizations, including the OECD, the ILO and the FAO, and nine non-governmental organizations, including Greenpeace International, the International Council of Chemicals Associations (ICCA) and two national chemicals industry associations.⁴³

The responses revealed the preliminary ideas of different actors about why a strategic approach was needed and what it should include. Nearly all respondents agreed that such an approach was warranted,⁴⁴ but views differed on why it was needed and what it should and should not entail. Two points in the responses are worth highlighting for the purposes of this chapter, as they reveal that most actors thought that existing instruments were relatively adequate to protect the environment and human health from chemicals. The first is that most actors saw a strategic approach as a chance to further the goals of improved coordination among and efficiency of chemicals-related instruments and activities, while only a few saw it also as a chance to move the chemicals agenda forward by adopting a broader legal approach to chemicals management. Second, although several governments identified the growth in production, consumption and global trade in chemicals as one of the reasons why a strategic approach was needed, none of them suggested the need to limit or contain that growth.

The view that a strategic approach should improve coordination among international programmes and organizations dealing with chemicals and support the effective implementation of existing relevant instruments was

⁴² See "SAICM UNEP GC SS.7," *supra* note 24 at 5.

⁴³ Government respondents included the countries of JUSCANZ (with the exception of Canada), several European countries, four countries with economies in transition and more than twenty developing countries. See UNEP, "SAICM: Main Points in Responses," UN Doc. UNEP/GCSS.VII/INF/1/Add.1, Cartagena, Colombia (29 October 2001) [Main Points in Responses] and UNEP, "SAICM: Main Points of Responses," UN Doc. UNEP/GCSS.VII/INF/1/Add.2, Cartagena, Colombia (1 February 2002).

⁴⁴ Only two respondents, Oman and the Brazilian Association of Chemical Industries (ABIQUIM), said that a strategic approach was not needed. See "Main Points in Responses," *ibid.* at 12 and 18.

supported by Australia, Austria, Brazil, the Czech Republic, Germany, New Zealand, the United States, the United Nations Institute for Training and Research and the ICCA, among others.⁴⁵ Some of these respondents suggested that a strategic approach already existed to a degree, in the form of mechanisms such as the IFCS and the IOMC,⁴⁶ and that further work should not entail the creation of new organizations⁴⁷ but should instead focus on priority setting, identifying gaps in chemicals policy,⁴⁸ improving coordination between existing instruments and actions and avoiding duplication of effort.⁴⁹

While agreeing on the benefits of enhanced coordination among and efficiency of chemicals-related instruments and activities, the Netherlands and Norway suggested that the proposed approach should also embrace new methods to reducing the risks of chemicals to human health and the environment. The Netherlands claimed that existing conventions only addressed chemicals with known harmful properties, which represented a “very limited selection of the thousands of chemicals [being] produced,” and that a more “systematic approach” was required to cover larger groups of chemicals. This, it argued, could be achieved through the adoption of a mechanism integrating legal instruments that might be needed to control specific chemicals, such as endocrine disruptors or persistent non-organic pollutants, and any future instruments dealing with general policy issues such as labelling and information access.⁵⁰ In a similar vein, Norway called for approaches “broader than bans on particular POPs substances” and for the adoption of instruments that would go “beyond substance-by-substance measures on the basis of detailed risk considerations” and include measures to

⁴⁵ See *ibid.* at 3, 5, 6-7.

⁴⁶ This view was held by Australia, Germany, the U.S. and the ICCA. See *ibid.* at 3, 6-7, 16 and 20.

⁴⁷ This view was explicitly articulated by Australia and implied in the responses of Germany, New Zealand and the United States. See *ibid.* at 3, 6-7, 13 and 16.

⁴⁸ The United States said the SAICM should focus on “high-volume toxic chemicals and those identified in existing multilateral environmental agreements.” See *ibid.* at 16.

⁴⁹ These views were expressed by Australia, New Zealand and the United States. See *ibid.* at 3, 13 and 16.

⁵⁰ See *ibid.* at 11-12.

address the risks posed by toxic substances on the basis of a “precautionary approach in light of knowledge gaps” regarding the thousands of chemicals being used.⁵¹ Greenpeace International also advocated precaution, stressing that the “main objective [of a strategic approach] should be the elimination of production, use or releases of hazardous substances based on precautionary action,” given the “local, regional and global impacts on the environment and human health” of “chemicals production, use and disposal.”⁵² It is notable that Greenpeace made no distinction between persistent chemicals with known global effects and acutely toxic chemicals causing primarily local problems, a distinction that was energetically supported by Australia⁵³ and had justified the adoption of bans and phase-outs for POPs but only a PIC procedure to deal with non-persistent hazardous chemicals traded internationally. Greenpeace also suggested that precaution was about *eliminating* rather than simply “managing” the risks posed by chemicals whose effects on human health or the environment were uncertain, an approach that could impose important limits on the production and consumption of a vast number of chemicals.

A number of respondents, including Egypt, Japan, the Maldives, the Philippines, Guinea, Kuwait, France, Sri Lanka and Sweden,⁵⁴ identified the rising production, consumption and/or global trade in chemicals as a primary reason why a strategic approach was needed. Only Egypt, however, suggested that it should promote “waste minimization,” which it listed alongside recycling, recovery and cleaner technology.⁵⁵ As discussed in Chapter 2, the parties to the Basel Convention have interpreted the principle of waste minimization as requiring increased recycling and reuse and/or the widespread application of cleaner production methods, not as demanding a curb on overall chemicals consumption. By listing waste minimization alongside recycling,

⁵¹ See *ibid.* at 11-13.

⁵² See *ibid.* at 19.

⁵³ Australia stated that it did not see as “problematic” that diverse legal obligations had been adopted for individual chemicals, since the Rotterdam and Stockholm conventions addressed “different situations.” See *ibid.* at 3.

⁵⁴ See *ibid.* at 6, 9-11 and 14-15.

⁵⁵ See *ibid.* at 6.

recovery and cleaner technology, Egypt's response suggested that it entailed something else, including perhaps restrictions on consumption. In a response to a later survey regarding possible elements of SAICM, however, Egypt clarified that the challenge was not the rising consumption of chemicals per se, but achieving their sound management.⁵⁶

While opinions diverged on how far the proposed strategic approach should go, most respondents agreed that it should include measures to build the capacity of less developed countries to implement chemicals-related agreements, to enhance risk assessment methods in order to fill gaps in knowledge on chemicals, to improve information exchange and/or information dissemination mechanisms and to clarify or augment industry responsibility,⁵⁷ none of which tackled the growing production, consumption or trade in chemicals. Most of the measures proposed were already included in the IFCS Bahia Declaration on Chemical Safety and its Priorities for Action beyond 2000, which New Zealand, Sweden, the United States and the ICCA suggested should be the basis of the proposed approach.⁵⁸ The ICCA argued that the Bahia instruments "address[ed] most of the main issues, opportunities, needs and objectives of what [was] a global strategy on chemicals management," the most important of which was the need for capacity building in developing countries.⁵⁹ This statement was unsurprising, as the Bahia instruments had been approved by acclamation by participants of IFCS Forum III, which the ICCA had attended.⁶⁰

⁵⁶ See UNEP, "Tabular Compilation of Main Points in Submissions Concerning Possible Draft Elements for a SAICM," UN Doc. SAICM/PREPCOM.1/4, Bangkok, Thailand (31 July 2003) [Tabular Compilation of Responses] at 8-9.

⁵⁷ One or more of these elements were supported by Austria, Brazil, Ecuador, Egypt, Germany, Iran, Italy, Jamaica, Japan, Jordan, Kuwait, Lesotho, Maldives, Marshall Islands, the Netherlands, New Zealand, Norway, the Philippines, Senegal, St Lucia, Slovakia, Sweden, Thailand and the United States, among other actors. See "Main Points in Responses," *supra* note 43 at 3-16 (Note: I use the term "less developed countries" to refer to developing countries and countries with economies in transition).

⁵⁸ See *ibid.* at 13 and 15-16. Australia, Brazil, France and Germany also emphasized the role of the goals and recommendations of the IFCS in SAICM. See *ibid.* at 3-4 and 6-7.

⁵⁹ See *ibid.* at 19.

⁶⁰ See IFCS, "IFCS Forum III Final report," Doc. IFCS/FORUM III/23w, Salvador da Bahia, Brazil (20 October 2000) [Forum III report] at 3, online: <<http://www.who.int/ifcs/documents/forums/forum3/en/>>.

The Executive Director of UNEP, Klaus Töpfer, also implied that the increasing consumption of chemicals was unavoidable. In a note on the strategic approach that he presented to the UNEP GC in 2001, Töpfer stressed that the use of chemicals in the products and processes of everyday life and the growth in the global production and trade of chemicals had resulted in a true “chemicalization of the world.”⁶¹ Rather than suggesting the need to control or reverse this phenomenon, however, he stressed the need to improve the capacity of all countries to manage chemicals safely.⁶²

Taking into account a number of elements identified in the responses to the May 2001 questionnaire,⁶³ Töpfer urged adherence to two key principles in the making of a strategic approach. First, it should be devised in an “open, transparent and inclusive manner,” in cooperation with the IOMC and the IFCS and the “full range of stakeholders” involved in chemicals management, including “civil society” and industry.⁶⁴ Second, in line with what the ICCA had proposed,⁶⁵ the strategic approach “should not seek to override” the contributions being made by existing bodies such as the IFCS but to “bolster such efforts” by helping to incorporate chemical safety objectives such as the IFCS Priorities for Action into the work of UNEP and other bodies, by placing chemicals management “in the broader context of sustainable development and by marshalling system-wide support for the implementation of capacity-building.”⁶⁶ In a nutshell, Töpfer advised that the development of a strategic approach focus on “the improvement of capacity-building, [the]

⁶¹ See UNEP, “Report on the Implementation of the Decisions Adopted at the 21st session of the Governing Council: Report by the Executive Director,” UN Doc. UNEP/GCSS.VII/4, Cartagena, Colombia (14 November 2001) [Report SAICM UNEP GC SS.7] at 6.

⁶² See *ibid.* at 7.

⁶³ The document singled out the need to build the capacity of less developed countries to implement existing chemicals-related agreements and activities, to “encourage” industry to accept increased responsibility and to “play a more active role in the promotion of chemical safety” and for SAICM “not [to] compete with or duplicate existing work.” See *ibid.* at 6.

⁶⁴ See *ibid.* at 7 (Although, as discussed in Chapter 1, the term “civil society” used here is meant to encompass all those actors that are not part of the state apparatus, it is often understood in a narrower sense as entailing only public interest groups, thereby the need to mention industry as a separate category).

⁶⁵ See “Main Points in Responses,” *supra* note 43 at 19.

⁶⁶ See “Report SAICM UNEP GC SS.7,” *supra* note 61 at 7.

creation of a policy framework to accommodate both current and emerging issues and [a] deeper engagement of industry in chemical safety issues.”⁶⁷

3. The Mandate

The mandate of the preparatory committee (hereinafter PrepCom) that developed SAICM was defined in two decisions of the UNEP GC, adopted in February 2002 and 2003, respectively. The first was Decision SS. VII/3, which asserted that there was a need to “further develop” a strategic approach with the IFCS *Bahia Declaration on Chemical Safety* [Bahia Declaration] and its *Priorities for Action beyond 2000* [Priorities for Action] as its “foundation” and called for a study on possible “gaps” in both instruments “or in [their] implementation.”⁶⁸ The second was Decision 22/4 IV, which stated that the strategic approach should be developed through an open-ended,⁶⁹ “open, transparent and inclusive” consultative process that would give “all stakeholder groups” the opportunity to participate.⁷⁰ As discussed above, the Executive Director of UNEP had advanced both ideas in 2001.

Before looking at how the SAICM negotiations unfolded, the next section examines the two instruments that were chosen as its foundation, as well as the analysis of “gaps” in both instruments. The relevance of these documents lies not only in the kinds of solutions they proposed, but also in the way in which they framed the problems to be tackled in order to achieve “chemical safety,” i.e., the protection of the environment and human health from the negative effects of hazardous chemicals. Consistent with Agenda 21, which gave life to IFCS and as discussed in Chapter 3 incorporates key principles of

⁶⁷ See *ibid.* at 7-8.

⁶⁸ See UNEP GC, Decision SS. VII/3, “[SAICM]” (15 February 2002) para. 1.

⁶⁹ The term “open-ended” refers to a meeting or process that is “not time-bound and [where] participation is not restricted.” See UNEP, “List of Acronyms and Glossary Terms,” online: <<http://www.unep.org/dec/onlinemanual/Resources/Glossary/tabid/69/Default.aspx?letter=O>>.

⁷⁰ See UNEP GC, Decision 22/4 IV, “[SAICM]” (7 February 2003) paras. 1, 3 and 5, in “Background and Mandate SAICM,” *supra* note 41, Annex IX.

international trade,⁷¹ the IFCS instruments framed the problem of hazardous chemicals exclusively in terms of insufficient capacity and information rather than ever-increasing consumption.

a) The Foundation of SAICM: the IFCS Bahia instruments

As noted before, the Bahia Declaration and the Priorities for Action were adopted by acclamation at IFCS Forum III in Salvador da Bahia, Brazil, in October 2000.⁷² It is important to understand that the IFCS emerged from Chapter 19 of Agenda 21 on the “sound management of toxic chemicals.”⁷³ Because Chapter 19 gave the IFCS its mandate, strategy and philosophy and because Agenda 21 addressed hazardous wastes management in a separate chapter, the IFCS addressed the issue of wastes at best only obliquely.⁷⁴ The separation between wastes and chemicals-related issues in Agenda 21 obscured the fact that chemicals that were not considered hazardous when produced or used could pose serious risks at the end of their life cycles,⁷⁵ which made it easier for policy-makers to address chemical safety problems separately from and without facing up to unsustainable consumption patterns.

⁷¹ As discussed in Chapter 3, Agenda 21 declares that “the international economy should provide a supportive international climate for achieving environment and development goals by: a. Promoting sustainable development through trade liberalization; [and] b. Making trade and environment mutually supportive.” It also provides that, “should trade policy measures be found necessary for the enforcement of environmental policies,” they should follow the principle of “non-discrimination and the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives,” two principles found in the GATT agreement. See section 3 of Part III in Chapter 3 and Agenda 21, *supra* note 14, Chapter 2, paras. 3(a) and 3(b) and Chapter 39, para. 39.3(d).

⁷² The IFCS is a broad consensus-building mechanism in which all stakeholders concerned with chemicals management, including governments, international, regional and national organizations, industry groups, public interest associations, labour organizations and scientific associations can actively participate. See IFCS, “IFCS,” online: <<http://www.who.int/ifcs/page2/en/index.html>> (last visited 28 February 2007).

⁷³ See Agenda 21, *supra* note 14, Chapter 19.

⁷⁴ Agenda 21 addresses the issue of hazardous wastes in Chapter 20, entitled “Environmentally Sound Management of Hazardous Wastes, Including Prevention of Illegal International Traffic in Hazardous Wastes.” See *ibid.*, Chapter 20.

⁷⁵ This point was made by IPEN during the second PrepCom session. See SAICM, “Comments on the Compilations of Concrete Elements and Strategic Elements, Headings and Sub-headings Identified During the First Session of the Committee,” UN Doc. SAICM/PREPCOM.2/3, Nairobi, Kenya (13 July 2004) [Comments Concrete Elements] at 26 (footnote 1).

Following the philosophy of Chapter 19, which frames the challenge of sound chemicals management in terms of inadequate capacity and information rather than increased volume,⁷⁶ the Bahia Declaration affirms that four factors have impeded the realisation of the “intent” of Chapter 19, namely a lack of or very limited chemical safety infrastructure in many countries; low chemical safety standards in much of the world; a lack of sufficient resources to properly manage and dispose of stockpiles of certain chemicals; and the limited progress achieved in international chemicals assessments.⁷⁷ Following this diagnosis, most of the objectives in the Bahia Declaration and its Priorities for Action, which expand on those objectives, seek to address the problems of insufficient information and capacity.⁷⁸

Nevertheless, the IFCS instruments recognise, as does Chapter 19, the role of risk reduction measures in protecting human health and the environment from known toxic chemicals. Embracing one such measure,⁷⁹ the Bahia Declaration expresses the will of governments, industry and other actors to “promot[e] global cooperation” for “sustainable agriculture” and for “cleaner processes,

⁷⁶ The following paragraph is self-explanatory: “A substantial use of chemicals is essential to meet the social and economic goals of the world community [and... chemicals] can be used widely in a cost-effective manner and with a high degree of safety. However, a great deal remains to be done to ensure the environmentally sound management of toxic chemicals ... Two of the major problems ... are (a) lack of sufficient scientific information for the assessment of risks entailed by the use of a great number of chemicals, and (b) lack of resources for assessment of chemicals for which data are at hand.” Agenda 21, *supra* note 14, Chapter 19, para. 19.1.

⁷⁷ See IFCS, “Bahia Declaration on Chemical Safety,” para. III, in “Forum III report,” *supra* note 60 at 1-4 [Bahia Declaration].

⁷⁸ The goals proposed include: increased information flows on the risks and safe use of chemicals and on resources for chemical safety activities; the establishment of effective poison control centres in some countries; various efforts to improve risk assessment methodologies; and the completion of chemical risk assessments for one thousand additional chemicals. See *ibid.*, paras. IV and V.

⁷⁹ While it does not frame the problem of hazardous chemicals in terms of rising production or consumption, Chapter 19 recognises that risk reduction from toxic chemicals could “sometimes be achieved by using [safer] chemicals or even non-chemical technologies,” as well as “integrated pest management [in the agricultural area,] including the use of biological control agents as alternatives to toxic pesticides” and the “promotion of the use of cleaner products and technologies,” among many other measures. It also recommends the “phasing out or banning of certain toxic chemicals,” namely those that “pose unreasonable and otherwise unmanageable risks to human health and the environment and of those that are toxic, persistent and bio-accumulative and whose use cannot be adequately controlled.” See Agenda 21, *supra* note 14, Chapter 19, para. 19.44.

materials and products.”⁸⁰ This commitment was partly elaborated in the Priorities for Action, which set as a goal the establishment of “ecologically sound and integrated strategies for the management of pests” in most countries by the year 2004.⁸¹

The Priorities also requested the IFCS Forum Standing Committee (FSC)⁸² to “provide initial input on the extent of the problem of acutely toxic pesticides and provide guidance for sound risk management and reduction, including options for phasing [them] out when appropriate.”⁸³ The reasoning behind this request was that the Rotterdam Convention addressed only aspects of the problem of pesticide-related poisonings and that a more comprehensive approach might be needed. The work that resulted from the request, however, confirmed the principle underlying the Rotterdam Convention that only those chemicals that posed clearly “global” problems (e.g., POPs) should be subject to global trade bans or production and use phase-outs. Consistent with the view that global bans on chemicals causing local problems would constitute an unjustifiable barrier to international trade, both the FSC and the IFCS recommended a range of *domestic* measures that governments could adopt to deal with pesticide-related poisonings, including actions to prohibit or restrict the availability and use of some acutely toxic pesticides.⁸⁴

⁸⁰ See “Bahia Declaration,” *supra* note 77, para. II(1).

⁸¹ See IFCS, *Priorities for Action beyond 2000*, in “Forum III report,” *supra* note 60, Annex VI [IFCS Priorities for Action] Programme Area D, para. 1. Although the concept of integrated pest management (IPM) is subject to very different interpretations, as a minimum it entails a reduction in the use of hazardous chemicals in agriculture.

⁸² The Forum Standing Committee (FSC) is composed by twenty-five IFCS participants. Two of its key functions are to propose new issues for inclusion in the Forum sessions’ agenda and to provide guidance on the development of documents and other items on the agenda. See “IFCS terms of reference,” in “Forum III report,” *supra* note 60, Annex I, paras. 7.1(a), 7.1(b) and 7.2 and Annex V (FCS terms of reference).

⁸³ See “IFCS Priorities for Action,” *supra* note 81, Programme Area D, para 5.

⁸⁴ See IFCS, “Acutely Toxic Pesticides: Initial Input on Extent of the Problem and Guidance for Risk Management,” Doc. IFCS/FORUM-IV/10w Bangkok, Thailand (23 April 2003) at 4; IFCS, “Forum IV Final Report,” Doc. IFCS/FORUM- IV/16w, Bangkok, Thailand (7 November 2003) at 12; and “Summary of the fourth session of IFCS” 15:87 *Earth Negotiations Bulletin* (9 November 2003) at 6 (additional notes taken by the author during the meeting).

b) The IFCS “gaps analysis”

As discussed above, the UNEP GC recognised that there might be “gaps” in the Bahia instruments or in their implementation and called for their study. In response, participants at IFCS Forum IV prepared a “thought starter” on SAICM. The document, which was submitted to the first PrepCom session, was a revised version of a paper that had been produced by a working group chaired by the United States for consideration at Forum IV.⁸⁵

The thought starter purported to compile a range of views expressed by Forum IV participants rather than embody a negotiated text.⁸⁶ Like the original document, however, it started from the premise that chemicals were “central to the global economy” and that the “key issue” facing all countries was thus “how to ensure that [they would be] produced, transported, used and disposed of throughout their full life-cycle” in a way that protected human health and the environment from their negative effects.⁸⁷ The problem was therefore not the “tremendous increase in output and consumption of chemicals in developing nations,”⁸⁸ but a number of “gaps” in chemicals management.

The gaps identified by various actors included gaps in information and scientific knowledge on existing chemicals (including information available to consumers),⁸⁹ gaps in existing multilateral treaties (e.g., the fact that they only covered a handful of the thousands of chemicals in commerce and were

⁸⁵ See IFCS, “Forum IV Thought Starter on Gaps in the Bahia Declaration and Priorities for Action Beyond 2000,” Doc. IFCS/FORUM-IV/13w, Bangkok, Thailand (14 August 2003) at 5.

⁸⁶ The main disagreement among participants was that while some wanted to give preference to addressing gaps in implementation of existing priorities, others stressed the need to consider “new priorities” and to set concrete timetables to achieve specific targets. See SAICM, “Forum IV Thought Starter Report to SAICM,” UN Doc. SAICM/PREPCOM.1/INF/3 (3 November 2003) at 14-15.

⁸⁷ See *ibid.* at 4.

⁸⁸ Quoting OECD sources, the document noted that conservative estimates foresaw an 85 percent increase of the global output of chemicals by the year 2020 from 1995 levels and estimated that by 2020 developing countries would increase their share of chemicals production to 31 percent and account for a third of global consumption of chemicals. See *ibid.* at 6.

⁸⁹ See *ibid.* at 8-9 and 12.

not designed to cover the entire life-cycle of chemicals)⁹⁰ and gaps in participation by certain key actors in decision-making processes.⁹¹ Particular emphasis was put on the “widening gap” among countries’ capacities to implement chemical safety policies and instruments⁹² and on the need to overcome the “barriers” that prevented less developed countries from “catching up” with developed countries in their “ability to safely manage chemicals.”⁹³ Again, unsustainable consumption patterns were not identified as a problem. What is more, the document warned that the “dynamics of chemical production and consumption” would need to be examined, but only for the purpose of considering “their implications” for the ability of countries to implement chemicals-related commitments “so as to ensure that gaps w[ould] continue to be narrowed as opposed to becoming ever wider,”⁹⁴ not to reflect on possible ways to reduce consumption.

