

THE NEED FOR AND THE UNAVAILABILITY OF INTERNATIONAL  
"POSITIVE INTEGRATION" IN CHEMICALS