The special significance of the SAICM thought starter is two-fold. First, it purported to “stimulate thinking about gaps” not only in the Bahia instruments but also “in present global chemicals policy,” and to provide an “analytical framework” for the SAICM discussions.⁹⁵ Second, because Forum IV was held in Bangkok immediately before the first PrepCom session, many Forum IV participants decided to stay on to attend the SAICM session, bringing with them a particular understanding of the “gaps” that SAICM should address.

III. The SAICM negotiations

The preparatory committee (PrepCom) that drafted SAICM held sessions in Bangkok, Thailand, from 9 to 13 November 2003; Nairobi, Kenya, from 4 to 8 October 2004; and Vienna, Austria, from 19 to 24 September 2005. The three

⁹⁰ See *ibid.* at 11.

⁹¹ See *ibid.* at 11-12.

⁹² See *ibid.* at 7.

⁹³ See *ibid.* at 15.

⁹⁴ See *ibid.*

⁹⁵ See *ibid.* at 2.

draft instruments that resulted from this preparatory work, namely the high-level declaration, the overarching policy strategy and the global plan of action, were finalized by the “International Conference on Chemicals Management” (ICCM), which met from 4 to 6 February 2006 in Dubai, United Arab Emirates. The ICCM adopted the high-level declaration (called the Dubai Declaration on International Chemicals Management) and the overarching policy strategy (OPS), while it decided merely to “recommend the use and further development” of the global plan of action (GPA).⁹⁶

At its peak, the SAICM process engaged nearly six hundred participants representing more than one hundred and eighty countries as well as UN bodies and specialized agencies, inter-governmental organizations (IGOs) and non-governmental organizations (NGOs). Participants represented a wide range of sectors and interests, including health, environment, labour, agriculture, industry, science, customs, commerce, justice and academia. Some of the key actors who attended the entire process were the FAO, the ILO, the GEF, UNDP, UNIDO, the World Bank, the WHO, the IFCS, the European Commission and the OECD; the International Confederation of Free Trade Unions (ICFTU); the ICCA, the International Council on Mining and Metals (ICMM) and CropLife International; and Greenpeace International, the Worldwide Fund for Nature (WWF), the Pesticide Action Network (PAN), the Center for International Environmental Law (CIEL) and the Environmental Health Fund, all of which were participating organizations of the International POPs Elimination Network (IPEN).

Participants addressed a wide array of issues, ranging from rules of procedure to administrative and financial aspects to which concrete activities should be carried out under SAICM, and by whom. The multiplicity of matters considered reflected not only the significant number of sectors and interests

⁹⁶ “Dubai Declaration on International Chemicals Management,” paras. 13 and 14 [Dubai Declaration], in SAICM “Report of the [ICCM] on the work of its first session,” UN Doc. SAICM/ICCM.1/7, Dubai, United Arab Emirates (8 March 2006) [ICCM report], Annex I. For details on why the GPA was not adopted see *infra* note 192.

represented but also the myriad of issues that a global strategy on chemicals management would need to cover to be of any consequence. Rather than attempt to provide an overview of the entire process, the next section traces a number of issues that are of interest to this study. The focus is on those proposals, statements and ideas put forward by participants that implied either a departure from or the confirmation of existing international regulatory approaches to chemicals management, especially those pertaining to consumption and the relationship between trade and environmental norms.

1. SAICM's legal nature

The mandate of the architects of SAICM was, to a certain extent, undefined. Since neither Decision 22/4 IV nor Decision SS. VII/3 of the UNEP GC envisaged what the outcome of the process should be, the end product could have been a new treaty instituting a comprehensive legal approach to chemicals management, as Belgium and the Netherlands had suggested back in 1996. Even before the beginning of the negotiations, however, it was evident that general support for a legally binding instrument was lacking. In March 2003, eight months before the first PrepCom session, a second questionnaire was sent by UNEP seeking the views of governments and other actors on possible elements of SAICM (as noted above, the first had been sent in 2001).⁹⁷ Among the twenty-two governments, nine IGOs and four NGOs that responded to the survey,⁹⁸ only one, Slovenia, expressed support for the adoption of a legally binding instrument.⁹⁹ While they did not suggest that SAICM should itself be legally binding, IPEN and WWF said that it should establish that new legal instruments or revisions to existing ones would be

⁹⁷ See "Tabular Compilation of Responses," *supra* note 56 at 2.

⁹⁸ The respondents to the 2003 questionnaire were the countries of JUSCANZ, the EU, several European countries, several African countries, a number of Arab countries and countries with economies in transition, China and Indonesia; the Secretariat of the Basel Convention, the FAO, the ILO, UNEP, UNIDO, the South Pacific Regional Environment Programme, UNITAR, the WHO and the World Bank. See *ibid.* at 3.

⁹⁹ See UNEP, "Compilation of Original Submissions Concerning Possible Draft Elements of the SAICM," UN Doc. SAICM/PREPCOM.1/INF/4, Bangkok, Thailand (8 August 2003) [Original Submissions], letter by Slovenia.

required to enable its successful implementation (e.g., to deal with endocrine disrupting chemicals and mercury and other heavy metals).¹⁰⁰

Most respondents favored an administrative arrangement or strategy that would enhance the implementation of existing relevant instruments and build on them to cover gaps in chemicals policy.¹⁰¹ A few explicitly warned that SAICM should not lead to the adoption of new legally binding instruments. Canada, for instance, suggested that while SAICM should be “flexible” enough to deal with new and emerging issues, it “should not be used to pursue an agenda to develop a new round of negotiations on new international instruments on chemicals, but rather to accommodate what ha[d already] been developed.”¹⁰² Similarly, the ICCA said that SAICM should not entail new global “command and control” methods that would undermine the chemicals industry and contradict “differing [regulatory] approaches,” but should instead be a flexible partnership-based strategy aimed at ensuring “consistent attention to key aspects of enhancing [the] safe management of chemicals.”¹⁰³

At the first session of the PrepCom in November 2003, Australia, New Zealand and a number of Arab countries voiced their opposition to the adoption of a new treaty.¹⁰⁴ Switzerland presented a proposal to structure SAICM into three non-legally binding instruments, namely a global plan of action, an “overarching” or wide-ranging policy strategy and a high-level declaration through which participating governments would adopt the first

¹⁰⁰ See “Tabular compilation of Responses,” *supra* note 56 at 42 and 49.

¹⁰¹ From their responses, one can infer that this was the position of Australia, Canada, Egypt, Ethiopia, the EU, Germany, Indonesia, Iran, Japan, Jordan, New Zealand, Nigeria, Switzerland, the U.S., the FAO, the ILO, the South Pacific Regional Environment Programme, UNEP, UNIDO, the World Bank and the WHO. See *ibid.* at 4, 7, 9-15, 18-20, 22, 24, 27-28, 30 and 34-36.

¹⁰² *Ibid.* at 7.

¹⁰³ *Ibid.* at 37-39.

¹⁰⁴ New Zealand said that the possibility of elaborating legal frameworks in the future should be kept open, however. See “SAICM PrepCom-1 Highlights” *Earth Negotiations Bulletin* 15:88 (10 November 2003) [PrepCom-1 daily 1] at 2; “SAICM PrepCom-1 Highlights” *Earth Negotiations Bulletin* 15:89 (11 November 2003) [PrepCom-1 daily 2] at 1; and “SAICM PrepCom-1 Highlights” *Earth Negotiations Bulletin* 15:90 (12 November 2003) [PrepCom-1 daily 3] at 1.

two. Many participants welcomed the proposed “three-tiered” structure, which was also sponsored by Argentina, Croatia, Iran, Norway and Slovenia.¹⁰⁵

In response to a questionnaire sent by the WHO in March 2004, a few developing countries revealed their willingness to support a new chemicals convention as one possible outcome of the SAICM process.¹⁰⁶ By the time of the second PrepCom session, however, the Swiss proposal had gained widespread support among states¹⁰⁷ and the PrepCom decided to structure its discussions around the “three-tiered” approach,¹⁰⁸ which was eventually adopted as SAICM’s final structure. General support for the Swiss proposal was built during regional consultations held by the African group and the group of Latin American and Caribbean countries (GRULAC) in Abuja, Nigeria and Nairobi, Kenya, respectively, where the two regions agreed on position statements supporting the idea of a three-tiered structure.¹⁰⁹ The African meeting statement, which was adopted by all participants, including the ICCA, PAN and IPEN, also warned that SAICM should not entail legally

¹⁰⁵ See “PrepCom-1 daily 2,” *ibid.* at 2 and SAICM, “Report of the [first session] of the [PrepCom] for the development of a [SAICM],” UN Doc. SAICM/PREPCOM.1/7, Bangkok, Thailand (19 November 2003) [PrepCom-1 report] at 7-8.

¹⁰⁶ The WHO asked respondents to indicate, by July 30, 2004, “any preference (including one or more options) with respect to the character of the final SAICM,” listing among possible options a high-level declaration; an overarching policy strategy; a global programme of action with concrete targets and timetables; a convention; and international voluntary agreements and partnerships. Benin, Mauritania, Mauritius, Panama, the Philippines and Vanuatu registered a convention among the outcomes that they would support. See SAICM, “Further Input on Health Aspects of Chemical Safety Submitted by the World Health Organization,” UN Doc. SAICM/PREPCOM.2/INF/14, Nairobi, Kenya (21 September 2004) [Further Input Health] at 20.

¹⁰⁷ See “PrepCom-1 daily 2,” *supra* note 104 at 2 and SAICM, “Report of the second session of the [PrepCom] for the Development of a [SAICM],” UN Doc. SAICM/PREPCOM.2/4, Nairobi, Kenya (16 November 2004) [PrepCom-2 report] at 5; and “Comments Concrete Elements,” *supra* note 75 at 9, 12, 14 and “Summary of the second session of the PrepCom for the development of a [SAICM],” *Earth Negotiations Bulletin* 15:111 (11 October 2004) [PrepCom-2 ENB report] at 2-3.

¹⁰⁸ See “PrepCom-2 ENB report,” *ibid.* at 3

¹⁰⁹ See SAICM, “Report of the Latin American and Caribbean Meeting on the Development of a [SAICM],” UN Doc. SAICM/PREPCOM.2/INF/25, Nairobi, Kenya (3 October 2004) [GRULAC 1st regional meeting report] at 9 and SAICM, “African regional meeting on the development of a [SAICM],” UN Doc. SAICM/PREPCOM.2/INF/8, Nairobi, Kenya (13 July 2004) [African group 1st regional meeting report] at 15 (Both meetings were attended by representatives of Switzerland and financed by the Swiss government).

binding norms but “international voluntary agreements, partnerships and synergies” and the “strengthened implementation of existing agreements.”¹¹⁰

Behind the position of African countries was the fear that by creating new obligations SAICM would impose a “new burden” on them.¹¹¹ This concern was generally shared by developing countries, which at the second session of the PrepCom called for assurances that “new and additional” financial resources, to be provided through clearly defined financial mechanisms, would be forthcoming to support the implementation of SAICM in less developed countries.¹¹² Interestingly, the view that SAICM should focus primarily on ensuring the effective implementation of existing legal instruments in developing countries rather than creating new obligations was voiced most forcefully by Australia and the United States,¹¹³ yet neither country agreed that “new and additional” resources should be provided to implement SAICM in less developed countries.¹¹⁴ This was also the position of the ICCA, which argued that the time had come to “focus capacity building efforts on the implementation of existing tools and partnerships, rather than the development of new initiatives,” but also made it clear that the chemicals industry was not prepared to commit new resources for the implementation of SAICM.¹¹⁵ Considering the position of Australia, the United States and the

¹¹⁰ See “African group 1st regional meeting report,” *ibid.* at 15 (The GRULAC statement was adopted only by governments).

¹¹¹ See *ibid.* at 12.

¹¹² See “SAICM PrepCom-2 Highlights,” *Earth Negotiations Bulletin* 15:109 (7 October 2004) [PrepCom-2 daily 3] at 2 and “PrepCom-1 report,” *supra* note 105 at 7-8. Central and Eastern European (CEE) countries made similar demands. See SAICM, “Report of the [CEE] regional consultation on [SAICM],” UN Doc. SAICM/CEE.1/1, Ljubljana, Slovenia (19 May 2005) [CEE regional meeting report] at 7.

¹¹³ See “PrepCom-1 daily 1,” *supra* note 104 at 2.

¹¹⁴ During the second PrepCom session, a drafting group that met to discuss financial considerations failed to reach consensus on, among other things, the need for “new and additional resources” to implement SAICM, mainly due to the opposition of developed country donors. See “PrepCom-2 ENB report,” *supra* note 107 at 6 and “PrepCom-2 daily 3,” *supra* note 112 at 2. See also SAICM, “Submissions of the Draft [OPS] and Draft Concrete Measures as Revised for the Report of the second session of the [PrepCom] for the Development of a [SAICM],” UN Doc. SAICM/PREPCOM.3/INF/22, Vienna, Austria (2 August 2005) [Submissions Draft OPS and Concrete Measures for PrepCom-3] at 53-54 (U.S. position on financial considerations).

¹¹⁵ See “Original Submissions,” *supra* note 99, letter by the ICCA and “PrepCom-2 report,” *supra* note 107 at 17.

ICCA on other issues (see below), it is very possible that behind their calls for a focus on the implementation of existing agreements was a desire to prevent the adoption of further restrictions on international trade.

The decision that SAICM would not be legally binding had two important implications. The first was that, in the minds of at least some participants, governments could be more flexible and aim for ambitious goals that would make it possible to advance the international chemicals agenda.¹¹⁶ The second was that, due to its inferior legal status, many participants argued that SAICM should not contradict or seek to serve as an alternative to existing chemicals-related treaties. This view was expressed by numerous participants throughout the SAICM process, including Australia, Austria, Germany, the United States, New Zealand, the ICCA,¹¹⁷ Canada, the EU, Lebanon, UNEP, UNIDO, the World Bank,¹¹⁸ GRULAC and the African group,¹¹⁹ all of which called for consistency between SAICM and relevant agreements such as the Stockholm, Rotterdam and Basel conventions. Some of these actors understood the quest for consistency between SAICM and existing instruments in very narrow terms, such that proposed provisions that contemplated countries going beyond their obligations under existing treaties, even voluntarily, were deemed to contradict those instruments.¹²⁰

Because key principles of international trade law were embedded in relevant international environmental legal instruments, these actors were able to ensure that SAICM would abide by liberal economic norms simply by invoking existing legal norms. Law therefore played a key role in reinforcing the

¹¹⁶ Comments of this nature were made by Argentina and IPEN. See section 2 of Part III and *infra* note 145.

¹¹⁷ See “Tabular Compilation of Responses,” *supra* note 56 at 4-6 and 11, 15, 20 and 38 and “Original Submissions,” *supra* note 99, letter by the ICCA.

¹¹⁸ See “Tabular Compilation of Responses,” *ibid.* at 7, 11, 13, 22, 30 and 34.

¹¹⁹ See “GRULAC 1st regional meeting report,” *supra* note 109 at 5 and “African group 1st regional meeting report,” *supra* note 109 at 12.

¹²⁰ Such was the case with a provision requesting countries not to export chemicals that they had banned for domestic use due to health or environmental reasons; the provision was said to contradict the Rotterdam Convention, which allows such exports through the implementation of the PIC procedure.

hegemony of the liberal economic perspective in the context of SAICM. As discussed below, three concrete instances in which this occurred were the decision to abide by the formulation of precaution articulated in the Rio Declaration on Environment and Development; the principle that governments should adopt the “least-trade restrictive” measures required to protect the environment and human health from harm embedded in the Rotterdam Convention; and the need for trade and environmental policies to be “mutually supportive,” as provided in Agenda 21.

2. Scope

From the beginning of the SAICM process, many participants stressed that if SAICM were to improve “coherence and efficiency” among the array of international instruments and activities regarding chemicals, it would need to deal with chemicals “throughout their life-cycles.” This terminology was used in paragraph 23 of the World Summit on Sustainable Development (WSSD) plan of implementation, which explicitly endorsed the development of SAICM in 2002.¹²¹ IPEN was particularly emphatic about this point, stressing that to be effective SAICM needed to incorporate “all relevant aspects of waste management into its scope.”¹²² Dealing with wastes was vital, IPEN claimed, because chemicals that had “no or minimal hazard characteristics” during production or use could pose “serious hazards after becoming waste”¹²³ and because unsound solid waste management approaches (including for products containing chemicals)¹²⁴ were “significant pathways for the environmental mobilization of POPs and other anthropogenic chemical pollutants.”¹²⁵

¹²¹ See “PrepCom-1 report,” *supra* note 105 at 3 and 7 and “PrepCom-2 report,” *supra* note 107 at 7-8.

¹²² See “Tabular compilation of Responses,” *supra* note 56 at 42-43 and “Original Submissions,” *supra* note 99, letter by IPEN at 6-7 (Similar arguments were articulated by WWF and the Environmental Health Fund. See “Tabular compilation of Responses,” *ibid.* at 47 and “SAICM PrepCom-2 Highlights,” *Earth Negotiations Bulletin* 15:107 (5 October 2004) at 2).

¹²³ See “Comments Concrete Elements,” *supra* note 75 at 26 (footnote 1).

¹²⁴ See *ibid.* at 6.

¹²⁵ See *ibid.* at 7.

The need for SAICM to take in the entire life cycle of chemicals was also emphasized by the EU,¹²⁶ Norway,¹²⁷ the African group,¹²⁸ GRULAC¹²⁹ and Switzerland,¹³⁰ among other participants.¹³¹ It was also widely agreed that SAICM should have a broad scope to allow the flexibility needed to deal with new and emerging issues such as pharmaceutical residues in waste,¹³² while excluding chemicals subject to military uses.¹³³ The United States wanted a much narrower scope, however. Throughout the SAICM process, it advised that SAICM should cover only pesticides and industrial chemicals, in particular those being produced in high volume, and should exclude pharmaceuticals and food additives.¹³⁴ The latter exception was needed, it argued, because in some countries food additives and pharmaceuticals were regulated by bodies that did not deal with chemicals management issues and it would be improper for SAICM to duplicate or direct their work. Excluding chemicals dealt with elsewhere would also make SAICM more “manageable” so that efforts could focus on those chemicals that raised the most concern.¹³⁵

Despite the U.S. request, at its third session, following a proposal by the PrepCom President, Viveka Bohn of Sweden, the PrepCom decided to adopt a

¹²⁶ See *ibid.* at 12 and “PrepCom-1 highlights” *Earth Negotiations Bulletin* 15:91 (13 November 2003) [PrepCom-1 daily 4] at 1.

¹²⁷ See “Tabular compilation of Responses,” *supra* note 56 at 18 and “PrepCom-1 daily 3,” *supra* note 104 at 1-2.

¹²⁸ See “African group 1st regional meeting report,” *supra* note 109 at 13.

¹²⁹ See “GRULAC 1st regional meeting report,” *supra* note 109 at 6.

¹³⁰ See “Comments Concrete Elements,” *supra* note 75 at 19.

¹³¹ See SAICM, “Report of the Asia-Pacific regional consultation on the development of a SAICM,” UN Doc. SAICM/APRC/1, Bangkok, Thailand (6 April 2005) [Asia Pacific regional meeting report] at 7 and “CEE regional meeting report,” *supra* note 112 at 11.

¹³² See “PrepCom-2 report,” *supra* note 107 at 7-8.

¹³³ Specifically, the chemicals covered by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. This was the position of Egypt at the first PrepCom session and of the African group at the second PrepCom session. See “PrepCom-1 daily 4,” *supra* note 126 at 1 and “African group 1st regional meeting report,” *supra* note 109 at 13.

¹³⁴ Initially, the United States also proposed that SAICM exclude “issues that [we]re solely under the purview of the Basel Convention.” See “Tabular compilation of Responses,” *supra* note 56 at 21 (Note: The United States is yet to become a party to the Basel Convention).

¹³⁵ See “PrepCom-1 daily 4,” *supra* note 126 at 1; “Original Submissions,” *supra* note 99, letter by the United States of America (25 April 2003); and “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 50 (additional notes taken by the author during the meeting).

scope that did not explicitly exclude pharmaceuticals and food additives.¹³⁶ Instead, it agreed to “a broad scope, covering at least, but not limited to: (a) environmental, economic, social, health and labour aspects of chemical safety, (b) agricultural and industrial chemicals; with a view to promoting sustainable development and covering chemicals at all stages of their life cycle, including in products.”¹³⁷ At Bohn’s suggestion, an asterisk was introduced indicating that “one participant” had not agreed with the adoption of the scope.¹³⁸

The United States, which had also opposed references to the scope being “broad” and “not limited” to the issues listed,¹³⁹ contested this outcome,¹⁴⁰ and the final text on scope remained unresolved until the evening of the last day of the ICCM meeting. At that meeting, participants decided to hold informal consultations hoping to resolve all outstanding issues and, as the result of a compromise “package” that included the text on scope, delegates were finally prepared to adopt SAICM at around midnight.¹⁴¹ The text that was finally agreed upon provides that SAICM “has a scope that includes: (a) Environmental, economic, social, health and labour aspects of chemical safety, (b) Agricultural and industrial chemicals, with a view to promoting

¹³⁶ At the third PrepCom session, Australia, India, Japan, the ICCA and the International Chamber of Commerce (ICC) agreed with the United States that SAICM should “clarify” that its scope would not deal with chemicals already covered in other processes. (Notes taken by the author during the third PrepCom session, held in Vienna, Austria from 19 to 24 September, 2005).

¹³⁷ It also agreed that SAICM “should take due account of instruments and processes that ha[d] been developed to date and be flexible enough to deal with new ones without duplicating efforts, in particular [those] of forums dealing with the military uses of chemicals.” See SAICM, “Report of the third session of the [PrepCom] for the Development of a [SAICM],” UN Doc. SAICM/PREPCOM.3/5, Vienna, Austria (19 October 2005) [PrepCom-3 report] at 12-13.

¹³⁸ See “PrepCom-3 report,” *ibid.* at 7 (additional notes taken by the author at the meeting).

¹³⁹ *Ibid.* at 99.

¹⁴⁰ The introduction of an asterisk was proposed by the PrepCom President and, immediately after its adoption, the United States protested that participants had not been given enough time to react to the proposal and asked that the text on scope be enclosed in square brackets to indicate a lack of consensus. The President disagreed and ruled that the procedure that she had outlined would be followed. See “PrepCom-3 report,” *supra* note 137 at 7. The United States voiced its concerns again at an intersessional meeting of the Bureau, which remained in office so as to facilitate the success of the ICCM and met in Jigny, Switzerland on 4 and 5 November 2005. Following that meeting, the PrepCom President decided to replace the asterisk agreed at PrepCom-3 with a footnote indicating that governments could “decide that, within their jurisdiction,” SAICM did “not cover products to the extent that [they we]re regulated by a domestic food or pharmaceutical authority or arrangement.” SAICM, “Draft Overarching Policy Strategy,” UN Doc. SAICM/ICCM.1/3, Dubai, United Arab Emirates (23 November 2005) at 2 and 4.

¹⁴¹ See “ICCM Highlights,” *Earth Negotiations Bulletin* 16:51 (7 February 2006) at 2.

sustainable development and covering chemicals at all stages of their life-cycle, including in products.”¹⁴² The text also specifies that SAICM should take “due account” of existing instruments and processes so as not to duplicate efforts,¹⁴³ while a footnote clarifies that SAICM will “not cover products *to the extent that* the health and environmental aspects of the safety of the chemicals and products are regulated by a domestic food or pharmaceutical authority or arrangement.”¹⁴⁴ The representative of Argentina initially opposed the footnote, stressing that it was unnecessary because SAICM was a voluntary instrument and states could decide to which chemicals it would apply.¹⁴⁵

Although the final provision on scope does not discard the possibility that SAICM might apply to pharmaceuticals and food additives,¹⁴⁶ some participants regretted the fact that the footnote was introduced, as well as the elimination of references to the scope being “broad” and “not limited to” the substances listed.¹⁴⁷ Still, SAICM covers a wide range of chemical substances and products containing chemicals. Perhaps the most important implication of the text on scope is that it embraces the notion of life cycle, breaking away with the idea that the sound management of chemicals and that of hazardous wastes can successfully be pursued separately.

If the point made by IPEN that many chemicals with minimal hazardous properties could pose serious risks upon becoming waste had been taken

¹⁴² See “Overarching Policy Strategy,” [SAICM OPS], para. 3, in “ICCM report,” *supra* note 96, Annex II.

¹⁴³ See “SAICM OPS,” *ibid.*, para. 4.

¹⁴⁴ See “ICCM report,” *supra* note 96 at 16.

¹⁴⁵ See “ICCM Highlights” *Earth Negotiations Bulletin* 16:49 (5 February 2006) at 2. A representative of IPEN made a similar statement during the third PrepCom session, when he rejected the proposal by the United States to exclude food additives and pharmaceuticals from SAICM’s scope because SAICM was a voluntary instrument and it did “not need to mirror the laws of any one country” (notes taken by the author during the meeting).

¹⁴⁶ After the adoption of SAICM, the United States declared that it understood that SAICM would “not apply” to food additives or pharmaceuticals, “especially to the extent that they [we]re regulated by a domestic food or pharmaceutical authority or arrangement such as [the U.S.] Food and Drug Administration.” See “ICCM report,” *supra* note 96 at 11.

¹⁴⁷ Interviews conducted with representatives of two environmental NGOs and three governments during the ICCM meeting.

seriously, however, embracing the notion of life cycle should have led to the conclusion that SAICM would need to tackle consumption in terms of the amount of chemicals consumed. Consumption, however, was consistently framed in terms of how its effects should be managed rather than whether the quantity of chemicals consumed could or should be reduced.

3. The “overarching goal” of SAICM

At its very first session, the PrepCom agreed that the overarching goal of SAICM should be the one articulated in the chapeau of paragraph 23 of the WSSD plan of implementation.¹⁴⁸ The objective, commonly referred to as the “2020 goal” in chemicals-related international environmental negotiations, is that by the year 2020 chemicals will be “used and produced in ways that lead to the minimization of significant adverse effects on human health and the environment.”¹⁴⁹

The selection of the 2020 goal as SAICM’s overall objective was predictable. First, paragraph 23 of the WSSD plan of implementation endorsed SAICM and depicted it as one of the means of achieving the 2020 goal and the sound management of chemicals “throughout their life cycle.”¹⁵⁰ Second, even the global chemical industry had expressed its full support for the WSSD plan of implementation following its adoption in 2002.¹⁵¹ In the same way, both the ICCA and the ICC, which claimed to represent, respectively, “the global chemical industry” and “businesses along the entire chemicals value chain

¹⁴⁸ See “Summary of the WSSD,” *Earth Negotiations Bulletin* 22:51 (6 September 2002), online: <<http://www.iisd.ca/linkages/2002/wssd/>> at 1.

¹⁴⁹ See “PrepCom-1 report,” *supra* note 105 at 10 and “Plan of Implementation of the [WSSD],” Chapter III, para. 23, in UN, “Report of the [WSSD],” UN doc. A/CONF.199/20, Johannesburg, South Africa (4 September 2002) [WSSD Plan of Implementation].

¹⁵⁰ See “WSSD Plan of Implementation,” *ibid.*, para. 23(d). It is interesting that the WSSD reaffirmed its commitment to the “sound management of chemicals throughout their life cycle *and of hazardous wastes.*” (emphasis added). By preferring “and of” to “including” hazardous wastes, it suggested that wastes were not integral to but separated from the lifecycle of chemicals, thereby furthering the conceptual separation between chemicals and wastes that was established in Agenda 21. See *ibid.* para. 23 (chapeau).

¹⁵¹ See ICCA, “Press Release: Global Chemical Industry Welcomes Action Plan on Chemicals Agreed at the [WSSD],” Johannesburg, 4 September 2002, online: <<http://www.icca-chem.org/section03.html>>.

from all regions around the world,” endorsed the 2020 goal as SAICM’s overall objective and SAICM as a “road map” for achieving it.¹⁵²

It would seem remarkable that even though the 2020 goal falls under Chapter III of the WSSD plan of implementation, entitled “Changing Unsustainable Patterns of Consumption and Production,”¹⁵³ participants in the SAICM negotiations barely touched upon the issue of unsustainable consumption patterns. A closer look at Chapter III helps to explain the lack of a serious debate on consumption. Although it affirms that “fundamental changes in the way societies produce and consume are indispensable for achieving global sustainable development,”¹⁵⁴ an idea that was also reflected in SAICM’s Dubai Declaration on International Chemicals Management,¹⁵⁵ none of the actions prescribed in Chapter III calls for any “fundamental change” in the amount of consumption.¹⁵⁶ In line with Agenda 21, Chapter III prescribes instead measures to make production more efficient (i.e., less resource-intensive) and “cleaner,” as well as measures to promote the consumption of “greener” products, for instance through the application of the polluter pays principle so that the price of consumer goods incorporates their environmental costs.¹⁵⁷ Also like Agenda 21, Chapter III emphasizes the need

¹⁵² See SAICM, “Perspective of the ICCA on a SAICM,” UN Doc. SAICM/PREPCOM.2/INF/3, Nairobi, Kenya (7 July 2004) [ICCA Perspective PrepCom-2] at 2; ICC, “SAICM PrepCom-3, Opening Session Statement” (19 September 2005) [ICC statement PrepCom-3] at 1, online: <<http://www.iccwbo.org/policy/environment/id1460/index.html>>.

¹⁵³ See “WSSD Plan of Implementation,” *supra* note 149, Chapter III, paras 14-23.

¹⁵⁴ See *ibid.*, para. 13.

¹⁵⁵ The Dubai Declaration affirms that, since “the global production, trade and use of chemicals are increasing, with growth patterns placing an increasing chemicals management burden on developing countries and countries with economies in transition [...],” “fundamental changes are needed in the way that societies manage chemicals.” Dubai Declaration, *supra* note 96, at 13.

¹⁵⁶ See “WSSD Plan of Implementation,” *supra* note 149, Chapter III, para. 13.

¹⁵⁷ Some of the actions proposed in Chapter III are: 1. Promoting programmes to “delink” economic growth and environmental degradation by improving “efficiency and sustainability in the use of resources and production processes;” 2. Increasing investment in cleaner production and eco-efficiency in all countries, through, e.g., “incentives for investment in cleaner production and eco-efficiency” that should avoid “trade-distorting measures inconsistent with WTO rules;” 4. Promoting the “internalization of environmental costs [...] without distorting international trade and investment;” and 5. Preventing and minimizing waste and maximizing reuse, recycling and use of environmentally friendly alternative materials...” See “WSSD Plan of Implementation,” *ibid.*, Chapter III, paras. 15, 16, 18, 19 and 22.

to avoid measures that “distort trade and investment” or that are inconsistent with the rules of the World Trade Organization (WTO).¹⁵⁸

As the next section shows, the SAICM discussions on production and consumption evolved along the lines of Chapter III, eschewing the difficult question of whether the increasing quantity (and not only the hazardousness) of chemicals being consumed worldwide was consistent with the “2020 goal.” It is the contention of this chapter that the reason why no one suggested that our consumerist Western life-styles might need to be radically revisited to achieve chemical safety was that liberal economic norms played a hegemonic role in the SAICM negotiations. The following sections show that, either deliberately or inadvertently, participants from different camps upheld liberal economic norms in their statements and proposals, which led them to accept that the consumption of chemicals would inevitably continue to grow. Thus, even though many actors recognised the considerable gaps in knowledge regarding the health and environmental effects of many (or most) chemicals on the market¹⁵⁹ and some participants stressed that chemicals with minimal hazardous properties during use could pose serious risks to human health or the environment when they became waste,¹⁶⁰ the problem of consumption was consistently framed as a question of managing it rather than reducing it.

Hegemonic discourses are not without fissures or contradictions, however, and even those who upheld liberal economic norms in SAICM and framed the problem of consumption in qualitative terms made proposals that could have had far-reaching implications for the quantity of chemicals being produced and consumed, had they been adopted. The most significant of these proposals concerned the understanding of precaution as an alternative paradigm for dealing with scientific uncertainty that would seek to avoid, rather than

¹⁵⁸ See *ibid.*, paras. 16(b) and 19(b) and *supra* note 14.

¹⁵⁹ This point was made by Norway, Switzerland, CIEL, IPEN and WECF, among other actors, before or during the SAICM process.

¹⁶⁰ This point was made by IPEN. See “Comments Concrete Elements,” *supra* note 75 at 26.

simply “manage,” chemicals-related risks. Because of the considerable degree of scientific uncertainty regarding the environmental and health effects of most chemicals on the market, such a conception of precaution could impose a drastic reduction in the production, consumption and trading of a considerably large number of chemicals and chemical-containing products despite a lack of conclusive scientific evidence on their effects on human health or the environment. Not surprisingly then, it was those participants who most eagerly defended liberal economic norms in the SAICM negotiations who resisted the proposals that entailed this reading of precaution most strongly.

4. Production and Consumption in SAICM

Few participants mentioned the word “consumption” during the SAICM deliberations and none of those who suggested that SAICM should promote “sustainable consumption” hinted that this might require a significant reduction of the amount of chemicals being produced and consumed.¹⁶¹ Norway, for instance, said that SAICM should prompt the integration of chemicals-related issues into other “policy areas,” including “sustainable production and consumption,” but it also accepted that “the global output of chemicals w[ould] increase by 85 per cent above 1995 levels, with the largest relative increase in the developing countries,” which it said would require a “substantial” improvement of the capacity of those countries to manage chemicals safely.¹⁶² This was consistent with a statement made by Norway’s Minister of Environment a few months earlier. During a ministerial discussion

¹⁶¹ At the first PrepCom session, Slovenia said SAICM should incorporate strategies to reduce certain chemicals’ emissions, including through “changing consumption patterns” (See “PrepCom-1 daily 2,” *supra* note 104 at 1). At the second PrepCom session, GRULAC proposed that reducing the use of “hazardous chemicals” and encouraging “sustainable production and use” should be two objectives of SAICM. It is interesting that the word “use” was preferred to “consumption.” (See “GRULAC 1st regional meeting report,” *supra* note 109 at 6-7). Lastly, during the third PrepCom session, Colombia suggested adding in the section on “principles and approaches” of SAICM that there was a need to “change patterns of production and consumption.” See “SAICM PrepCom-3 highlights,” *Earth Negotiations Bulletin* 15:121 (22 September 2005) [PrepCom-3 daily 3] at 2.

¹⁶² See “Tabular Compilation of Responses,” *supra* note 56 at 17 and “Original submissions,” *supra* note 99, letter by Norway.

on “sustainable consumption” at the UNEP GC, the Minister said that the challenge of sustainable consumption was to achieve “*more growth* with less use of land, resources, energy and harmful chemicals and producing less waste(.)”¹⁶³ The solution, he suggested, lay in improvements in production and in the use of market-based instruments such as eco-labelling and the internalization of environmental costs into products to orient consumption towards greener products.¹⁶⁴ According to this statement, sustainable consumption would not require major changes in the amount of consumption, nor would it compromise the continued pursuit of economic growth in all countries, including highly industrialized ones.

Other proposals related to consumption also framed the problem in terms of managing rather than limiting consumption. They included calls for the promotion of cleaner production, waste minimization (via changes in production) and the substitution of hazardous chemicals and technologies with safer chemical and non-chemical alternatives. A few participants also supported the inclusion of commitments in SAICM to phase out certain groups of hazardous chemicals by the year 2020. This proposal conceptualized precaution as a principle or approach whose purpose should be to avoid chemicals-related risks and therefore differed substantially from the formulation of precaution of the Rio Declaration, which implied that precaution was a risk management rather than a risk avoidance tool. Given the degree of scientific uncertainty regarding the effects of most chemicals on the market, the proposal had the potential to lead to important restrictions on the quantity of chemicals being produced and consumed. It is therefore no wonder that JUSCANZ countries and industry, which unambiguously sought to protect liberal economic norms in SAICM, were its most vocal opponents.

¹⁶³ (Emphasis added) The means the Minister proposed included the application of the polluter pays principle; the creation of new markets for “healthier products” such as unleaded petrol and hybrid cars; and the use of systems to better inform consumers to help them make better choices such as eco-labelling. See UNEP, “Proceedings of the Governing Council at its twenty-second session,” UN Doc. UNEP/GC.22/11, Nairobi, Kenya (3 February 2003) at 93-94.

¹⁶⁴ See *ibid.*

a) Cleaner production, safer alternatives and waste minimization

i) Cleaner production and safer alternatives

The idea that SAICM should promote the use and dissemination of, and research on, cleaner production methods and technologies and of safer or “less hazardous” alternatives to toxic chemicals was widely advocated throughout the SAICM negotiations. Proposals of this kind were submitted or supported by Austria, Bulgaria, Egypt, the EU, Japan, Lebanon, Norway, UNIDO, the ICCA, IPEN and WWF in their responses to the 2003 questionnaire;¹⁶⁵ by the Russian Federation, Zambia, Chile, Mexico, Egypt and the Basel Convention Secretariat at the first PrepCom session;¹⁶⁶ by the African group, GRULAC, “global unions” (including ICFTU) and the WHO at the second PrepCom session;¹⁶⁷ and by Switzerland and Norway, the United States, the EU, the Central and Eastern European (CEE) countries and the Asia-Pacific group at the third PrepCom session,¹⁶⁸ just to mention a few examples.

That there was widespread support for cleaner production and safer alternatives is evident in the three SAICM instruments. The overarching policy strategy (OPS) declares the need to “accelerate” the “development of safer alternatives” and lists as objectives of SAICM “to promote and support the development and implementation of, and further innovation in, environmentally sound and safer alternatives, including cleaner production, informed substitution of chemicals of particular concern and non-chemical

¹⁶⁵ See “Tabular compilation of Responses,” *supra* note 56 at 6, 9, 10, 12, 14, 17, 31-32, 39 and 45-47.

¹⁶⁶ See “PrepCom-1 daily 2,” *supra* note 104 at 1-2; “PrepCom-1 daily 3,” *supra* note 104 at 1; and “PrepCom-1 daily 4,” *supra* note 126 at 1.

¹⁶⁷ See “GRULAC 1st regional meeting report,” *supra* note 109 at 6-7; “African group 1st regional meeting report,” *supra* note 109 at 12; SAICM, “Statement by Global Unions,” UN Doc. SAICM/PREPCOM.2/CRP.2 (4 October 2004) [Global Unions Statement] at 3) (Global Unions comprised the ICTFU, ten union federations and the Trade Advisory Committee of the OECD); and “Further Input Health,” *supra* note 106 at 3 and 11.

¹⁶⁸ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 13 and 57-60 and 70; “CEE regional meeting report,” *supra* note 112 at 12-14; “Asia Pacific regional meeting report,” *supra* note 131 at 9.

alternatives,”¹⁶⁹ “to ensure that research and development are undertaken in relation to chemical control technologies, development of safer chemicals and cleaner technologies and non-chemical alternatives and technologies”¹⁷⁰ and “to establish or strengthen partnerships [...] for [...] the provision of appropriate and clean technology to and among [less developed countries].”¹⁷¹ Similarly, the Dubai Declaration expresses the commitment of the ICCM to “work towards closing the gaps” between developed and less developed countries in sound chemicals management “by addressing the special needs of the latter and strengthening their capacities for [...] the development of safer alternative products and processes, including non-chemical alternatives.”¹⁷² Lastly, several activities in the global plan of action (GPA) concern the promotion of cleaner production methods and safer alternatives. Governments and other stakeholders are asked to promote the “transfer, implementation and adoption of [...] cleaner production technologies,” “the development and use of products and processes that pose lesser risks,” “the transfer of technology and knowledge for cleaner production and manufacture of alternatives,” “research into technologies and alternatives that are less resource intensive and less polluting” and “access to lower-risk or safer pesticides,”¹⁷³ while industry, the Basel Convention Secretariat and other actors are asked to “undertake research into innovative means of cleaner production, including those involving waste minimization in all economic sectors.”¹⁷⁴

¹⁶⁹ See “SAICM OPS,” *supra* note 142, para. 14(j).

¹⁷⁰ See *ibid.*, para. 15(g).

¹⁷¹ See *ibid.*, para. 17(c).

¹⁷² See Dubai Declaration, *supra* note 96, para. 17.

¹⁷³ See “Global Plan of Action,” in “ICCM report,” *supra* note 96, Annex III [SAICM GPA], activities 43, 44, 242, 84 and 52.

¹⁷⁴ See *ibid.*, activity 118.

ii) Agriculture and non-chemical alternatives

Consistent with Chapter 19 of Agenda 21¹⁷⁵ and the IFCS Bahia instruments,¹⁷⁶ a number of participants said that SAICM should promote research on and the use of non-chemical alternatives to toxic agricultural chemicals as a way to reduce chemical risks. Lebanon, for instance, said that SAICM should encourage “a shift from highly toxic chemicals to those with lower toxicity or [...] non-chemical alternatives” and “education and research on the development of environmentally friendly pesticides in developing countries, including non-chemical pest control products.”¹⁷⁷ Correspondingly, at the first PrepCom session the African group proposed that the GPA include concrete measures regarding building the capacity of less developed countries to develop clean technologies, including “alternative and ecological agricultural practices” that did not require the use of chemicals.¹⁷⁸ Although the proposed measure related to capacity building assistance in ecological agricultural practices and would not require governments to implement those practices, it hinted that the use of chemicals in agriculture should be avoided.

The FAO proposed that SAICM promote a reduction in the use of agricultural chemicals through integrated pest management (IPM) and that it address the role that government policies were playing in promoting the “unnecessary use or overuse of chemicals.”¹⁷⁹ In a similar vein, UNIDO suggested that SAICM should, “at the government level,” “reduce dependency on chemical inputs in agriculture by encouraging and facilitating the exploitation of [IPM] that

¹⁷⁵ Chapter 19 stresses that risk reduction from toxic chemicals could “sometimes be achieved by using [safer] chemicals or even non-chemical technologies,” as well as “integrated pest management [in the agricultural area,] including the use of biological control agents as alternatives to toxic pesticides.” See Agenda 21, *supra* note 14, Chapter 19, para. 19.44.

¹⁷⁶ See “Bahia Declaration,” *supra* note 77, para. II(1) and “IFCS Priorities for Action,” *supra* note 81, Programme Area D, para. 1.

¹⁷⁷ “Tabular compilation of Responses,” *supra* note 56 at 14-15.

¹⁷⁸ See “PrepCom-I report,” *supra* note 105, Annex IV.

¹⁷⁹ Such government policies included subsidies that kept the price of pesticides low and policies of donor countries that linked development assistance with the provision of agricultural chemicals. See “Tabular Compilation of Responses,” *supra* note 56 at 23.

employ[ed] indigenous or regionally available techniques for crop protection.”¹⁸⁰ While these proposals could be seen as a challenge to the continued use of synthetic chemicals in agriculture, they both understood the goal of IPM to be not the eventual elimination but the reduction of such use, consistent with the definition of IPM of the FAO International Code of Conduct on the Distribution and Use of Pesticides, which the global agrochemicals industry supports and understands as including not only the use of pesticides but also of another of its key “crop protection” products, genetically engineered seeds.¹⁸¹

Partly because of the great number of activities to be considered for inclusion in the GPA, participants did not engage in a lengthy debate about what IPM or “sustainable agriculture” might entail. What is worthy of note here is that even though some actors suggested that the use of hazardous chemicals in agriculture should eventually be eliminated, there were no proposals to articulate clearly in SAICM the need to replace the large-scale, monoculture-based and pesticide-dependent industrial agricultural model with a more sustainable option. Two statements were made hinting that industrial agriculture was unsustainable, however. The first was by the President of

¹⁸⁰ See *ibid.* at 31.

¹⁸¹ The FAO Code defines IPM as “the careful consideration of all available pest control techniques and subsequent integration of appropriate measures that discourage the development of pest populations and keep pesticides and other interventions to levels that are economically justified and reduce or minimize risks to human health and the environment.” The global agrochemicals industry supports this definition, as expressed in a leaflet distributed during the second PrepCom session. See CropLife International, “[IPM]: The Way Forward for the Plant Science Industry” (May 2004), online: <[http://www.croplife.org/library/attachments/9e08cb9c-1363-4698-bc34-64358502b03d/4/IPM_Summary_Leaflet%20\(May-2004\).pdf](http://www.croplife.org/library/attachments/9e08cb9c-1363-4698-bc34-64358502b03d/4/IPM_Summary_Leaflet%20(May-2004).pdf)>. There are at least two plausible reasons for industry’s support of IPM as defined in the FAO Code. The first is that, by preventing the overuse and misuse of pesticides, IPM can help avoid or postpone problems of pesticide resistance, thereby contributing to ensure the continued use of pesticide in agriculture. The second is that, unlike organic agriculture, IPM does not preclude the use of genetically modified seeds, which have become one of the major products offered by large agrochemicals corporations, which refer to themselves as the “crop protection” industry rather than the “chemicals” industry. Genetically modified seeds could ensure profitable returns not only by themselves but also because they may be designed to be used in conjunction with pesticides (Monsanto’s “roundup” seeds, for instance, are resistant to Monsanto’s glyphosate so they may be used together to ensure a high yield). According to CropLife International, “IPM involves using the best combination of cultural, biological and chemical measures, including plant biotechnology.” See CropLife International, “IPM,” online: <<http://www.gcpf.org/search.aspx?s=IPM>> (last visited 15 November 2007).

IFCS at the third PrepCom session, when he asked participants to “bear in mind” during their deliberations and their efforts to achieve the 2020 goal the story of a group of rice farmers in Thailand that had successfully returned to their traditional ways of farming and “away from modern, synthetic chemical-dependent farming methods,” which had left them with debts, ill health, poverty and social disruption.¹⁸² The second was articulated by the participating organizations of IPEN on the very last day of the ICCM meeting, when they issued a declaration in which they expressed their commitment to “sustainable, ecological agriculture,” which included “organic farming, [the] progressive substitution of pesticides and other chemical inputs in agriculture, community [IPM], agro-ecological methods of pest control and other sustainable agriculture techniques [...].”¹⁸³

Although IPEN’s final statement suggested that sustainable agriculture entailed the ultimate elimination of pesticides and other chemical inputs, IPEN presented a more moderate position during the SAICM negotiations. Furthermore, before the negotiations had begun, when actors had an opportunity to articulate their views freely about what a future SAICM should entail, IPEN suggested that SAICM should assist agricultural workers in less developed countries to “avoid the misuse of pesticides and restore the balance between beneficial and harmful insects by means of integrated and ecologically sound pest management measures.”¹⁸⁴ It also argued that SAICM should include measures to facilitate the spread of techniques and skills to enable farmers to reduce and “possibly eliminate” reliance on “toxic” chemical agricultural inputs,¹⁸⁵ yet at no point did it propose that the

¹⁸² See “PrepCom-3 report,” *supra* note 137 at 2-3 (additional notes taken by the author during the meeting).

¹⁸³ See IPEN, “Declaration for a Toxics-Free Future,” Dubai, United Arab Emirates, (February 6, 2006), online: <<http://www.ipen.org/ipenweb/saicm.html#miss>>.

¹⁸⁴ See “Original Submissions,” *supra* note 99 at 11.

¹⁸⁵ *Ibid.*, letter by IPEN at 11 and “Tabular Compilation of Responses,” *supra* note 56 at 45.

elimination of pesticide dependency in agriculture should be one of SAICM's key policy goals.¹⁸⁶

Still, one of the activities supported by IPEN did imply that governments should try to move away from industrial agriculture. Similar to the proposal by the African group concerning capacity building in ecological agricultural practices, the activity contemplated that governments, intergovernmental organizations (IGOs) and other actors would “undertake research on and implement better agricultural practices, including methods that d[id] not require the application of chemicals.”¹⁸⁷ Because it asked stakeholders to avoid the use of synthetic chemicals in agriculture, the proposed provision meant that industrial agriculture, which requires not only chemical pesticides but also chemical fertilizers, should be replaced with non-chemical agricultural practices. Realising this, at the next PrepCom session the United States urged inserting the term “polluting or harmful” before the word chemicals. This was necessary, it argued, because “not all agricultural chemical use [wa]s harmful to the environment or human health.” Practices such as the application of “readily-degrading herbicides,” the U.S. argued, were “sustainable”, while the use of chemical fertilizers was essential “to maintain world food security.” In its view, it was “persistent, broad-spectrum pesticides that [we]re the primary target for reduction, not all chemicals.”¹⁸⁸

¹⁸⁶ IPEN could have done this, for instance, by calling for a progressive shift to organic agriculture and a move from an agricultural system oriented towards international markets to one intended primarily for local consumption (this issue is discussed further in Chapter 6). IPEN did mention organic agriculture in the SAICM deliberations, but only in the context of a proposal that was explicitly grounded on liberal economics and sought to internalise the costs of chemical safety programmes in the industries that produced and used chemicals, explaining that it did not seek to either promote or curb the growing volume of chemicals being produced and used. If such cost internalisation “raised the price of agricultural chemicals and create[d] hardships for [...] agricultural communities,” IPEN claimed, then “assistance programs should be instituted to help provide farmers [in less developed countries] get access to safe and effective alternatives (e.g., IPM, organic agriculture, natural and indigenous pesticides, etc).” See “Original responses,” *supra* note 98, letter by IPEN at 8.

¹⁸⁷ The proposal was reflected in the draft GPA that resulted from the second PrepCom session. See “PrepCom-2 report,” *supra* note 107 at 39.

¹⁸⁸ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 60.

The Secretariat introduced the change proposed by the United States to the revised draft OPS, which was then agreed by the PrepCom and the ICCM.¹⁸⁹ As a result, the GPA asks governments and other actors to “undertake research on and implement better agricultural practices, including methods that do not require the application of *polluting or harmful* chemicals.”¹⁹⁰ Although this formulation could be read in support of the complete elimination of pesticide use in agriculture, as all pesticides are by definition toxic chemicals, the fact that no one refuted the explanation provided by the United States to introduce the qualifier suggests that in fact the GPA measure is intended to cover only those pesticides that are most harmful.

Another indication of SAICM failing to challenge industrial agriculture is that it makes no mention of the need to promote or work towards the elimination of pesticide use in agriculture. Although the Dubai Declaration affirms that “the need to take concerted action is accentuated by a wide range of chemical safety concerns at the international level, including ... dependency on pesticides in agriculture,”¹⁹¹ the OPS, the key policy instrument of SAICM, makes no reference to this important issue. The fact that agricultural practices are dealt with only in the GPA inevitably relegates them to a lesser plane. First, because the GPA was not formally adopted by the ICCM,¹⁹² it has an

¹⁸⁹ See SAICM “Draft [GPA],” UN Doc. SAICM/PREPCOM.3/4, Vienna, Austria (21 July 2005) at 35 (activity 168), “PrepCom-3 report,” *supra* note 137 at 69 (activity 172) and *infra* note 192.

¹⁹⁰ See “SAICM GPA,” *supra* note 173, activity 158 (emphasis added). The GPA also asks governments, IGOs and other actors to promote “information exchange on alternative and ecological agricultural practices, including on non-chemical alternatives,” to develop “schemes for [IPM]” and to provide “training in alternative and ecological agricultural practices, including non-chemical alternatives.” See “SAICM GPA,” *supra* note 173, activities 160, 50 and 51.

¹⁹¹ See Dubai Declaration, *supra* note 96, para. 7.

¹⁹² The original proposal for a three-tiered approach was that the ICCM would adopt both the OPS and the GPA through the high-level declaration. As the concrete measures associated with the GPA started shaping up, however, some participants expressed concern that the plan was becoming too prescriptive. Thus, it was suggested that the GPA should be seen as a “tool kit” of options for chemicals management from which different actors could draw upon as they saw fit, a view that was widely agreed by participants and by the PrepCom President. Still, the PrepCom agreed that the GPA should single out a number of “global priorities” that required concerted action and that all stakeholders should thus be asked to implement. The only priority concerning agriculture that was included on that list, however, did not refer to agricultural practices but to the promotion of “alternatives in order to reduce and phase out highly toxic pesticides.” See “SAICM GPA,” *supra* note 173, Executive Summary, para. 8(e).

inferior status to that of the OPS and arguably also that of other plans of action, such as Agenda 21 and the WSSD plan of implementation. Second, the GPA itself provides that its activities “may be undertaken voluntarily by stakeholders in order to pursue the commitments and objectives expressed in the [Dubai Declaration and the OPS].” Not only is there no express commitment or objective concerning agricultural practices in the two instruments, but the GPA measures concerning this issue are not considered a “global” priority in the GPA itself.¹⁹³ In addition, in the view of one participant who opposed describing SAICM or its activities as voluntary,¹⁹⁴ the fact that the GPA characterizes its activities as voluntary sends the message that SAICM has “no moral or political weight” and that the achievement of the 2020 goal is up to the “whim of governments.”¹⁹⁵

iii) Waste Minimization

Like in the Basel Convention discussions, those who suggested that SAICM should promote the reduction of waste generation conceptualized waste minimization as requiring nothing but qualitative changes in production and consumption.¹⁹⁶ WWF, for instance, suggested that SAICM should cover “all relevant aspects of waste management, including reuse, recycling, product

¹⁹³ See *supra* note 192.

¹⁹⁴ The characterisation of SAICM and its activities as “voluntary” was supported by the United States and India since the third PrepCom session; many participants opposed it, including the Arab group, the EU, Argentina, Croatia, Norway, Tanzania, IPEN and ICFTU, but it was finally agreed upon as part of a package compromise adopted at the ICCM meeting. See “Summary of the third session of the [PrepCom] for the development of a [SAICM],” *Earth Negotiations Bulletin* 15:124 (26 September 2005) [PrepCom-3 ENB report] at 3, 5 and 12 and “Summary of the ICCM and 9th special session of the UNEP GC/Global Ministerial Environment Forum,” *Earth Negotiations Bulletin* 16:15 (13 February 2006) [ICCM ENB report] at 4.

¹⁹⁵ This view was expressed by CIEL at the third PrepCom session and supported by the EU, Croatia, ICFTU, the Arab group and Argentina. See “PrepCom-3 report,” *supra* note 137 at 8, 12 and 26 (additional notes taken by the author during the meeting).

¹⁹⁶ Egypt, Lebanon, the Basel Convention Secretariat, WWF, IPEN, Switzerland and Norway were some of the actors who said that SAICM should promote waste minimization. See “Tabular Compilation of Responses,” *supra* note 56 at 9, 14, 22, 42 and 47; “Original submissions,” *supra* note 99, letter by the Basel Convention Secretariat at 1; and “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 9.

redesign and other means of waste minimization.”¹⁹⁷ Although the list of methods to minimize waste was not meant to be exhaustive,¹⁹⁸ none of the measures listed hinted that radical changes in consumption might also be required.¹⁹⁹ IPEN described waste minimization in a similar way.²⁰⁰ It claimed that the term “chemicals” covered not only commodity and specialty chemicals, but also a “whole range of synthetic materials produced by the chemical industry,” such as adhesives, paints, inks, dyes, plastic additives and detergents, which were “widely used” in consumer products and constituted a “substantial fraction of the solid wastes that most societies either burn[ed] or dump[ed] in landfills.” Because the WSSD “2020 goal” called for the sound management of chemicals “throughout their life cycles,” IPEN claimed, SAICM needed to take in “all relevant aspects” of the management of chemicals-containing wastes,²⁰¹ including “reuse, recycling, product redesign and the promotion of “no waste” strategies at the national and community levels.”²⁰²

Like WWF, IPEN failed to point out that a drastic reduction in the amount of consumption might be required to tackle waste-related problems and achieve the sound management of chemicals “throughout their life-cycles.” So did the Secretariat of the Basel Convention, which in a note forwarded to the second PrepCom session insisted that “waste prevention” should be included among the actions of SAICM “with the goal of achieving zero waste through the use of less toxic alternatives as well as recycling, re-use and reclamation.”²⁰³ Even

¹⁹⁷ See “Original submissions,” *supra* note 99, letter by WWF at 2.

¹⁹⁸ WWF also mentioned the need for “clean/er production and technology,” another widely acknowledged method of waste minimization. See *ibid.* at 1.

¹⁹⁹ Of the measures listed, only reuse referred to consumption. There are two types of reuse. The first involves designing products to be used a number of times before they are discarded, e.g., milk bottles; the second occurs when alternative uses are found for products once they have served their original purpose, e.g., discarded tyres used as boat fenders. See Land Regeneration Network, “Waste Re-use,” online: <<http://www.grc.cf.ac.uk/lrn/resources/waste/management/re-use/index.php>>.

²⁰⁰ See “Original Submissions,” *supra* note 99, letter by IPEN at 7.

²⁰¹ See *ibid.* at 6.

²⁰² See *ibid.* at 7.

²⁰³ See SAICM “Perspective of the Secretariat of the Basel Convention on a SAICM,” UN Doc. SAICM/PREPCOM.2/INF/12, Nairobi, Kenya (4 August 2004) at 2.

zero waste was depicted as something that could be achieved by promoting greener production and by reducing consumption through the reuse of products that would otherwise be discarded.

Switzerland and Norway were two of the governments that laid particular emphasis on waste minimization and argued that SAICM should “promote risk reduction across the whole life cycle of chemicals, including when chemicals bec[a]me or [we]re contained in waste.”²⁰⁴ Accordingly, they suggested that one of the risk reduction objectives in the OPS should be “to reduce the volume of hazardous waste generation and reduce the toxicity of such waste.”²⁰⁵ While it called for a reduction of hazardous waste in terms of both quality and quantity, the proposal did not suggest that such reduction would demand a considerable reduction in the amount of chemicals consumed; it only specified that it would require “promoting activities in [the] sustainable and ecologically viable production of chemicals (i.e., green chemistry).”²⁰⁶ Once again, the means described to minimize waste concerned qualitative changes in production only.

If the idea that many non-hazardous chemicals could pose serious risks after becoming waste had been fully absorbed, however, even qualitative changes in production would have entailed important restrictions on the quantity of chemicals being consumed. In a statement submitted for information purposes to the second PrepCom session, twelve NGOs working on chemical safety issues in East Africa said that “SAICM should promote waste minimization, with emphasis on those materials that exhibit[ed] toxicity in their ordinary life cycles,” and that “synthetic materials” that “generat[ed] toxic releases

²⁰⁴ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 9.

²⁰⁵ See *ibid.* at 13.

²⁰⁶ See *ibid.* at 9. According to the U.S. Environmental Protection Agency (EPA), green chemistry is the use of chemistry for pollution prevention, specifically through “the design of chemical products and processes that reduce or eliminate the use and generation of hazardous substances.” See U.S. EPA, “Green chemistry,” online: <http://www.epa.gov/greenchemistry/pubs/whats_gc.html> (last visited 25 March 2007) and Paul Anastas and John Warner, *Green Chemistry: Theory and Practice* (Oxford U. Press: New York, 1998).

when they [we]re burned and/or when they degrade[d] in the environment” should be “avoided.”²⁰⁷ Because substances not usually categorized as hazardous, such as various kinds of plastic,²⁰⁸ would fall under the category of materials to be averted, the second measure could have entailed a drastic reduction of the amount of chemicals and products available for consumption. The statement was submitted for information purposes only, however, so it did not generate discussion, as no similar measure was proposed during the SAICM negotiations.

In line with the proposals presented, SAICM reflects the view that the reduction of hazardous waste generation requires nothing but changes in production. While the OPS states that one of SAICM’s risk reduction objectives is to “reduce the generation of hazardous waste, *both in quantity and toxicity*,”²⁰⁹ the means by which this is to be achieved are “the application of best practices, including the use of alternatives that pose less risk,” the “production of reusable/recyclable consumer goods and biodegradable products” and the “undertak[ing of] research into innovative means of cleaner production,”²¹⁰ all of which involve qualitative changes in production alone.

²⁰⁷ See SAICM, “Eastern African Non-governmental and Civil Society Organization Statement on [SAICM],” UN Doc. SAICM/PREPCOM.2/INF/9, Nairobi, Kenya (13 July 2004) at 5.

²⁰⁸ See Berkeley Plastics Task Force, “Report of the Berkeley Plastics Task Force” (8 April 1996), online: <<http://www.mindfully.org/Berkeley/Berkeley-Plastics-Task-Force.htm>>; Environmental Research Foundation, “Some Hidden Hazards of a Plastic World” *Rachel Hazardous Wastes News* 216 (16 January 1991), online: <<http://www.ejnet.org/rachel/rhwn216.htm>>; Greenpeace International “Pyramid of Plastics,” online: <<http://archive.greenpeace.org/toxics/pvcdatabase/bad.html>>; and Sheela Rani Chunkath, “Hazardous Hues: Plastics vs. Glass” *The Hindu* (29 July 2001), online: <<http://www.mindfully.org/Plastic/Alternatives/Hazardous-Plastic-vs-Glass29jul01.htm>>.

²⁰⁹ See “SAICM OPS,” *supra* note 142, para. 14(h) (Emphasis added).

²¹⁰ See “SAICM GPA,” *supra* note 173, activities 70, 73 and 118.

5. Phase-outs and bans

In addition to supporting cleaner production and waste minimization, a number of participants suggested that SAICM should require the adoption of global trade bans and production and use phase-outs of certain groups of hazardous chemicals. IPEN suggested this in its response to the 2003 questionnaire, where it suggested that SAICM should identify those chemicals that posed “unmanageable risks”²¹¹ and subject them to global phase-outs and bans; such chemicals, IPEN claimed, included not only those that were “subject to global environmental transport” and fell under the scope of the Stockholm Convention, but also those that were “persistent and bioaccumulative and/or that exhibit[ed] endocrine disruption properties.”²¹²

During the first PrepCom session, Greenpeace International identified the phasing out of certain chemicals by 2020 as critical to achieving chemical safety, as did Women in Europe for a Common Future (WECF), ICFTU and WWF.²¹³ Greenpeace reported that, in response to an informal survey conducted during the meeting by several IPEN participating organizations, the idea that certain chemicals should be phased out had received “overwhelming support” among respondents and should thus be included among SAICM’s objectives.²¹⁴ Norway and Switzerland agreed and proposed listing as an objective of SAICM the elimination by the year 2020 of the production and use of “hazardous chemicals,” “in particular” persistent bioaccumulative substances, heavy metals, endocrine disruptors and chemicals that were carcinogenic, mutagenic or toxic to reproduction. Australia expressed

²¹¹ See “Original Submissions,” *supra* note 99, letter by IPEN at 1 and 9-10.

²¹² See *ibid.* at 10. WWF called for “phase-outs and/or severe restrictions on the production, use, import and export of POPs and “POP-like” substances by 2020.” See *ibid.*, letter by WWF at 1.

²¹³ See “PrepCom-1 daily 2,” *supra* note 104 at 1-2; see also WECF, “About WECF,” online: <<http://www.wecf.org/>>.

²¹⁴ See “PrepCom-1 report,” *supra* note 105 at 10 (additional notes taken by the author during the meeting). While African and Latin American countries might have supported phase-outs for certain chemicals in response to IPEN’s survey, neither the African group nor GRULAC supported such phase-outs in the regional statements that they submitted to the next PrepCom session.

reservations about the proposal, arguing that existing treaties such as the Stockholm Convention phased out specific chemicals on the basis of specific criteria.²¹⁵ In contrast, the proposed objective suggested that entire groups of chemicals should be phased out simply because of their hazardous properties, a measure that would have imposed considerable restrictions on international trade and would have contradicted the GATT/WTO principle that governments should adopt the “least trade-restrictive” measures necessary to achieve a desired level of environmental or health protection.²¹⁶

WECF and IPEN reiterated their call for bans and phase-outs at the next PrepCom session.²¹⁷ Their proposal was reflected in an outline of views prepared by the Secretariat during the meeting, which listed among SAICM’s risk reduction objectives “to ensure that chemicals that [could not] be handled without significant damage to human health and/or the environment [would be], by 2020, no longer produced, used, released or incorporated into products or articles;” such chemicals “would include: [POPs] and persistent, bioaccumulative and toxic substances not covered by the Stockholm Convention; some toxic heavy metals; substances that [we]re carcinogenic, mutagenic or toxic to reproduction; endocrine disruptors; and some acutely toxic pesticides.”²¹⁸ One important difference between this proposal and the one presented by Norway and Switzerland is that the latter did not include acutely toxic pesticides. As discussed in Chapter 3, such chemicals generally had local as opposed to global effects and it was therefore understood that they did not need to be subjected to global bans or phase-outs. The adoption of bans or phase-outs for these chemicals would thus be in contravention of

²¹⁵ See “PrepCom-1 daily 4,” *supra* note 126 at 2 and “PrepCom-1 report,” *supra* note 105 at 10.

²¹⁶ See General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194 [GATT], Art. XX(b), online: <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> and UNEP-IISD, “Environment and Trade: A Handbook” (2000), online: <http://www.iisd.org/pdf/envirotrade_handbook.pdf> at 27-29 (For further details see section 3 of Part III in Chapter 3).

²¹⁷ See IPEN, “To Delegates and Participants in SAICM PrepCom-2” (October 2004) at 2 (additional notes taken by the author during the meeting). The banning of certain chemicals was also supported by a group of labour organizations. See “Global Unions Statement,” *supra* note 167 at 2.

²¹⁸ See SAICM, “Risk Reduction: Synthesis of Views Submitted by the Secretariat,” UN Doc. SAICM/PREPCOM.2/CRP.17, Nairobi, Kenya (6 October 2004) at 2.

the international trade principle that governments should adopt the least-trade restrictive measures to protect the environment and health, which was embedded in the Rotterdam Convention. It is thus unsurprising that the PrepCom agreed to include only the first part of the proposed objective in the draft OPS,²¹⁹ while the list of chemicals to be phased out was removed at the insistence of the United States and Japan.²²⁰

By the time of the third PrepCom session, the idea that certain chemicals should be phased-out by 2020 had been completely lost, following revisions of the draft OPS by the Secretariat on the basis of comments submitted by participants.²²¹ Instead of a provision on phase-outs, the revised OPS affirmed that the purpose of the objectives of SAICM in relation to “science-based” risk reduction was “to ensure that, by 2020, chemicals [were] produced, used, released or incorporated into products or articles only in ways in which risks to human health and to the environment [were] minimized.”²²²

If the draft objective on phase-outs was deleted it was because, even though the African group, GRULAC, the CEE countries,²²³ Switzerland, Norway and IPEN supported it,²²⁴ a number of key actors, including Australia, the United States and the EU, did not. Australia, the United States and industry

²¹⁹ See “PrepCom-2 report,” *supra* note 107 at 59 (Annex VII, draft OPS).

²²⁰ See “SAICM PrepCom-2 Highlights,” *Earth Negotiations Bulletin* 15:110 (8 October 2004) [PrepCom-2 daily 4] at 2 (additional notes taken by the author during the meeting).

²²¹ Comments were submitted in writing, during regional consultations and at a meeting of the expanded bureau held in Sweden in the summer of 2005. See SAICM, “Draft [OPS],” UN Doc. SAICM/PREPCOM.3/3, Vienna, Austria (12 July 2005) [Draft OPS PrepCom-3] at 2.

²²² See “Draft OPS PrepCom-3,” *ibid.* at 5, para. 14, chapeau.

²²³ See SAICM, “Report of the 2nd African regional consultation on the development of a SAICM,” UN Doc. SAICM/AFRC.2/1, Saly, Senegal (31 March 2005) [African group 2nd regional meeting report] at 10; SAICM, “Report of the second Latin American and Caribbean regional consultation on the development of a strategic approach to international chemicals management,” UN Doc. SAICM/LAC2/1, Punta del Este, Uruguay (13 May 2005) [GRULAC 2nd regional meeting report] at 10; and “CEE regional meeting report,” *supra* note 112 at 13.

²²⁴ In a joint response, Switzerland and Norway, supported by IPEN, proposed reinserting a list of chemicals that should be phased-out by 2020 “taking into consideration the availability of substitutes and their costs.” See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 13, 26 and 186-187.

organizations explicitly rejected the draft objective.²²⁵ Essentially, they did so because it contradicted the notion that phase-outs should be used as a last resort to manage the risks posed by specific chemicals (or uses) on the basis of specific criteria. In other words, the measure contravened the principle that governments should adopt the least trade-restrictive measures necessary to protect health and the environment.²²⁶ Australia argued that the draft objective failed to take into account a range of “risk management strategies” that could reduce the risks of chemicals to human health and the environment,²²⁷ while the United States said that it “pre-select[ed] a general risk management option to cover broad classes of chemicals rather than using science-based decision making on a case-by-case basis for specific chemicals of concern.”²²⁸ The chemicals industry made similar claims. CropLife International suggested that “SAICM should not mandate [...] bans and phase-outs of broad categories of chemicals,” but focus on “understanding and communicating risks and increasing cooperation between chemical producers and users to help promote the sound management and proper use of chemicals.”²²⁹ Together with the ICCA, it argued that, “as a general rule, all substances should be regulated in accordance with the degree of risk they pose[d], consistent with a science-based risk assessment and mindful of the[ir] beneficial contributions.”²³⁰ Industry organizations also argued that phase-outs should apply to specific *uses* of particular chemicals rather than to the chemicals themselves, and only when scientific evidence proved that those uses posed “unmanageable risks.”²³¹

Although the EU did not comment on the draft objective,²³² it suggested that

²²⁵ See *ibid.* at 3.

²²⁶ See *supra* note 14.

²²⁷ See *ibid.* at 6.

²²⁸ *ibid.* at 51.

²²⁹ See *ibid.* at 101-102.

²³⁰ See *ibid.* at 102. A similar view was held by the International Council on Mining and Metals (ICMM). See *ibid.* at 182.

²³¹ See ICCA, “Perspective of ICCA on SAICM,” UN Doc. SAICM/PREPCOM.2/INF/2 (7 July 2004) at 3 and “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 98 and 182.

²³² See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *ibid.* at 67.

the objectives of the OPS should inform the prioritization of the measures in the GPA and that actions targeting the “minimization or reduction of exposure” to “particularly hazardous substances, such as carcinogenic, mutagenic and toxic to reproduction, persistent, bioaccumulative, toxic substances, endocrine disruptors and heavy metals such as mercury, cadmium and lead,” should be a criterion to guide such prioritization.²³³ This statement hinted that the EU supported minimizing, rather than eliminating, exposures to these chemicals.²³⁴ The Asia-Pacific group rejected the objective on phase-outs more overtly by proposing as an alternative “to ensure that, by 2020, chemicals [would be] produced, used, released or incorporated into products or articles only in ways in which risks to human health and to the environment [we]re minimized.”²³⁵

Following its deletion by the Secretariat based on the comments received, at the third PrepCom session Switzerland and Norway insisted on reinserting the objective concerning phase-outs, as well as a list of substances as “possible examples of such chemicals.”²³⁶ The list again did not include acutely toxic pesticides, so IPEN suggested adding “immunotoxicants” and “neurotoxicants” to it, with which two major classes of acutely toxic pesticides might be considered for phase-out.²³⁷ To reiterate, the listing of these chemicals would entail a considerable restriction of international trade (because of the much greater number of chemicals involved) and an affront to the principle embedded in the Rotterdam Convention that only chemicals with global effects deserved to be globally phased-out or banned. Not surprisingly

²³³ See *ibid.* at 73.

²³⁴ See *ibid.* at 79.

²³⁵ “Asia Pacific regional meeting report,” *supra* note 131 at 9.

²³⁶ See SAICM, “Policy guidance on substances that pose unmanageable risks: submission by Norway and Switzerland,” UN Doc. SAICM/PREPCOM.3/CRP.15 (20 September 2005) [Policy guidance proposal] at 2.

²³⁷ See SAICM, “Amendments to the draft OPS: submission by IPEN,” UN Doc.

SAICM/PREPCOM.3/CRP.8 (19 September 2005) at 2 (Note: two major classes of acutely toxic pesticides, carbamates and organophosphates, are toxic to the nervous system and would thus be covered by the provision).

then, Japan and the ICCA rejected the proposed paragraph and,²³⁸ with Canada, Australia and the United States, urged a greater emphasis on “science-based risk assessments.”²³⁹ In the end, the matter was resolved in informal consultations among interested delegations. Eventually, it was agreed that chemicals “or chemical uses” that pose an “unreasonable [or] unmanageable risk to human health and the environment” should be phased out by 2020 on the basis of “a science-based risk assessment and taking into account the costs and benefits as well as the availability of safer substitutes and their efficacy;” it was also decided that the risks from “unintended releases” of chemicals posing unmanageable risks should be “minimized.”²⁴⁰ A list of specific groups of chemicals was included, but as chemicals that “might be prioritized for assessment and related studies,”²⁴¹ not as examples of chemicals that should be phased out by 2020, as originally intended.

The provision was approved, with minor amendments, by the ICCM.²⁴² In the end, the outcome that prevailed was that which was consistent with international trade principles and which affected the production, consumption and trading of hazardous chemicals the least. Not only are “unmanageable risks” to be determined through “risk assessments” rather than hazard (i.e., the intrinsic properties of a chemical), but also phase-outs might be limited to specific uses of a chemical rather than to the chemical itself, as desired by the agrochemicals industry. Also, consistent with the Stockholm Convention’s approach to dealing with unintentionally produced POPs,²⁴³ releases of chemicals posing unmanageable risks that are unintentionally produced (e.g., in the manufacture of certain chemicals and a myriad of other industrial processes) are to be minimized rather than eliminated.²⁴⁴ This means that there

²³⁸ See “SAICM PrepCom-3 Highlights” *Earth Negotiations Bulletin* 15:120 (21 September 2005) at 2.

²³⁹ Notes taken by the author during the meeting.

²⁴⁰ See “Draft OPS PrepCom-3,” *supra* note 221, para 14(d).

²⁴¹ See *ibid.*

²⁴² The paragraph was divided into two sections and the list of chemicals to be considered for assessment was moved to a footnote. See “SAICM OPS,” *supra* note 142, para. 14(d).

²⁴³ See section 2(b) of Part III in Chapter 4 (unintentionally produced POPs).

²⁴⁴ See “SAICM OPS,” *supra* note 142, para. 14(d)(ii).

is no need to reconsider those processes (and the products that result from them) that release such chemicals and for which no viable alternatives exist.

The most obvious reason why industry and other actors rejected the proposal concerning phase-outs is that it would have imposed important restrictions on international trade, as entire groups of chemicals might be phased out. A less obvious but equally important reason why the measure was rejected so strongly is that it had far-reaching implications for the understanding of precaution in the context of chemicals management. One of the points made by Switzerland at the second PrepCom session was that “SAICM should contribute to the better understanding, the operationalization and the more coherent implementation of general international principles in the specific area of chemicals policy,” for instance by “clarify[ing] that specific characteristics such as persistency or bioaccumulation, linked with insufficient knowledge, could be an important criteria for implementing precautionary measures.”²⁴⁵ That was precisely what the proposal presented by Switzerland and Norway aimed to do. The reasoning behind the proposal was that, because for some hazardous chemicals it was “difficult to set safe exposure levels for human health and/or the environment,” those chemicals should be considered to pose “unmanageable risks” and exposure should thus be avoided.²⁴⁶ The proposal suggested that a substance with certain hazardous properties should be phased out in order to *avoid* risks, despite the absence of conclusive scientific evidence regarding those risks. As discussed below, this constituted an exceptional interpretation of the precautionary principle that the countries of JUSCANZ, industry groups and others were not prepared to accept and which, while framing consumption in qualitative terms, could impose drastic limits on the volume and number of chemicals on the market.

²⁴⁵ See “Comments Concrete Elements,” *supra* note 75 at 19.

²⁴⁶ See “Policy guidance proposal,” *supra* note 236 at 2.

6. Precaution and chemicals management

Throughout the SAICM negotiations, it was widely accepted that precaution should be one of the “principles” or “approaches” guiding the implementation of SAICM.²⁴⁷ The issue of *how* and *where* it should be articulated, however, generated much disagreement and debate, a significant part of which took place in contact group meetings. The first dispute concerned which formulation of precaution should be used in the “principles and approaches” section of the OPS. The second disagreement was over whether, and how, to refer to precaution in the risk reduction objectives section of the OPS.

a) The precautionary approach/principle and SAICM

The PrepCom began discussing the section on “principles and approaches” of the OPS at its second session.²⁴⁸ Everyone, including the chemicals industry, agreed that the precautionary approach, as articulated in Principle 15 of the Rio Declaration on Environment and Development,²⁴⁹ should guide the implementation of SAICM.²⁵⁰ This was entirely predictable since, as discussed in Chapter 4, from the Principle 15 formulation follows the idea that precaution is nothing more than one component of risk management²⁵¹ rather

²⁴⁷ Among the actors who supported including the precautionary “principle” or “approach” in SAICM before the first PrepCom session were Austria, Egypt, Japan, Norway, Switzerland, UNIDO, the WHO, the ICCA, IPEN and WWF. See “Tabular Compilation of Responses,” *supra* note 56 at 5, 9, 12, 17, 19, 30, 36-37, 42-43 and 47. The debate over whether precaution constitutes a “principle” of international law or merely an “approach” is considered in section 3(b) of Part III in Chapter 4.

²⁴⁸ At the first PrepCom session, participants simply proposed elements that could be included in the section on principles and approaches. See “PrepCom-1 report,” *supra* note 105 at 7 and 11.

²⁴⁹ Principle 15 provides that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” See *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) Annex I [Rio Declaration], Principle 15.

²⁵⁰ See “Tabular compilation of Responses,” *supra* note 56 at 37 and “ICCA Perspective PrepCom-2,” *supra* note 152 at 3.

²⁵¹ The European Commission, for instance, argues that “the precautionary principle should be considered within a structured approach to the analysis of risk,” in particular risk management, so that where there are “reasonable grounds” for concern that potential hazards may affect the environment or human, animal or plant health, the principle can be applied to reduce risks according to the “desired level of protection.” See Commission of the European Communities, “Communication on the Precautionary Principle,” doc.

than an alternative approach for dealing with scientific uncertainty that seeks to avoid, rather than simply “manage,” risks.²⁵² Paragraph 23 of the WSSD plan of implementation reinforced this interpretation by linking the pursuit of the “2020 goal” with the use of “transparent science-based risk-assessment procedures and science-based risk management procedures, taking into account the precautionary approach, as set out in [Rio] Principle 15.”²⁵³

The issue was not whether Principle 15 should be one of SAICM’s principles and approaches, but whether precaution as “further elaborated and defined” in chemicals-related agreements should also guide its implementation and development.²⁵⁴ At the second PrepCom session, Australia, New Zealand and the United States claimed that they could only accept those principles and approaches that had been universally agreed on, in particular those that were contained in the Rio Declaration, which were also supported by GRULAC.²⁵⁵ Switzerland and others argued, however, that some principles and approaches had evolved in the field of chemicals management since 1992 and that SAICM should recognise such developments.²⁵⁶

To set the stage for further debate on the issue at its next session, the PrepCom requested Switzerland to identify principles and approaches that could be incorporated into SAICM. This led to the elaboration of a study on

COM(2000)1, Brussels (2 Feb 2000) at 3 and 10-11, online:
<ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf>.

²⁵² Although risk management and precaution are both rooted in science, they approach scientific uncertainty in different ways by asking different kinds of questions that lead them to use different methodologies. Risk management seeks to determine what level of risk by a particular substance or activity is acceptable, while precaution asks how much risk can be avoided by inquiring what are the alternatives or opportunities for prevention. As a result, the precautionary approach requires more comprehensive analyses that involve not only the risks of a substance or activity but also the feasibility of alternative technologies and products (as well as an analysis of whether the activity or product is needed at all), emphasizing the multiple uncertainties involved. In addition, it shifts the presumptions used in decision making, placing the responsibility for demonstrating relative safety and analyzing alternatives on those undertaking potentially harmful activities. For further details see section 3(b) of Part III in Chapter 4.

²⁵³ See “WSSD Plan of Implementation,” *supra* note 149, para. 23.

²⁵⁴ See “Draft OPS PrepCom-3,” *supra* note 221 at 10, para. 10(b)(v).

²⁵⁵ See “PrepCom-2 report,” *supra* note 107 at 19; “PrepCom-2 daily 3,” *supra* note 112 at 2 and “GRULAC 1st regional meeting report,” *supra* note 109 at 7.

²⁵⁶ See “PrepCom-2 daily 3,” *ibid.* at 2.

the matter that Switzerland entrusted to CIEL, a participating organization of IPEN.²⁵⁷ One of the key conclusions of the study was that, although the most “widely accepted articulation” of precaution was that of Rio Principle 15, precaution had “evolved significantly” in the area of international chemicals management since the adoption of the Rio Declaration; specifically, its scope had “expanded from environmental protection policies to include also the protection of human health;” it had been formulated in an active rather than a passive way (i.e., while Rio Principle 15 provided that “lack of full scientific certainty sh[ould] not be used as a reason for postponing cost-effective measures,” the Stockholm Convention *requested* parties to decide “in a precautionary manner” whether a new substance should be covered by the treaty); and the “cost-effective” qualifier of Principle 15 had been “shown to apply to the *choice* of appropriate precautionary measures, but not to the decision of whether precautionary measures should be *taken*.”²⁵⁸ In view of those developments, the study suggested that the “principles and approaches” section of the SAICM OPS should include “precaution, as set out in Principle 15 of the Rio Declaration and as further elaborated and defined in multilateral chemicals and wastes conventions and agreements, which ha[d] broadened the scope of precaution to include human health and ha[d] provided additional guidance for its use in decision making.”²⁵⁹

On the basis of the CIEL study and at the request of the expanded bureau, the Secretariat revised the draft OPS for consideration by the PrepCom.²⁶⁰ The section on “principles and approaches” was divided into two sections. The first section listed principles and approaches developed for “general application,” among which precaution, “as set out in [Rio] Principle 15,” was singled out; the second section listed principles and approaches that had been

²⁵⁷ See “PrepCom-2 report,” *supra* note 107 at 18-19 and SAICM “Paper submitted by the Government of Switzerland on principles and approaches of sustainable development and chemicals management for a SAICM,” UN Doc. SAICM/PREPCOM.2/INF/4, Vienna, Austria (20 July 2005) [CIEL study] at 13-17.

²⁵⁸ See “CIEL study,” *ibid.* at 16 (emphasis in original).

²⁵⁹ See *ibid.*

²⁶⁰ See “PrepCom-3 report,” *supra* note 137 at 7.

developed in “the context of chemicals management,” including “precaution, as further elaborated and defined in multilateral chemicals and wastes conventions and agreements.”²⁶¹

At the third PrepCom session, the African and Arab groups suggested merging the two lists into one so as to avoid duplication. This meant that approaches that were included in both lists, such as precaution, would make up a single paragraph, as initially suggested by CIEL. The two lists were maintained, however, as the EU, Canada, Australia, Switzerland, the United States and others supported the division to mark a distinction between principles and approaches that had been universally agreed upon, which SAICM should not attempt to renegotiate, and other principles and approaches that could “break new ground” and guide chemicals management into the future. What that guidance should be became a major point of contention, however, with precaution at the centre of the debate. On one side were Australia, Canada, Japan, the United States, the ICCA and the ICC, who insisted that SAICM should not depart from the Rio Principle 15 wording and opposed any reference to precaution on the second list because it would be tantamount to renegotiating the wording of Principle 15.²⁶² On the other side were Switzerland, Norway, the EU and IPEN, who supported the text drafted by the Secretariat.²⁶³

The discussion on precaution quickly moved to a contact group, where participants hoped to draft a text that would be agreeable to the PrepCom. At that point, Australia, Canada, Japan and the United States submitted a proposal that would replace the entire text drafted by the Secretariat. They explained that, instead of using “nicknames” such as “precaution,” the first section of principles and approaches listed a number of instruments from

²⁶¹ See “Draft OPS PrepCom-3,” *supra* note 221 at 10, para. 10(b)(v).

²⁶² Notes taken by the author during the meeting; see “ICC statement PrepCom-3,” *supra* note 152 at 2 and *infra* note 263.

²⁶³ See “Draft OPS PrepCom-3,” *supra* note 221 at 10, para. 10(b)(v).

which “relevant principles, approaches and provisions” could be found.²⁶⁴ The second section listed several “approaches of specific application in the context of chemicals management.” The “approaches” listed, none of which concerned precaution, included that “risk management decisions should be founded on science-based risk assessment;” that “where there [wa]s significant risk, alternatives to chemicals and uses of chemicals should be considered, taking into account benefits, costs and efficacy;” and that “risk management actions should be proportional to the assessed risk.”²⁶⁵ The proposal was rejected by many participants not only because it did not refer to precaution as further developed in chemicals-related instruments but also because it did not single out which general principles and approaches should guide SAICM. In the opinion of the representative of a member of IPEN, to adopt an instrument on chemicals that did not even mention precaution in its section on principles and approaches would be “shocking.”²⁶⁶

The issue of precaution was still unresolved at the ICCM meeting, when Australia, Canada, Japan and the United States submitted a new proposal, this time joined by New Zealand (thereby completing the “JUSCANZ” group) and the Republic of Korea. Instead of listing specific principles or approaches of “general” and “specific” application, the proposal simply listed instruments that were said to contain principles and approaches that should guide SAICM’s implementation.²⁶⁷ Although key actors, including the EU, Norway and Switzerland initially rejected this approach,²⁶⁸ they eventually agreed to it

²⁶⁴ It is possible that New Zealand did not join the other JUSCANZ countries at PrepCom-3 in an effort to be impartial, since a representative of New Zealand chaired the contact group on principles and approaches throughout the SAICM negotiations. At the ICCM, however, New Zealand finally joined the other JUSCANZ countries and made it clear that it did not support making references to precaution in the principles and approaches section of the OPS. See *infra* note 287.

²⁶⁵ See “Draft OPS: Principles and Approaches: submission by Australia, Canada, Japan and the USA,” UN Doc. SAICM/PREPCOM.3/CRP.30, Vienna, Austria (22 September 2005) at 2.

²⁶⁶ Notes taken by the author during the meeting. The two groups could not reach an agreement, so the entire section on principles and approaches that had been drafted by the Secretariat was put in square brackets to indicate a lack of consensus. See “PrepCom-3 report,” *supra* note 137 at 20-21 (additional notes taken by the author).

²⁶⁷ See “ICCM ENB report,” *supra* note 194 at 5.

²⁶⁸ See *ibid.* at 6.

in informal consultations as part of a compromise package that resolved all outstanding issues in the SAICM instruments. Thus, the final OPS provides that in developing and implementing SAICM and the GPA, governments and other stakeholders should be guided by the principles and approaches contained in a number of non-legally binding instruments (e.g., the Stockholm and Rio declarations) and treaties, including the Basel, Rotterdam and Stockholm conventions, “where applicable to them.”²⁶⁹ In the opinion of four participants, the fact that SAICM does not specify which principles and approaches should guide its implementation and asks governments to follow agreements to which they are already bound means that it breaks “no new ground” in guiding chemicals management.²⁷⁰

b) Precaution as a risk reduction objective

The most important implication of adding a reference to post-Rio developments, according to its supporters, was that precautionary measures would be required to prevent adverse effects of chemicals not only on the environment, as provided in Rio Principle 15, but also on human health.²⁷¹ This did not necessarily mean that SAICM would interpret precaution as being more than a risk management tool, however; even the ICCA said that one of SAICM’s goals should be “to take risk-based and cost-effective chemicals management measures to *prevent human health* and environmental effects, consistent with the precautionary approach as set forth in Principle 15.”²⁷²

As in the negotiations on the Stockholm Convention, the views of industry and environmental organizations clarified what was really at stake. The former claimed that the purpose of SAICM should be to “manage” rather than

²⁶⁹ See “SAICM OPS,” *supra* note 142, para. 20(b).

²⁷⁰ Interviews with two environmental NGO representatives and two government representatives on the last day of the ICCM meeting, Dubai, United Arab Emirates (6 February 2006).

²⁷¹ This argument was made by CIEL, the EU and Switzerland during the third PrepCom session. See “PrepCom-3 daily 3,” *supra* note 161 at 2 (additional notes taken by the author during the meeting).

²⁷² See “ICCA Perspective PrepCom-2,” *supra* note 152 at 3 (emphasis added).

to simply “reduce” or “eliminate” chemical risks. This argument was premised on the idea that all chemicals presented risks to human health or the environment if improperly managed, while chemicals with “high hazard characteristics” could be safely managed “for unique and beneficial use,” and the “effective management of risks” of a chemical was therefore a function of how the chemical was *used*, not of its inherent properties or characteristics. Following this view, industry organizations claimed that SAICM should adopt a “risk-based” rather than a “hazard-based” approach, consistent with the WSSD plan of implementation.²⁷³ This meant that instead of seeking to reduce or eliminate the risks from chemicals that had hazardous properties (e.g., persistence or disruptive effects on the endocrine system), SAICM should presume that those chemicals could be safely managed and demand precautionary measures on specific uses only, when there were clear signs that such uses could cause significant harm on health or the environment.²⁷⁴

Environmental NGOs interpreted precaution in a significantly different way. According to IPEN, the application of the precautionary principle/approach in the context of chemicals management meant that whenever a chemical of anthropogenic origin was present in food, water or air and there was insufficient scientific knowledge concerning its effects on human health or the environment, “decision-makers [should] err in the direction of caution [rather than] placing an unknowing or un-consenting public at risk.”²⁷⁵ Against industry’s view that chemicals with certain properties should be considered safe unless specific risks were conclusively identified, IPEN claimed that the application of precaution meant that whenever chemicals exhibited certain characteristics (e.g., biologically active properties), “the burden of proof should not be on society to demonstrate harm, but on the producer and user to demonstrate no harm.”²⁷⁶ Under this view, precaution would seek to reduce or

²⁷³ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 134.

²⁷⁴ See *ibid.* at 138 and 182.

²⁷⁵ See “Original Submissions,” *supra* note 99, letter by IPEN at 5.

²⁷⁶ See *ibid.* at 6.

eliminate rather than simply “manage” chemical risks and would reverse the burden of proof so that a chemical exhibiting certain properties would be presumed to be harmful unless manufacturers proved otherwise, rather than presumed to be safe. Following this interpretation, which as discussed above was supported by IPEN, Switzerland and Norway, in situations of scientific uncertainty the hazardous properties of a chemical should be enough for decision-makers to adopt precautionary measures such as bans or phase-outs.

In addition to supporting the measure on phase-outs discussed in the previous section, IPEN insisted that SAICM should make precaution operational by incorporating “clear statements” that the precautionary approach should be applied by decision makers when weighing scientific evidence.²⁷⁷ IPEN’s proposal²⁷⁸ was reflected in the draft OPS that resulted from the second PrepCom session, which listed among SAICM’s risk reduction objectives “to give priority consideration to the application of preventive measures when there [we]re reasonable grounds for concern, even when there [wa]s scientific uncertainty as to a causal relationship between a chemical and its environmental or health effects.”²⁷⁹

Many participants supported the proposed objective, including the African group, GRULAC,²⁸⁰ the Asia Pacific group and the CEE countries.²⁸¹ Australia, the United States and the chemicals industry strongly rejected it, however. Australia argued that it confused prevention, which could be applied irrespective of the degree of scientific uncertainty, with precaution, and that it

²⁷⁷ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 28.

²⁷⁸ IPEN urged calling for “preventive measures” when there were “reasonable grounds for concern, even when the evidence [wa]s inconclusive of a causal relationship between an activity and its effects.” SAICM, “Principles to be Operationalized within the Plan of Action and Concrete Measures: a Submission by IPEN,” UN Doc. SAICM/PREPCOM.2/INF/26, Nairobi, Kenya (5 October 2004) at 2.

²⁷⁹ See “PrepCom-2 report,” *supra* note 107 at 59 (para. 15(d) of draft OPS).

²⁸⁰ See “GRULAC 2nd regional meeting report,” *supra* note 223 at 10 and “African group 2nd regional meeting report,” *supra* note 223 at 11.

²⁸¹ The Asia Pacific and CEE regional groups suggested replacing the term “preventive measures” with “the precautionary approach,” presumably to establish a clearer connection between the draft objective and Rio Principle 15. See “Asia Pacific regional meeting report,” *supra* note 131 at 9 and “CEE regional meeting report,” *supra* note 112 at 13.

was at odds with Rio Principle 15, which constituted the “accepted position on scientific uncertainty in the chemicals management context” and was “called up in the chapeau [of] paragraph 23 of the [WSSD plan of implementation], which Australia strongly support[ed].”²⁸² The United States reiterated its position that SAICM should recognise and reaffirm the “already well-understood principles that [we]re contained in the 1992 Rio Declaration [and] should not attempt to articulate new principles of international environmental law or reinterpret the Rio principles.”²⁸³ The ICCA and the ICMM held analogous views, with the latter claiming that the Rio Principle 15 definition should not be replaced “anywhere in the SAICM text” and that the proposed paragraph read like a “redefinition of the precautionary principle.”²⁸⁴

Since four regional groups had supported the draft objective, the Secretariat decided to leave it for consideration by the PrepCom at its third session and limited itself to replacing “preventive measures” with “precautionary measures.”²⁸⁵ Predictably, at the third session Australia and the United States reiterated their opposition to the objective and, with Canada and India, suggested that it be either deleted or rephrased in accordance with the wording of Rio Principle 15.²⁸⁶ No agreement had been reached by the beginning of the ICCM meeting, when the countries of JUSCANZ and the Republic of Korea proposed reformulating the objective on precaution to require the application of the precautionary approach “as set forth in” in Rio Principle 15.²⁸⁷ The Rio definition was also backed by the Executive Director of UNEP, Klaus Töpfer, who in his opening statement said that SAICM should apply “the precautionary approach outlined in [Rio] Principle 15.”²⁸⁸

²⁸² See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 5-6.

²⁸³ See *ibid.* at 54.

²⁸⁴ See *ibid.* at 182.

²⁸⁵ See “Draft OPS PrepCom-3,” *supra* note 221 at 5, para. 14 (d) (risk reduction objectives).

²⁸⁶ See “SAICM PrepCom-3 Highlights,” *supra* note 237 at 2 (additional notes taken by the author).

²⁸⁷ See “ICCM ENB report,” *supra* note 194 at 5.

²⁸⁸ See “ICCM report,” *supra* note 96 at 10.

The issue of precaution remained contentious until the last hours of the ICCM meeting. As part of an overall compromise, participants finally agreed that “the precautionary approach, as set out in [Rio] Principle 15” should be “appropriately” applied, “while aiming to achieve that chemicals [would be] used and produced in ways that [would] lead to the minimization of significant adverse effects on human health and the environment.”²⁸⁹ As wished by JUSCANZ countries, industry and others, the final wording implies that, consistent with the Rio Principle 15 formulation, precaution is essentially a risk management tool. As a result, the continued production, consumption and trading of hazardous chemicals is not likely to be materially affected by SAICM. Nevertheless, the agreed paragraph made a connection, however ambiguous, between precaution and health. Afraid that it might be used as an additional barrier to international trade,²⁹⁰ the United States felt the need to declare that it understood that the “references to precaution in [SAICM we]re intended to represent the status quo, which [wa]s the appropriate application of Rio Principle 15 to science-based approaches to chemicals management,” and that “neither [such] references nor any other provision of [SAICM wa]s intended to affect the application or interpretation of rights or obligations under international agreements and law.”²⁹¹

Also, even though SAICM does not depart from the Rio Principle 15 formulation of precaution, it is foreseeable that the struggle for a different meaning will continue as SAICM evolves. This is likely to occur in the context of the GPA, since it is meant to be an “evolving tool” and provides that “stakeholders may wish to discuss” those activities on which consensus could not be reached.²⁹² One such activity is precisely the application of “precautionary measures when there are reasonable grounds for concern, even when there is a lack of full scientific certainty as to a chemical’s

²⁸⁹ See “SAICM OPS,” *supra* note 142, para. 14(e).

²⁹⁰ See “ICCM ENB report,” *supra* note 194 at 8.

²⁹¹ See *ibid.* at 11.

²⁹² See *ibid.* at 28.

environmental or health effects.”²⁹³ The discussion on precaution constitutes a concrete instance where counter-hegemonic norms and ideas might eventually emerge within SAICM.

7. International Trade and SAICM

Perhaps the best indication of how hegemonic liberal economic norms were in the SAICM negotiations is that actors representing a wide range of interests explicitly upheld those norms in some of their statements and proposals. The liberal economic perspective was defended not only by industry organizations and the countries of JUSCANZ, but also by UNEP, a number of public interest NGOs and some governments, including several developing countries, Switzerland and Norway.

First, a few actors suggested that trade liberalization and the proper functioning of market systems was essential to achieving SAICM’s overall objective, the WSSD “2020 goal.” Predictably, this view was held by the chemicals industry. The ICCA, for instance, argued that a key to achieving the 2020 goal was to promote the design and application of products and technologies that were “more environmentally friendly, more energy efficient, less resource intense, less polluting and [more] oriented towards recycling.”²⁹⁴ This, it claimed, would require that SAICM “develop means to eliminate unnecessary barriers to innovation and trade.”²⁹⁵ Similarly, the ICC argued that “business solutions that contribute[d] to meeting [...] sustainable development objectives rel[ied] on innovation, production efficiencies and the free flow of innovative products to world markets.” As a result, SAICM needed to “provide and support enabling frameworks for businesses to develop and improve products [and] bring those products to market in a

²⁹³ See SAICM, “Draft GPA,” UN Doc. SAICM/ICCM.1/4, Dubai, United Arab Emirates (6 December 2005) at 69 (Table C).

²⁹⁴ See “Original Submissions,” *supra* note 99, letter by ICCA at 3.

²⁹⁵ See *ibid.* at 2.

cost-effective and timely manner without [o]bstacles of technical barriers to trade.”²⁹⁶ Because SAICM could have adverse impacts on small and medium size businesses in developing countries, the ICC also urged delegates to ensure that SAICM’s measures would be “in alignment with WTO rules and [would] not pose market access barriers [... and] work within the free market system, seeking the most cost effective approaches to risk reduction.”²⁹⁷

Not only industry organizations defended free trade, however. UNEP did too by prescribing “sound policies” that could be implemented in a “practical manner so as to strengthen industry’s innovation potential and free trade and competition to the benefit of society” in order to ensure that chemicals would be “used and handled safely throughout the product chain.”²⁹⁸ Austria did not explicitly defend free trade, but suggested that SAICM should seek to ensure that chemicals were used “rightly” and “efficiently” to minimize their release into the environment, among other things by stimulating the “diffusion of best practices,” including “products, technologies and business models” to achieve “ecological as well as economic benefits.”²⁹⁹ Using customary WTO jargon,³⁰⁰ Austria advised that SAICM’s “backbone” should be to create “win-win situations” where the “application of innovative products, technologies and business models [would] lea[d] to prosperity and economic success while at the same time being ecologically favourable.”³⁰¹ As envisioned by Austria, UNEP and the chemical industry, proper business models would lead to innovative products and technologies that would surely benefit both the environment and economic development.

²⁹⁶ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 132.

²⁹⁷ See *ibid.*

²⁹⁸ See “Background and Mandate SAICM,” *supra* note 41 at 2.

²⁹⁹ See “Original Submissions,” *supra* note 99, letter by Austria at 2-3.

³⁰⁰ According to the Committee of Trade and Environment of the WTO, “win-win situations” occur when the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development. See WTO, “Understanding the WTO,” 3rd ed., October 2005 at 92, online:

<www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.doc>.

³⁰¹ See “Original Submissions,” *supra* note 99, letter by Austria at 3.

Others presented more concise proposals. Such was the case with New Zealand, which simply recommended that SAICM be consistent with the norms of the WTO and be the “least trade distorting” possible.³⁰² With Australia, the United States, Switzerland and Norway, New Zealand also defended international trade principles by rejecting a provision that would have asked governments and other actors to “ensure that countries that [had] ban[ned] the sale or use of specified chemicals within their own territories [did] not export, or permit the export of, those chemicals.”³⁰³ These governments rejected the provision on the basis that it was inconsistent with the Rotterdam Convention, which allows parties to export hazardous chemicals that they have banned for domestic use under certain circumstances.³⁰⁴ Although the proposed provision in effect asked countries to adopt a more stringent standard than that required by the Rotterdam Convention, it contradicted the principle of international trade on which the Convention is based, i.e., that governments should adopt the “least trade-restrictive” measures (in this case prior informed consent) to achieve an acceptable level of environmental or health protection and that global bans and phase-outs should be used only as a last resort and to deal with chemicals with clearly “global” effects.³⁰⁵ In the end, the calls for consistency between SAICM and the Rotterdam Convention played to the advantage of those who sought to reaffirm international trade principles and, at their insistence, the proposed provision was deleted from the draft GPA.³⁰⁶

In an overt effort to protect international trade norms in SAICM, the United States, with Canada and India, also supported the insertion of a “savings clause” to “clarify” that SAICM was “not intended to supercede/conflict

³⁰² See “Tabular Compilation of Responses,” *supra* note 56 at 15.

³⁰³ See PrepCom-2 report,” *supra* note 107 at 54 and 16 and “PrepCom-2 daily 4,” *supra* note 220 at 2 (additional notes taken by the author during the meeting).

³⁰⁴ For details on the PIC procedure and the Rotterdam Convention see Chapter 3.

³⁰⁵ This principle is articulated in Chapter 39 of Agenda 21 and in the report of the ad hoc working group of experts that met in 1996 to discuss the possibility of extending the scope of the PIC convention beyond PIC. See *supra* note 14 and “1996 Group of Experts Report,” *supra* note 8 at 10.

³⁰⁶ See “ICCM report,” *supra* note 96 at 9. While this and other activities were deleted from the GPA because participants could not reach agreement on them, it was agreed that they could be discussed at a future date. See “ICCM report,” *ibid.* at 28.

with/violate/affect existing (domestic or) international legal obligations.”³⁰⁷ The proposed rule had the purpose of ensuring that if a provision in SAICM were found to be inconsistent with a norm of international trade, the latter would take precedence over it. Although neither the PrepCom nor the ICCM was prepared to establish a legal hierarchy between trade and environmental norms,³⁰⁸ they both welcomed a proposal presented by Switzerland and Norway at the third PrepCom session to include as an objective of SAICM the promotion of “the mutual supportiveness between trade and environment,”³⁰⁹ with a corresponding activity in the GPA.³¹⁰ WWF had made a similar suggestion in its response to the 2003 questionnaire, where it called for the “recognition” in SAICM that trade and multilateral environmental agreements such as the Basel, Rotterdam and Stockholm conventions were “mutually supportive and that measures taken pursuant to [those treaties] should be presumed [to be] consistent with WTO rules unless there [wa]s clear evidence that their application involve[d] discrimination that [wa]s arbitrary and unjustifiable.”³¹¹

Like WWF, Switzerland and Norway wanted to clarify that there was no legal hierarchy between SAICM and international trade law and that any trade restriction imposed by SAICM should thus be understood as being compatible with the norms of the WTO.³¹² By affirming the “mutual supportiveness” between trade and environmental norms, however, SAICM implies that existing international trade norms are consistent with the goals of SAICM and

³⁰⁷ See “PrepCom-3 report,” *supra* note 137 at 27 (additional notes taken by the author during the meeting).

³⁰⁸ The proposal for a savings clause was eventually withdrawn in exchange for other concessions, including a reference to SAICM being a “voluntary” initiative. See “ICCM report,” *supra* note 96 at 6, 8-9 and 11 and Dubai Declaration, *supra* note 96, para. 28 (additional notes taken by the author).

³⁰⁹ “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 14. See also “PrepCom-3 report,” *supra* note 137 at 17 and 74 and “ICCM ENB report,” *supra* note 194 at 4 and 6.

³¹⁰ See “Submissions Draft OPS and Concrete Measures for PrepCom-3,” *supra* note 114 at 42. The GPA asks UNEP and other stakeholders to “ensure mutual supportiveness between trade and environment policies.” See “SAICM GPA,” *supra* note 173, activity 250.

³¹¹ See “Original Submissions,” *supra* note 99, letter by WWF at 3.

³¹² Interview with a representative of Switzerland (9 April 2007). For an outline of the ongoing debate concerning the relationship between WTO law and trade-related obligations under MEAs within the WTO see pages 95-97 and footnotes 163-165 in Chapter 2.

that chemical safety can be achieved within a liberal economic world order that is premised on continued economic growth and the production, consumption and trading of an ever-increasing volume and number of chemicals and chemicals-containing products.

The last proposal is perhaps the most remarkable, as it was explicitly grounded on liberal economics and was submitted by a large network of public interest groups, revealing the extent to which the liberal economic perspective was hegemonic in the SAICM negotiations. Initially articulated by IPEN, the proposal was that SAICM should “fully incorporate” the polluter pays principle as formulated in principle 16 of the Rio Declaration.³¹³ According to IPEN, this meant that the cost of chemical safety programmes should be internalized within the industries that produced and used chemicals without “distort[ing] international trade and investment.”³¹⁴ The Environmental Health Fund, a participating organization of IPEN, further elaborated the proposal in a paper that it submitted with IPEN and the African group at the third PrepCom session.³¹⁵ In essence, the paper claimed that the costs that governments had to incur in fulfilling their duty to protect the environment and human health from the negative effects of chemicals were “economic externalities.” Since these externalities arose from the “economic decision” of certain industries to manufacture and use chemicals, it was the responsibility of those industries to fund them.³¹⁶

Claiming to follow “liberal economic terms,” the paper described the “uncompensated” harms to the environment or health associated with chemical exposures as a “market failure” and SAICM as a “global effort” to

³¹³ Principle 16 provides that “national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” See Rio Declaration, *supra* note 249, Pple. 16.

³¹⁴ See “Original Submissions,” *supra* note 99, letter by IPEN at 8.

³¹⁵ See SAICM, “Paper Submitted by [IPEN] on Internalization of SAICM Costs Within Relevant Producer Industries,” UN Doc. SAICM/PREPCOM.3/INF/2, Vienna, Austria (9 September 2005) at 1.

³¹⁶ See *ibid.* at 2-3.

“correct” that failure by putting in place “adequate measures [t]o protect the public’s health and the environment from harms associated with the growth and spread of chemical production and chemical use.”³¹⁷ Like Agenda 21 and the IFCS Bahia instruments, the paper suggested that the key to chemical safety was to reach a point where all countries had “competence” in the field of chemicals management, while the “increased chemical production, chemical use and chemical imports” and the “strong market forces” that were promoting them were taken for granted.³¹⁸ Furthermore, IPEN clarified that the primary intent of the proposal was “to generate the funds that governments w[ould] need [t]o institute robust chemicals management [programmes],” rather than either to “discourage [or] encourage chemical production and use.”³¹⁹ Predictably, IPEN failed to achieve the desired objective because the proposal had important financial implications for the chemicals industry and was therefore rejected by industry organizations and other free trade advocates.³²⁰ The important point is that IPEN, whose primary concern is the environment, suggested in its proposal that chemical safety could be achieved irrespective of growing consumption. According to the proposal, the problem was not increasing consumption but that chemical companies, with their “economic externalities,” were distorting the market, and liberal economics offered a suitable way to fix it through price regulation.³²¹

³¹⁷ See *ibid.* at 12.

³¹⁸ See *ibid.*

³¹⁹ See *ibid.* at 8.

³²⁰ The main goal of the study was to prompt the adoption of a global instrument to internalise the costs of chemicals management programmes in relevant industries. This idea was supported by the African group, GRULAC and the CEE countries, but was openly rejected by industry and Australia and tacitly opposed by the EU, which expressed support for costs internalization as a *national* strategy to mobilise resources for the implementation of SAICM. Due to a lack of support for IPEN’s proposal, the PrepCom decided that SAICM should simply ask governments to assess and adopt economic instruments to internalize the external costs of chemicals “at the national and sub-national levels” and to exchange relevant information with UNEP. See “PrepCom-2 report,” *supra* note 107 at 17; “PrepCom-2 daily 3,” *supra* note 112 at 2; “PrepCom-3 ENB report,” *supra* note 194 at 9-10 (additional notes taken by the author during the meeting); “GRULAC 2nd regional meeting report,” *supra* note 223 at 12; “African group 2nd regional meeting report,” *supra* note 223 at 14; “CEE regional meeting report,” *supra* note 112 at 7; and “SAICM OPS,” *supra* note 142, paras. 19(a)(iv) and para. 19(a)(v).

³²¹ Although economic approaches that are critical of free trade and continued economic growth, such as ecological economics, make use of terms such as “externalization” and “cost internalization,” they see these microeconomic instruments as being fundamentally inadequate to tackle environmental problems. This is because while they are an effective means of allocating resources efficiently and getting prices

While IPEN's main objective was to establish a mechanism for funding the implementation of SAICM, it nevertheless grounded its strategy on liberal economics and arguably helped to reinforce the liberal economic perspective by suggesting that chemical safety could be achieved regardless of the increasing volume of chemicals being produced, used and traded. As discussed in Chapter 1, to say that a perspective is hegemonic does not necessarily imply that all actors have internalized that perspective, but that they have chosen it to frame their arguments and proposals because of a perceived need to be realistic, practical or persuasive. IPEN's proposal, therefore, should not be understood as an indication that IPEN organizations approved of the free trade ideal and other liberal economic principles, but rather as a clear sign that liberal economic norms were hegemonic in the SAICM negotiating process.

IV. Questionnaire: liberal environmentalism as "hegemony"

What has been substantiated so far is that although many actors in the SAICM negotiations saw the growing consumption and production of chemicals as part of the reason why a strategic approach was needed, none of them presented proposals that confronted consumption in quantitative terms. Either purposely or inadvertently, through their statements and proposals the great majority of actors in the SAICM process suggested that they accepted the increasing amount of chemicals and wastes being produced and consumed worldwide as an unavoidable fact. This, I have argued, is because liberal economic norms played a hegemonic role in the SAICM negotiations. Again, this does not mean that all participants deliberately sought to defend liberal

"right," they presuppose that the economy is a system independent of the environment and thus cannot deal with the questions of *scale*, i.e., with how much the economy can grow given the physical limits imposed by the natural environment (which is a macroeconomic rather than a microeconomic issue). For further details see Herman E. Daly, *Beyond Growth: the Economics of Sustainable Development* (Boston: Beacon Press, 1996) at 45-60.

economic norms in SAICM, but that those norms were the language with which actors from different camps framed their proposals and arguments.

As discussed in Chapter 1, an important aspect of a perspective being hegemonic is that even those who do not adhere to hegemonic norms adopt them because of a perceived need to be realistic or practical. This section investigates the extent to which that perception existed in the SAICM negotiating process by looking at the responses of a representative group of survey participants. The following three questions comprised the survey, which participants were asked to respond to in their personal capacities rather than as representatives of particular organizations or countries:

1. Do you believe that the increasing consumption of hazardous chemicals (and of products containing these chemicals) is sustainable (i.e., do you think that the *quantity* of hazardous chemicals being consumed worldwide is consistent with the carrying capacity of the planet)?
2. If you think that the answer to question (1) is no, what should be done, in your view, to address the problem of increasing waste generation and production and consumption of hazardous chemicals?
3. Do you think that existing international conventions are going in the right direction?

Fifty-two participants responded to the survey, including representatives of twenty-six countries from the five UN regions; four industry organizations; eight advocacy, health or environmental NGOs; one regional economic integration organization; one major labour union confederation; the secretariats of three chemicals-related instruments; and four inter-governmental organizations dealing with chemical safety with a focus on agricultural, environmental, industrial development or health-related issues. Thirty-nine out of fifty-two respondents expressed the view that the growing quantity of chemicals being consumed worldwide was *not* sustainable.³²² When considering what should be done about it, however, only five of them pointed out that consumption itself was a problem by stressing. These actors

³²² Some individuals said that this was so not only because the current and anticipated level of consumption of chemicals appeared to be exceeding the capacity of the planet to absorb pollutants and waste, but also because of the negative effects of many chemicals on human health.

suggested that the root problem was consumerism and unsustainable (or “Western”) patterns of consumption, which two of them claimed were being reproduced all over the world through a paradigm of development that was “fundamentally flawed” from an environmental point of view. Several respondents said that part of the problem was that we did not know the risks that we were facing, given the substantial degree of scientific uncertainty regarding the environmental and health effects of most chemicals on the market and the fact that negative environmental or health effects of chemicals often did not emerge for years or even decades.

Although they agreed that the growing consumption of some chemicals was not sustainable, seven participants felt uncomfortable with the idea that it was the *quantity* of hazardous chemicals being consumed that was at issue. One of them said that the first question “need[ed] rephrasing” because the issue was “not so much the quantity of hazardous chemicals that we consume[d], but how we d[id] it, even if the quantities [we]re low.” Another suggested that the problem was “less about the quantity of hazardous chemicals [being] consumed than about how those chemicals [we]re being managed –specifically as it relate[d] to actual releases to the environment.” In essence, these actors claimed that what made chemicals consumption unsustainable was not the quantity but the quality of the substances being consumed, specifically their hazardous properties and the degree of exposure and risk that could result from their use or release. In stark contrast to this view, one of the thirty-nine actors in the first group said that “over-consumption (quantitative dimension) was a real and serious issue” because “we w[ould] never reach a point where all products [we]re non-hazardous in content and throughout their production process, then product sale, use and reuse/recycling into more products.”³²³ Still, he said that he had chosen to focus on the “qualitative dimension” of the problem because he saw it as the “most pressing issue” given the “direct and

³²³ This participant also said that “the current and ever-increasing use of hazardous substances in consumer products [wa]s not sustainable.”

long-lasting damage [of some chemicals] to the environment” and because it seemed “more realistic in terms of achieving change.”

Of the remaining six respondents, only three said that the increasing global consumption of hazardous chemicals was sustainable.³²⁴ The other three said that they did not feel confident enough to respond to the first question. Notably, one of them suggested that the answer to that question was irrelevant because the “increasing waste generation and production and use of hazardous chemicals [we]re facts, whether or not they [we]re a sustainable phenomenon.” This respondent suggested the more “interesting” issue was thus “whether these facts c[ould] be managed more sustainably and [chemicals-related] conventions c[ould] improve matters.”

Although thirty-nine respondents thought that the growing consumption of hazardous chemicals was not consistent with the carrying capacity of the planet, only six of them suggested the need to limit that growth in quantitative terms through drastic changes in consumption patterns, including through radical reforms of the economic system. In response to the second question, most participants in this group proposed tackling production and consumption exclusively in qualitative terms. Similar to the proposals presented during the SAICM negotiations, some of the solutions proposed were the development and use of cleaner technologies and safer alternatives; hazardous waste minimization via changes in production; the adoption of global bans and phase-outs on certain hazardous substances that had global effects; the adoption of more stringent rules concerning the responsibility of industry for the safety of its products; the application of the polluter pays principle to orient consumption towards “greener” products; better information for

³²⁴ The first said that it was “both sustainable, if managed soundly, and predictable for the foreseeable future as populations gr[e]w and nations develop[ed] economically,” while the second argued that the planet could “clearly handle more chemicals [and] the issue [wa]s how much of a given chemical c[ould] be used [...] without accumulating to the point that it cause[d] harm.” The third expressed the view that it was sustainable in some regions, where stringent norms concerning the testing and management of chemicals were implemented.

consumers to enable them to make informed (and presumably “greener”) choices; and the implementation of precautionary measures to deal with certain chemicals in the face of scientific uncertainty concerning their effects. Regarding precaution, a few respondents hinted that it would require avoiding certain substances due to their hazardous properties, e.g., persistence or ability to disrupt the endocrine system. This view was consistent with the proposals presented by Switzerland, Norway and IPEN during the SAICM negotiations and could have entailed substantial restrictions on the production, use and trading of hazardous chemicals. In contrast, one respondent said that he did not “believe” in the precautionary approach, as it would lead to inaction and hinder innovation and progress.³²⁵

A few participants made more radical proposals but did not suggest that the economic system would need to be drastically reformed. Two proposed massive campaigns to raise awareness among individual consumers about their “unsustainable practices,” which they presumed would lead to more sustainable ones. Two others said that sustainable consumption and production patterns needed to be further developed and implemented at the global level, but one of them said that it would take a “miracle” to make people demand and consume less. Another suggested that “the only alternative that w[ould] save the planet [was] organic farming and going back to natural ways of living.” In the opinion of another participant, however, the shift to organic agriculture was not feasible, as food security for an increasing world population could only be achieved through the increased use of chemical pesticides and fertilizers, i.e., through industrial agriculture.³²⁶

³²⁵ This respondent was among those who suggested that what made chemicals consumption unsustainable was not so much the quantity but the quality (hazardousness) of the substances being consumed.

³²⁶ According to this respondent, “some statistics [suggested] that in order to halve the number of hungry people in the world by 2015 we need[ed] to increase food production – some 80% of the necessary increase w[ould] have to come from land that [wa]s already under cultivation – [an] intensification [that would] require chemical inputs both pesticides and fertilizers.” He then concluded that there was “no other way.”

Only three respondents suggested that sweeping social and economic changes were essential to achieve a truly sustainable kind of development and to effectively tackle unsustainable consumption patterns. The first said that the solution lay in “bringing down the wealthy,” an “oligarchy” that was richer than any other in history and was “imposing on others a model of consumption that [wa]s both irresponsible and criminal,” since the desire to bridge the “gulf of inequalities” in society created a natural desire in people to follow that model, which would inevitably strain the physical limits of the biosphere. Achieving sustainable consumption would also require “that we renounce ... many of our assets,” in order that “those who had few assets [would have] enough to have a decent livelihood,” and that we ensure “food production sovereignty (which [wa]s different from food security) everywhere and for everyone (via autonomous local production for local consumption).”

The second respondent argued that the “development paradigm” and consumerism were not sustainable and that only a “sweeping reform of the international economic and educational models w[ould] bring about the changes required to address the problem at its root.” Nevertheless, he expressed the view that “changing the economic paradigm of consumerism [would be] very, very difficult, not to say impossible,” and that the only alternative that we had left was to “try to control, through international negotiations, those effects [of chemicals consumption] that were visible and most drastic.” The third respondent said that to “really achieve sustainability” we needed to “redevelop our society, our standard of living and some of the basic philosophies of our consumerist society,” such as the “idea that increased production and consumption w[ould] lead to economic growth and deliver the financial resources required to clean up the environment.” Even so, he said that “for the moment the existing conventions and programmes [we]re the best we c[ould] achieve.”

Some of the respondents who did not answer “no” to the first question suggested a number of solutions premised on liberal economic norms. One suggested, for instance, that there needed to be a “better integration” between the work of chemicals-related treaties and the work of the OECD, since “a lot of the chemicals work there ha[d] its basis in burden sharing and harmonization of approaches (with an eye towards minimizing technical barriers to trade) [and there was] tremendous expertise there which could theoretically be harnessed to great advantage.” Another argued that it was necessary to “keep encouraging green design and production as a market based advantage for private sector firms.” A third actor proposed levelling the playing field across borders through the development of more “standardized regulations,” as well as the “development and implementation of market based incentives to encourage better practices and technologies.” A fourth said that the “only chance we ha[d] for achieving sustainability [wa]s through cultural change” and by making sustainability “popular.” This would “lead to increased demand for the sustainable lifestyle,” which would in turn lead to “increased supply of sustainable designs, goods and services.” This cultural change, he suggested, could only occur at the regional level, since we were “not quite ready for a universal cultural code,” and “with little government interference, or [we would] risk losing our freedom of choice.” Like the proposals presented by UNEP, the chemicals industry and Austria during the SAICM negotiations, these respondents suggested that free trade, market-based incentives and innovation could lead to sound chemicals management and environmental sustainability.

In response to the third question, nearly all respondents (forty-three) said that current international instruments concerning chemicals were a step in the “right direction,” even if much more needed to be done to implement them effectively in all countries and to cover gaps in the chemicals management

regime, which some suggested was still in its “infancy.”³²⁷ In contrast, three respondents suggested that current agreements were part of the problem. Two of them said that while they had helped to create awareness on the issue of chemicals management, they had also contributed to delaying the adoption of the radical decisions that were required to address the root of the problem, i.e., consumerism. One claimed that “strong commercial interests” underlay existing treaties. The other said that current agreements were founded on the principle of “risk management” and thus helped to reinforce industrial development, which, both agreed, was unsustainable. The third respondent said that the existing international conventions could not address the problems of increasing waste generation and production and consumption of hazardous chemicals because “they [we]re led by the exporting countries, governments and most importantly multinationals producing chemicals.”

A fourth felt a need to distinguish between different agreements; he said that while the Basel Convention had been considerably weakened because it was now “dominated by the recycling industry,” SAICM offered an opportunity to adopt a “preventive approach” to deal with chemical substances. He suggested that SAICM itself was adequate and that the problem was that it faced “enormous challenges,” including the “productivity-oriented and economic visions of economic development,” the pressure in many countries to negotiate free trade agreements, weak labour organizations and a still inadequate level of participation of civil society in environmental decision-making processes. A fifth respondent suggested that existing conventions were showing to have “limited value” because governments tended to agree to tighter controls only when the chemicals to be controlled had “little or no commercial value,” such as the great majority of POPs covered by the

³²⁷ Some of the gaps mentioned by participants were a lack of adequate knowledge concerning the environmental and health effects of most chemicals on the market, insufficient resources and implementation, insufficient involvement of civil society in decision-making processes, a need for increased industry responsibility for the safety of its products and greater political will by governments to list relevant chemicals in existing agreements to protect the environment and health.

Stockholm Convention. The remaining four participants did not comment on the adequacy of existing chemicals-related agreements.

1. Individuals vs. organizations

With a few exceptions, the responses to the questionnaire revealed a correlation between the proposals presented during the SAICM process and the views of the individuals who attended the negotiations. First, even though the majority of respondents thought that the growing quantity of chemicals being consumed worldwide was not environmentally sustainable, only a handful of those participants suggested the need to tackle consumption in quantitative, and not only qualitative, terms. Second, in addition to the fact that only a handful of participants said that radical changes in the economic system and consumerism were required to tackle consumption, all but one of them suggested that, for the time being, it was unrealistic and impractical to expect those changes to take place. Despite their open rejection of liberal economics and consumerism, these participants decided to focus on what was “achievable.” They viewed alternatives to liberal economics as lacking “weight, plausibility, credibility or practical effectiveness,”³²⁸ a fact that confirms that liberal economic norms played a hegemonic role in the SAICM negotiating process. Third, like some actors in the SAICM negotiations, a number of respondents explicitly defended liberal economic norms and ideas, expressing the belief that chemical safety could be surely achieved within a liberal economic world order. Lastly, nearly all respondents suggested that existing chemicals-related agreements were a step in the “right direction,” which accords with the statements made by many actors during the SAICM process regarding the need for SAICM to be consistent with those agreements.

³²⁸ Stephen Gill, *Power and Resistance in the New World Order* (NY: Palgrave MacMillan, 2003) at 169.

V. Conclusion

A look at the SAICM negotiations reveals that liberal economic norms and ideas pervaded the process and affected its outcome in important ways, the most important being that SAICM fails to confront consumption in terms of the volume, and not only the hazardousness, of the chemicals and chemicals-containing products that we consume. A few key actors defended liberal economic norms overtly and deliberately. They included the countries of JUSCANZ, large industry organizations (e.g., the ICC and the ICCA) and a few developing countries, most notably India. Liberal economic norms were also upheld by those who did not necessarily seek to defend them, however, suggesting that those norms indeed played a hegemonic role in the SAICM negotiations. Regardless of what their intentions were, actors from different camps used liberal economic norms as the language with which to structure and ground several of their statements and proposals. This chapter has argued that this led them to accept the growing quantity of chemicals consumed as an unavoidable fact and to frame the problem of chemicals consumption as being merely of a qualitative nature.

The proposal to internalize the costs of chemical safety programs in relevant industries is perhaps the best example of this phenomenon, as it was overtly grounded on liberal economics and was presented by IPEN, a network of over 180 public interest organizations, including numerous environmental and health non-governmental organizations of varied sizes.³²⁹ Clearly, the purpose of the proposal was not to defend liberal economic norms in SAICM, but to make the chemicals industry responsible for part of the costs of implementing SAICM. Even so, IPEN decided to ground its arguments on liberal economic norms, which led it to affirm that chemical safety could be attained

³²⁹ IPEN organizations include large ENGOs based in the North such as Greenpeace International, WWF and the Sierra Club, as well as smaller grassroots organizations from developing countries such as Fundación Aguaclara (Venezuela) and the Association de Lutte pour la Protection de l'Environnement et de la Promotion de l'Agriculture Biologique (Congo). See IPEN, "Participating Organizations," online: <http://www.ipen.org/ipenweb/ipen/2_3_po.html> (Last visited 26 May, 2007).

irrespective of the ever-greater volume of chemicals being produced, consumed and traded. Similarly, the proposal of Switzerland, Norway and WWF to affirm the “mutual supportiveness” between trade and environmental norms, while denying that there should be a legal hierarchy between the two sets of norms, implied that existing international trade norms and principles were compatible with the goals of SAICM and that chemical safety could be achieved within an economic system premised on those norms and continued economic growth in all countries.

The personal views of a representative group of individuals who attended the SAICM negotiations corresponded, with a very few exceptions, to the statements and proposals submitted by participants during the negotiations. While the majority of respondents thought that the rate of consumption of hazardous chemicals was not sustainable, most of them framed the problem of consumption in terms of quality rather than quantity and proposed solutions that tackled the problem in only that way. Very few of them said that radical changes in the economic system or ending unsustainable life-styles would be necessary to address the problem at its root, while all but one of those participants suggested that it was not realistic or practical to work towards such changes for the time being. These few actors explicitly rejected liberal economic norms but expressed the view that it was not realistic to challenge them, substantiating the argument that the liberal economic perspective was hegemonic role in the SAICM negotiations at the level of individuals.

Legal norms played a crucial role in reinforcing the hegemony of liberal economic norms in the context of the SAICM negotiations, as most actors agreed that SAICM should build on, rather than seek to modify, existing chemicals-related international instruments, in particular the Basel, Rotterdam and Stockholm conventions. The need for consistency between SAICM and existing instruments was emphasized even more after it was decided that SAICM itself would not be a legally binding instrument; because of SAICM’s

inferior legal status, it was widely understood that it should not seek to contradict existing legal norms. The calls for consistency between SAICM and relevant agreements played to the advantage of those who defended international trade norms in SAICM, primarily because those norms were incorporated in widely agreed international environmental instruments.

Thus, even though the ICCM decided not to insert a “savings clause,” which was supported by the United States, Canada and India and would have effectively established a legal hierarchy between SAICM and international trade law, it agreed to delete a measure that asked countries not to export hazardous chemicals that they had banned for domestic use on the grounds that it contradicted the Rotterdam Convention. In doing so, the ICCM reaffirmed the principle embedded in the Rotterdam Convention that governments should apply the least trade-restrictive measures (i.e., PIC rather than bans or phase-outs) required to protect the environment or human health from hazardous chemicals that did not have global effects. Similarly, those who defended liberal economic norms in SAICM fought hard to ensure that SAICM would not modify the formulation of precaution of the Rio Declaration on Environment and Development, which framed precaution as a risk assessment tool that would not pose a significant challenge to the continued production, use and trading of the great majority of hazardous chemicals. If they were successful in their efforts, it was largely because the Rio Declaration was a universally agreed legal instrument.³³⁰

Because liberal economic norms were so pervasive in the SAICM negotiating process, participants addressed the issue of consumption without dealing with the difficult question of whether the growing volume of chemicals being consumed worldwide was consistent with the “2020 goal.” As a result,

³³⁰ Furthermore, the WSSD plan of implementation, another universally agreed instrument, linked the pursuit of the 2020 goal with the use of risk assessment and risk management procedures “taking into account” the precautionary approach as set out in Rio Principle 15. See “WSSD Plan of Implementation,” *supra* note 149, para. 23.

SAICM deals with the problem of chemicals consumption only by calling for qualitative changes in production. The measures proposed include the application of cleaner production processes and technologies; the substitution of safer, including non-chemical alternatives for hazardous chemicals; and hazardous waste minimization via increased recycling, reuse and cleaner production. Like the Basel Convention, SAICM reaffirms the hegemony of liberal economic norms by presupposing that the goal of waste minimization and the protection of the environment and human health can be achieved irrespective of the increasing amount of chemicals consumed.

The only area in which the possible elimination of hazardous chemicals use is contemplated in SAICM is agriculture. Agricultural practices are only addressed in the global plan of action (GPA), however, which has an inferior legal status to that of the overarching policy strategy (OPS) because it was not formally adopted by the ICCM and because it provides that its activities are to be implemented “voluntarily” by stakeholders. In addition, none of the objectives or commitments expressed in the Dubai Declaration or the OPS, which governments and other actors are asked to implement through the GPA activities, concern agricultural practices. SAICM therefore fails to challenge the pesticide-dependent industrial agricultural model in any real way.

The achievement of hegemony is always “complex, contested, contradictory and necessarily incomplete,”³³¹ however, and a number of proposals reveal that liberal economic norms were not uncontested in the negotiations on SAICM. Even though they upheld liberal economic norms in some of their statements and proposals, IPEN, Switzerland and Norway also suggested that groups of chemicals that exhibited certain characteristics should be phased-out as a precautionary measure in order to avoid risks, despite a lack of conclusive scientific evidence regarding the nature and extent of the threats that they posed. While framing the problem of consumption in qualitative

³³¹ Gill, *supra* note 328 at 62.

terms, these actors pushed for an interpretation of the precautionary approach or principle that, because the degree of scientific uncertainty regarding the environmental and health effects of most chemicals on the market is considerable, could have imposed significant limits on the continued production, consumption and trading of a potentially very large number of chemicals. As mentioned above, this understanding of precaution was not adopted in SAICM, given the insistence of key actors that SAICM should not depart from the widely agreed formulation of the precautionary approach contained in the Rio Declaration. Nevertheless, the struggle to give a different meaning to the concept of precaution is likely to continue, in particular in the context of the GPA, which is meant to be an evolving tool. The debate on precaution therefore constitutes a concrete instance where counter-hegemonic approaches for dealing with hazardous chemicals might eventually emerge within SAICM.

Chapter 6

Conclusion

A perspective becomes hegemonic when the ideas that underlie it and the actors who defend those ideas succeed in dominating the discussion and the framing of specific issues in a given social system. In the case of international environmental negotiations on hazardous chemicals, it involves the widely accepted framing and resolution of concrete problems in ways that do not pose a challenge to the prevailing perspective or the social forces that defend it. This does not mean that all actors accept the hegemonic perspective in a normative sense, but that they nevertheless use it to frame their proposals, statements and arguments if not out of conviction then out of a perceived need to be realistic, practical or persuasive.

I have argued that liberal economic norms are hegemonic in the continuously evolving processes that are the Basel, Rotterdam and Stockholm conventions and, most clearly of all, the strategic approach to international chemicals management (SAICM), which is broader in scope than the three conventions and was negotiated by a considerably wider spectrum of actors who had the opportunity to submit their views on a wide range of issues. In all of these processes, participants representing different interests and sectors, including developed and less developed country governments, industry, environmental and health non-governmental organizations (NGOs) and international organizations, are using liberal economic norms and ideas to frame their proposals and arguments, while very few of them are contesting those norms. Regardless of whether or not these actors adhere to the view that economic growth and the liberalization of trade and finance are consistent with and necessary for environmental protection, liberal economic norms appear to provide the common language with which chemicals-related issues are being framed and addressed at the international level.

The most important implication of the hegemony of liberal economic norms in chemicals-related negotiations, I have further argued, is the widespread assumption that the environment and human health can be effectively protected from hazardous chemicals and wastes even though the volume of chemicals and chemical-containing products being produced and consumed worldwide (and the waste resulting from this production and use) is growing at a spectacular rate. Premised on that assumption, the actors who are involved in the processes considered in this study are failing to confront consumption in terms of the quantity and not only the quality (hazardousness) of the chemicals consumed, including those in products. This can be seen most clearly in the context of the Basel Convention and SAICM, where actors from all camps have constructed the principle of waste minimization as requiring nothing but changes in production –how to make it greener, cleaner and more efficient– while calls for a reduction in the amount of consumption are nowhere to be heard.

Similarly, the Rotterdam Convention presupposes the continued production, consumption and trading of the hazardous chemicals that it regulates, embracing the principle of international trade that governments should adopt the least trade-restrictive measures necessary to achieve an adequate level of environmental and health protection, which has been understood to mean that only specific chemicals or uses with clearly global effects justify the adoption of global trade bans or production and use phase-outs. In addition, because it is limited to regulating a system of information exchange and prior informed consent (PIC) for certain chemicals traded internationally, the Rotterdam Convention precludes debating the wider issue of their management. This leaves very little space for actors to formulate proposals that could challenge the liberal economic perspective, for instance by calling for the eventual or virtual elimination of the use of synthetic chemicals in agriculture via a shift

to organic agriculture to feed primarily local, rather than international, markets.¹

The Stockholm Convention on persistent organic pollutants (POPs) also confirms the principle that only specific groups of hazardous chemicals with global effects should be banned or phased out, as it was decided that only those POPs that could be transported globally would fall within its scope. Furthermore, even in the case of POPs, the negotiators decided that less stringent rules would apply to those POPs that are unintentionally produced in a myriad of industrial processes and activities. Because the elimination of these specified POPs would require phasing out activities and processes for which no viable alternatives exist, as well as the consumption of the products that result from those processes, it was generally deemed unrealistic and unfeasible. On the basis that “practical” approaches, i.e., approaches that would not require significant changes to the legal, political and economic structures of an increasingly globalized market economy, should be adopted to deal with the POPs issue, it was decided that these unintentionally released POPs should be reduced and eliminated only when “feasible.” Environmental NGOs did defend the goal of elimination, as did a number of governments. The latter, however, clarified that they understood the goal of elimination as being a political aspiration towards which parties should strive, while the former effectively softened their stance by suggesting that the goal could be achieved simply through changes in production. As in the case of the Basel Convention, these actors retreated from the radical position that the eradication of unintentional POPs by-products should also require revisiting those processes (and the products that result from them) for which viable “POP-free” alternatives do not exist. Because POPs by-products are released as the result of activities as prevalent as the incineration of wastes and the production of many chemicals, such a position would have been tantamount to

¹ This issue is considered in more detail below.

questioning whether certain economic activities should be open for political discussion.

As discussed in Chapter 1, the consolidation of liberal economic hegemony in international environmental negotiations is, to a significant extent, the product of the conscious and relentless efforts of a number of key actors to ensure consistency between international environmental agreements and the liberal economic perspective, as reflected in the norms and principles of international trade.² These actors are part of an emergent “transnational historical bloc” pushing for a more open world economy. Some of these actors have as their very mission the promotion of trade liberalization. Such is the case with the OECD, which was instrumental in ensuring that the voluntary system that formed the basis of the Rotterdam Convention would conform to international trade principles, and with the ICC, the ICCA and Croplife International, which were actively involved in the SAICM negotiating process and fought hard to prevent the adoption of further restrictions on international trade via phase-outs of groups of chemicals based on their hazardous characteristics.

A number of governments also have demonstrated a particularly strong commitment to liberal economic norms. These include the countries of “JUSCANZ,” namely Japan, the United States, Canada, Australia and New Zealand, who were particularly eager to defend international trade norms in the context of the negotiations studied here. As discussed in Chapter 2, since the initial negotiations on the Basel Convention these countries have strongly opposed that Convention’s “Ban Amendment,” which once in effect will essentially result in a ban on the export of hazardous wastes (including those

² As discussed in Chapter 2, some government representatives have defended the use of trade-restrictive measures that, because of their wide scope of application, would appear to contradict international trade principles in multilateral environmental agreements. This is the case with the EU, which has fully accepted an amendment to the Basel Convention that bans hazardous waste exports from a group of countries to another. Also as discussed in that chapter, however, these actors interpret such trade-restrictive measures as being nothing but legitimate exceptions to, rather than a negation of, international trade law.

that are recyclable) from developed to developing countries. If they eventually agreed to the adoption of the Ban Amendment, which they are yet to ratify, it is because the Basel Convention negotiations were extremely politicized and they felt the need to compromise, as those who supported the ban were the overwhelming majority. Canada and the United States also showed a strong commitment to the principle of free trade in both the regional and global POPs negotiations. Despite their special interest in the POPs issue, which was most evident in the case of Canada, these countries initially opposed the adoption of trade restrictions even for POPs. The countries of JUSCANZ also revealed a preoccupation with trade in their strong opposition to expanding the scope of the Rotterdam Convention beyond PIC, which could have entailed further restrictions on international trade. Similarly, together with the United States and the global chemicals industry, Germany, the United Kingdom and other OECD countries strongly opposed any controls on international trade in hazardous chemicals during the negotiations of the two voluntary instruments that preceded and formed the basis of the Rotterdam Convention.

If those who sought to ensure a consistency between international environmental agreements and liberal economic norms were successful in their efforts, it was to a large extent because international trade norms were embedded in key international environmental instruments. As discussed in Chapter 1, one of the characteristics of state modes of regulation is a quest for coherence or consistency among related parts. A fixation with coherence was most evident in the SAICM process, as achieving greater coherence among related instruments was one of the key purposes of SAICM. Throughout the SAICM proceedings, it was emphasized that SAICM should not seek to modify or contradict existing international legal instruments. As Chapter 5 argues, one concrete instance in which the quest for consistency played to the advantage of those who wanted to ensure that international trade norms would be protected in SAICM was the decision to delete a provision in which

governments were asked not to export substances that they had banned for domestic use, on the grounds that it contradicted the Rotterdam Convention. Another such instance was the decision to abide by the definition of precaution of the Rio Declaration on Environment and Development, which defined precaution as a risk management tool and ensured that hazardous chemicals (or specific uses) would be phased-out only on the basis of risk assessments and not in order to avoid potential risks when conclusive scientific evidence about their risks was lacking.

Repeated calls for consistency between related instruments were also heard in the negotiations on the two voluntary instruments that formed the basis of the Rotterdam Convention, which a number of actors, including the representatives of the OECD, industry and the FAO, argued needed to be consistent with a recommendation that had been adopted by the OECD and a provisional scheme adopted by UNEP, both of which excluded PIC. Similarly, in the processes leading up to the negotiations on the Stockholm Convention it was repeatedly emphasized that the work toward a global POPs convention should build on the work being carried out under UNECE's regional Protocol on POPs. That process, as maintained in Chapter 4, determined key principles regarding how the POPs issue should be framed and tackled at the global level, including the decision initially to limit the POPs treaty to a small number of substances and to adopt different approaches for intentionally and unintentionally produced POPs. In all these instances, calls for consistency between related instruments and regulatory efforts helped to reinforce key liberal economic norms and principles in the instruments that are the subject of this dissertation.

The members of the emergent transnational historical bloc referred to in Chapter 1 have played a decisive role in reinforcing liberal economic hegemony in chemicals-related international environmental negotiations, but they are by no means the only ones. International organizations such as UNEP

and the FAO and environmental and other public interest NGOs have also played a role, which is precisely why the concept of hegemony so aptly elucidates the nature of the supremacy that the liberal economic perspective is enjoying in chemicals-related international environmental negotiations.

With the exception of the ban on hazardous waste exports adopted under the Basel Convention's Ban Amendment, which UNEP helped to promote under the leadership of Executive Director Mostapha Tolba, UNEP has been eager to defend and uphold liberal economic norms in the negotiations considered in this study. This has significantly buttressed the liberal economic perspective in chemicals-related environmental negotiations, given that UNEP's mission is to "provide leadership and encourage partnership in caring for the environment"³ and that it plays an influential role in preparing the various documents, reports and analyses that are considered by participants. UNEP upheld liberal economic norms in the negotiations on the Rotterdam Convention, where Executive Director Elizabeth Dowdeswell urged the negotiators to ensure that the convention was consistent with relevant GATT/WTO agreements, as well as in the SAICM negotiating process, where Executive Director Klaus Töpfer urged a "deeper engagement" of industry in the development of SAICM and UNEP advised that SAICM should entail "sound policies" that could be implemented in a "practical manner so as to strengthen industry's innovation potential and free trade and competition." As discussed in Chapter 5, Töpfer also argued that the pervasive use of chemicals and the growth in their global production and trade had resulted in a true "chemicalization" of the world, yet he failed to suggest that this phenomenon could or should be controlled or reversed, stressing instead the need to improve the capacity of all countries to manage chemicals safely.

³ See UNEP, "About UNEP" (last visited October 4, 2007), online: <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43>>.

In the context of the negotiations on the two voluntary instruments that formed the basis of the Rotterdam Convention, the FAO was among those who insisted that international trade in hazardous chemicals should be controlled through a system of information exchange rather than prior informed consent (PIC). In resisting PIC, the FAO contributed to consolidating the view that international trade in hazardous chemicals should be controlled rather than banned. As discussed in Chapter 3, the initial resistance to PIC by the chemicals industry, a number of OECD countries and the FAO sent the message to those who were hoping for export bans that PIC was all that they might be able to achieve, as PIC was more onerous than mere information exchange but was also premised on the idea that international trade in hazardous chemicals should be controlled rather than proscribed. In that context, environmental groups such as the Pesticide Action Network decided to abandon the goal of eventually eliminating the use of synthetic pesticides in agriculture, which had been among their key goals, and ally themselves with developing countries in their calls for PIC, which they saw as being more achievable. Once industry and others were prepared to go along with it, therefore, PIC became the widely accepted compromise position on how the problem of international trade in hazardous chemicals should be tackled. Because PIC presupposes the continued trading and use of hazardous chemicals, it contributes to reinforcing the view that there is no need for solutions that seek to *avoid* the use of hazardous chemicals, such as ways to shift from industrial agricultural methods to agricultural practices that do not require the use of synthetic chemicals.

Perhaps the clearest indication of liberal economic hegemony can be appreciated in the proposal presented by IPEN during the SAICM negotiating process to internalize the costs of chemical safety programmes in relevant industries. Although, as maintained in Chapter 5, IPEN was looking to make the chemicals industry financially responsible for the implementation of SAICM, the proposal was explicitly grounded on liberal economics and

openly stated that its intention was neither to promote nor to discourage chemicals production and use. As a result, IPEN helped to bolster the liberal economic perspective and to reinforce the belief that chemical safety could be achieved irrespective of increasing consumption.

As discussed above, environmental non-governmental organizations (ENGOS) have also reinforced the liberal economic perspective in the context of the Basel Convention. Although they continue to resist the dominance of liberal economics in the Basel Convention by lending unconditional support to the Ban Amendment, Chapter 2 shows that ENGOS have chosen to interpret waste minimization as requiring nothing but changes in production methods. In doing so, they are reinforcing the conviction that the global waste crisis can be effectively addressed within a liberal economic world order. While a number of ENGOS are aware of the fact that waste minimization should also involve reducing consumption, they have decided to focus on the qualitative side of the waste problem because they see it as a more pressing issue and a more realistic and achievable objective, as it can be executed through market-based mechanisms and even industry supports action on that front. Consistent with liberal economics, these groups have made it their priority to rid the world of toxics first by calling on governments and other actors to demand the manufacturing of “toxic-free” products.

There are two reasons why achieving the goal of “toxic-free” products seems implausible, however, both of which were raised during the SAICM negotiating process. The first is that chemicals that display minimal or no hazardous properties during use can pose serious risks to the environment or human health during manufacture or upon becoming waste, which suggests that something as innocuous and prevalent as plastic could be toxic at some stage of its life cycle. The second is that there is a considerable degree of scientific uncertainty regarding the health and environmental effects of most chemicals on the market, while the campaign to eliminate toxic chemicals

covers only a very small portion of relevant chemicals, i.e., those that are *known* to be toxic. The strategy of ENGOs in the context of the Basel Convention—including their support for partnerships with industry, which as discussed in Chapter 2 are bound to presuppose increasing levels of consumption—might therefore prove counter-productive, as their focus on the qualitative side of the waste problem helps to divert attention from the issue of consumption.

If confronting consumption in quantitative terms is both wise and necessary, as I argue, and if the hegemony of liberal economic norms in chemicals-related negotiations has led actors to accept the increasing amount of chemicals being consumed and produced, then actors must reflect on possible avenues through which that hegemony might be challenged. One of the key insights of neo-Gramscian studies of world order is that hegemony is never fully achieved and is often contradictory and marked with fissures. It is by deepening these fissures that those who are preoccupied with consumption could start to formulate alternative solutions to the problems that multilateral environmental agreements on hazardous chemicals seek to address.

A number of fissures in the hegemony of the liberal economic perspective can be seen in the processes studied here. They can be observed in the context of the Basel Convention, where ENGOs have implicitly adhered to liberal environmentalism by portraying waste minimization as requiring nothing but improved production but have also continued to resist the dominance of liberal economics by lending their unconditional support to the Ban Amendment, which is also supported by several governments, including those of the EU countries. As suggested in Chapter 2, the Ban Amendment attests that legal norms can be a powerful tool with which to challenge liberal economic hegemony; even if it comes to be regarded as a mere legal “exception” to WTO law, the Ban challenges the liberal economic perspective and notions of economic efficiency because it suggests that industrialized

countries should not export hazardous wastes to poorer countries *even if* the latter can manage such wastes in an environmentally sound manner and even if it is economically efficient to do so. The views of representatives of the Basel Action Network that have not been expressed in the negotiations on the Basel Convention also suggest that the potential exists for elaborating more radical approaches to waste minimization that encompass and question, rather than presuppose, increased consumption.

A fissure in liberal economic hegemony can also be identified in the context of SAICM, where IPEN, Switzerland and Norway upheld international trade norms in some of their statements but also supported proposals that, while framing the problem of chemicals consumption in qualitative terms, could have resulted in significant restrictions on the production, consumption and trading of a potentially large number of chemicals. One such proposal called for the phase-out of entire groups of chemicals that exhibited certain hazardous properties, even when scientific evidence regarding their effects on human health and the environment was inconclusive. The proposal implied that, in the case of certain chemicals (e.g., those that were persistent or that accumulated in living organisms) the precautionary approach should be applied in order to avoid, rather than simply “manage,” possible risks to human health or the environment. Similarly, IPEN supported a proposal that called for the use of preventive measures when there were “reasonable grounds for concern,” even when scientific evidence regarding the causal relationship between a chemical and its environmental or health effects was not conclusive. Because of the degree of scientific uncertainty concerning the environmental and health effects of most chemicals on the market, the conception of precaution proposed by these actors, had it been adopted, could have required the phase-out of a considerable number of chemicals in order to avoid risks, posing a direct threat to the liberal economic perspective.

A similar understanding of precaution was articulated by ENGOs in the context of the Stockholm Convention negotiations. As discussed before, a number of ENGOs supported the goal of eliminating POPs by-products, yet they failed to suggest that achieving that goal might require reassessing those activities and processes (and the products that resulted from them) that generated POPs by-products and for which no viable alternatives existed. Instead they insisted, consistent with the liberal economic perspective, that the goal of elimination could be pursued through changes in production alone. On the other hand, these ENGOs advocated an understanding of the precautionary approach that, like the concept defended in the SAICM negotiations, sought to avoid POP-related risks, which were considered “unmanageable.” Had this interpretation been clearly articulated in the Stockholm Convention, it would have required the parties to reassess POPs-releasing activities (and the consumption of the products that resulted from them) in order to avoid risks.

Even the Rotterdam Convention, which is fully compatible with international trade principles, could eventually present a challenge to liberal economics. As feared by the United States and the global chemicals industry, many governments have come to see the list of substances subject to the PIC procedure, consisting of chemicals that have been banned or severely restricted for environmental or health reasons in a given number of countries, as a “blacklist” of chemicals that should be avoided in all countries. This perception, if it became widespread, could evolve into a de facto global phase-out of PIC chemicals. The PIC list contains only a very tiny fraction of the thousands of chemicals currently on the market. However, unlike the Stockholm Convention, which is meant to regulate chemicals with very specific characteristics, the Rotterdam Convention is meant to cover a wide range of industrial chemicals and pesticides and any chemical banned or severely restricted in a minimum number of countries for environmental or health reasons is a candidate to enter the PIC list. If the PIC list became

substantial enough and if the “blacklist” perception became widespread, therefore, the Rotterdam Convention could trigger significant restrictions on international trade. To the relief of free traders, however, the Convention requires that the decision to add a new chemical to the PIC list be made by consensus. As Chapter 3 argues, this provides parties with an effective tool to counter the “blacklist” effect, as they can prevent chemicals of commercial significance to them from entering the PIC list. The experience with chrysotile asbestos has demonstrated that the consensus-voting rule is indeed an effective mechanism for keeping the PIC list short and greatly limits the potential of the Rotterdam Convention to impose restrictions on international trade in hazardous chemicals.

The points made above suggest that the hegemony of liberal economic norms in international environmental negotiations is not complete. The negotiations also reveal, however, that economic liberalism constitutes a powerful perspective that is decisively framing how chemicals-related issues are being understood and addressed at the international level. Particular liberal economic principles such as the principle of free trade are being openly contested, as evidenced by the Basel Convention’s Ban Amendment and the view held by some actors that free trade should not apply to toxic wastes. At the same time, protests against the liberal economic belief that economic growth (i.e., increased consumption) will create the conditions that are necessary to achieve environmental protection are nowhere to be heard.

Confirming the proposition of transnational advocacy networks studies that such networks are more likely to gain influence if their ideas “fit well with existing ideas and ideologies in a particular historical setting,”⁴ public interest NGOs interacting in chemicals-related negotiations have decided to support arguments and proposals that do not pose a direct challenge to the liberal

⁴ See Margaret E. Keck and Kathrin Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca; London: Cornell U. Press, 1998) at 204.

economic worldview because they are more likely to resonate with governments and industry. I have argued that, in an effort to gain influence, these actors have chosen not to challenge consumption and they are therefore helping to reinforce the hegemony of the liberal economic perspective in international environmental negotiations. This holds true especially in the case of the SAICM negotiating process, which exhibited a greater degree of openness and participation by public interest organizations than treaty negotiations and could thus be perceived as being more “democratic,” even if only states had a right to vote and evidently only public interest NGOs with sufficient technical and financial means were able to attend the negotiations.⁵

As argued elsewhere, it is misleading to conceive of public interest NGOs, which are often said to represent elements of an emerging “global civil society,” as operating independently of the state and the market and thus as being inherently emancipatory, i.e., as a force that should be expected to counter the forces of global capitalism or global governance.⁶ As suggested by neo-Gramscian scholars, the definition of “civil society” that stems from Gramsci’s writings is ambiguous and “elastic” and implies that civil society, the state and the market are not clearly separated but rather are intermingled in complex ways.⁷ Civil society is thus better understood as the space where hegemony can be both constructed and challenged, as well as the constellation of actors that engage in the struggle for hegemony. Under this reading, ENGOs can be co-opted by states or corporate influence and contribute to stabilizing, rather than challenging, the social and political *status quo*,⁸ as the present study attests.

⁵ This begs the question of the extent to which those public interest NGOs that did participate in the negotiations represented their constituencies or other groups in their respective networks, an issue that exceeds the scope of this dissertation but could be the subject of further study.

⁶ See Ruth Buchanan, “Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization,” (2003) 16 *Leiden J. of Int’l L.* 673-699.

⁷ See Robert W. Cox, “Civil Society at the Turn of the Millenium: Prospects for an Alternative Order,” (1999) 25 *Review of International Studies* 3-28.

⁸ See *ibid.* at 11.

The co-opting of some ENGOs and other public interest NGOs, however, is not fully achieved, and the potential therefore exists for challenging the liberal economic perspective in the context of international environmental negotiations. Although ENGOs can be co-opted by states and the market, unlike state-led or industry organizations, ENGOs and the transnational networks that they develop (e.g., IPEN and PAN) are motivated primarily by principled ideas or values, including environmental protection and social justice.⁹ Public interest organizations should therefore take the lead in challenging liberal economic hegemony by deepening the fissures in that hegemony so that a wider range of solutions to the hazardous chemicals issue might emerge, including solutions that explicitly confront and problematize consumption.

One specific way in which ENGOs could challenge liberal economics is by continuing to insist on an alternative to the prevailing interpretation of precaution as reflected in Principle 15 of the Rio Declaration, which sees precaution as a method intended to manage, rather than avoid, the risks posed by chemicals or uses when conclusive evidence regarding their effects is lacking. As discussed in chapters 4 and 5, ENGOs have already articulated an alternative reading of precaution, which they could continue to advocate in the context of SAICM. The fact that a number of governments, in particular Switzerland and Norway, have supported this alternative interpretation of precaution means that there is a possibility, however small, for it to succeed. While efforts to define precaution in these terms could also be undertaken in the context of the Stockholm Convention, any achievements there are likely to be understood as applying only to POPs, which are only a small group of chemicals with very specific characteristics that the Stockholm Convention already presupposes pose “unmanageable” risks to the environment and human health and should thus be avoided. In other words, any redefinition of precaution in the context of the Stockholm Convention is unlikely to spill

⁹ See Keck and Sikkink, *supra* note 4 at 1-3 and 8.

over into the management of the thousands of known and potentially hazardous chemicals that are on the market that do not exhibit the characteristics of POPs.

Because of its broad scope, the SAICM process appears to be the space in which strategies for redefining precaution and directly confronting consumption might be most productive. Not only is SAICM meant to encompass the entire lifecycle of chemicals, including those that are regulated under the Basel, Rotterdam and Stockholm conventions, but also the more flexible and participatory structure through which it has been developed promises a greater role for non-state actors than do the three conventions. Another aspect that might make SAICM more susceptible to deepening the fissures in liberal economic hegemony is that it is a non-legally binding instrument and thus might be more open to experimentation. As discussed in Chapter 5, the global plan of action (GPA) of SAICM is meant to be a living document, subject to adjustments and renegotiation as SAICM is implemented on the ground, and it can be interpreted as having an inferior legal status to that of the two other instruments that make up SAICM. This inferior legal status, I believe, might prove advantageous for those seeking to challenge hegemony, as it could give them a powerful argument against the reluctance by state representatives to accept or even consider solutions that promise drastically to improve the environment and the lives of specific communities being negatively affected by hazardous chemicals.

One way that the hegemony of liberal economic norms can be challenged is through the promotion of organic agriculture in the development of SAICM at the global level and in its implementation at the local level. As suggested by the literature on transnational advocacy networks, the most valuable asset of groups in such networks seeking to gain the support of more powerful actors is their ability to generate information quickly and deploy it effectively, their ability to “use the power of their information, ideas and strategies to alter

information and value contexts within which states make policies.”¹⁰ In the field of agriculture, a major challenge for these networks will be to find and generate reliable information that contradicts the widely held assumption that industrial agriculture, with its widespread use of synthetic pesticides and fertilizers and increasingly of genetically-modified organisms,¹¹ is the “only way” to achieve food security.

ENGOs could build on studies that suggest that, although more data and funding for research on organic agriculture is needed, an extensive conversion to organic agriculture might contribute to long-term food security in many parts of the world (especially those that are food insecure), given its positive role in the preservation of soil fertility and biodiversity, reduced energy use and increased self-sufficiency in food production (e.g., by reducing the need of farmers for credit through the elimination of purchased inputs).¹² ENGOs could also make the case that the discussion of whether or not organic agriculture can contribute to food security must go beyond food production and productivity and include the socio-economic and political dimension of food security, in particular the linkage between food insecurity and poverty.¹³ Strategies could include providing testimony of communities whose lives have improved as the result of switching to organic agriculture and persuading state

¹⁰ Keck and Sikkink, *supra* note 4 at 16 (see also *ibid.* at 10 and 30).

¹¹ Although the issue of genetically engineered seeds exceeds the scope of this dissertation, it is important to mention its role in promoting the use of pesticides. In 1999, nearly 20 years after agrochemical giants had entered the field, 78% of all the genetically engineered crops planted in the world were engineered for herbicide tolerance. These crops are designed to resist the broad-spectrum herbicides of the companies that make them. One example is Monsanto’s ‘Roundup’ transgenic soybeans, which are resistant to its herbicide glyphosate and have pushed sales through the roof. By gaining control of the genetically engineered seed market, agrochemical corporations are linking the seed market inextricably to the pesticides market. See Devlin Kuyek, “Lords of Poison: The Pesticide Cartel,” *Seedling* (Quarterly Newsletter of Genetic Resources Action International -GRAIN) (June 2000).

¹² See Niels Halberg et al., “The Impact of Organic Farming on Food Security in a Regional and Global Perspective,” in Niels Halberg et al., eds., *Global Development of Organic Agriculture: Challenges and Prospects* (CABI Publ., 2006) at 277-317 and Marie Trydeman Knudsen et al., “Global Trends in Agriculture and Food Systems,” in Halberg et al., *ibid.* at 32.

¹³ See Halberg et al., *ibid.* at 280. Studies suggest, for instance, that even though current food production is in theory sufficient to feed the world population, there are still more than 800 million food insecure people in the world, the majority of whom live in sub-Saharan Africa and South Asia. See FAO, “The State of Food Insecurity in the World” (2000), online: <<http://www.fao.org/FOCUS/E/SOFI00/img/sofirep-e.pdf>> and See Knudsen et al., *ibid.*, at 19.

representatives, particularly in those countries where the food insecure live, of the benefits of promoting a switch to organic agriculture.

Confronting the common-sense idea that industrial agriculture is the only way to ensure food security would also entail disseminating reliable information about industrial agriculture's negative effects on the environment and communities, including its contribution to soil erosion, water pollution, biodiversity loss and the poisoning of people and wildlife.¹⁴ A much more challenging task will be to formulate a counter-hegemonic vision of organic agriculture to prevent it from being co-opted by liberal economic forces. For instance, a number of authors have expressed concern that, as organic produce gains a larger share of the global food system and is increasingly processed, packaged and transported over long-distances, patterns of trade in organically produced food may be replicating those of the conventional agricultural sector, with negative effects on organic farming (e.g., specialization and enlargement of farms, loss of diversity and markets becoming export-oriented rather than local) and the environment (e.g., climate change via long-distance transport).¹⁵ In response to this concern, ENGOs could look into suggestions that there is a need to incorporate a principle of "nearness" into the agro-production system to promote the consumption of local and regional produce over goods imported from afar, as well as mechanisms to avoid hurting farmers in developing countries (e.g., fair trade schemes that reduce the distance between producers and consumers).¹⁶

¹⁴ See Marie Trydeman Knudsen et al., "Global Trends in Agriculture and Food Systems," in N. Halberg et al, eds., *Global Development of Organic Agriculture: Challenges and Prospects* (CABI Publ., 2006) at 6-16.

¹⁵ See John Byrne et al., "Globalization and Sustainable Development: A Political Ecology to Realize Ecological Justice," in Halberg et al., *ibid.* at 64-65; Knudsen et al., *ibid.* at 28-31 and 41 and Niels Halberg et al., "Synthesis: Prospects for Organic Agriculture in a Global Context," in Halberg et al., *ibid.* at 347-349.

¹⁶ See Byrne et al., *ibid.* at 49-71. Some authors suggest that while the development of an "organic fair trade policy" could be beneficial for low-income societies and the environment, two major challenges will be to secure ecological justice to those outside the trade network and to resolve the potential conflict between the benefits of fair global trade to low-income areas and the inherent environmental disadvantages of distant trading. See Niels Halberg et al., "Synthesis: Prospects for Organic Agriculture in a Global Context," in Halberg et al., *ibid.* at 353.

To advocate organic agriculture as a means of reducing the distance between producers and consumers by supplying primarily local and regional markets promises to be a daunting task. This is because it entails questioning not only the need for hazardous chemicals in agriculture but also the widespread consensus among economists and policy-makers concerning the theories of comparative advantage and free trade. This difficulty suggests the need to engage with economic analyses that challenge those theories and propose that the default position should be in favour of domestic production for domestic markets, such as analyses on ecological economics and steady-state perspectives. An ecological economics approach suggests, among other things, that highly industrialized countries should stop growing to give space to less developed countries to grow up to a sustainable level.¹⁷ It seems imperative to consider such analyses because the proposition that economic growth is necessary not only to achieve environmental protection but also to avoid unemployment are indeed very powerful and well ingrained, as is the proposition that poor countries will only get out of poverty if highly industrialized countries also continue to grow.

Developing a conceptualization of waste minimization that explicitly includes consumption in the context of the Basel Convention also promises to be a colossal undertaking. Because it draws attention to the environmental and social consequences of over-consumption (e.g., the export of toxic wastes to poor countries and communities), the issue of wastes offers a unique opportunity for ENGOs to adopt what some commentators have called a “consumption angle,” that is, the determination to consider ways to confront the structural forces that are driving environmentally unsustainable consumption decisions. Two aspects of the “consumption angle,” which is

¹⁷ See Herman E. Daly, *Beyond Growth: the Economics of Sustainable Development* (Boston: Beacon Press, 1996); Herman E. Daly, “Against Free Trade: Neoclassical and Steady-State Perspectives,” prepared for the Conference on Trade and Environment, Harvard University (29-30 April 1994), online: <www.ap.harvard.edu/mainsite/papers/tne/daly/daly.pdf> and Douglas E. Booth, *Hooked on Growth: Economic Addictions and the Environment* (Lanham: Rowman & Littlefield Publishers, 2004).

considered extensively elsewhere,¹⁸ are worth emphasizing here. The first is that consumption consists not only of the spending decisions of final consumers but also the multiple resource-use decisions¹⁹ that are being made by different actors along the transnational commodity chains that are characteristic of today's flexible post-Fordist mode of production. Those commodity chains involve activities as diverse as investment, resource extraction, manufacturing, processing, distribution, marketing, retailing and disposal. The importance of this point is that confronting consumption requires devising solutions that include not only the production sources of pollution but also the various actors and forces along the production chain that are promoting over-consumption.

The second implication of adopting a "consumption angle" is understanding that actions oriented toward persuading consumers (e.g., via information or market mechanisms) to make more "sustainable" choices are not sufficient to get us on a more sustainable path. This is because such actions see consumption as being nothing more than an individual's choice among goods offered by the market, e.g., glass over plastic, a hybrid car over an SUV or organic over conventional produce, and overlook the structural forces that drive over-consumption. The consumption angle stresses the need for individuals to act as citizens rather than consumers, to engage in political action in order to expand the range of choices, which is currently being determined by commercial interests. From a "re-politization" of the economy could emerge, for instance, the option of creating a public transportation system that makes it workable for people *not* to buy cars. In the context of the Basel Convention, ENGOs could undertake such an approach by insisting that waste minimization requires confronting consumption not only in qualitative but also quantitative terms and by advocating solutions aimed at reducing

¹⁸ See Thomas Princen et al., *Confronting Consumption* (Cambridge, Mass.; Boston, England: MIT Press, 2002).

¹⁹ Instead of seeing economic activities along a production chain as producing or "adding" value, a consumption-oriented perspective construes them as *depleting* both social and natural resources, i.e., it sees production as *consumption*. See *ibid.* at 16-17.

consumption to minimize waste generation. As discussed in Chapter 2, solutions of this kind have been imagined by at least some actors, even if they are not being put on the table because they are not likely to be welcomed by governments and industry.²⁰

If it is true, as suggested by one participant at the SAICM negotiations, that we will never reach a point where all products are non-hazardous in content and throughout their life cycles, then it is essential to confront all aspects of consumption. Even if the premise of this statement is rejected, it cannot be denied that at present there is considerable scientific uncertainty regarding the health and environmental effects of many (if not most) of the chemicals on the market and that as a result we have limited knowledge about the risks that we are facing. Nor is there any reason to believe that the gaps in our knowledge will be overcome any time soon, if only because of the vast number of chemicals in use. Over-consumption is therefore an important aspect of what is to be done about hazardous chemicals and wastes. Until the hegemony of the liberal economic perspective is challenged with regard to the belief that chemical safety can be achieved irrespective of the ever-increasing consumption of chemicals, one must question seriously whether current regulatory efforts to address chemicals-related problems in the international arena can ever be truly effective.

²⁰ See footnote 205 in Chapter 2 for details on this proposal.

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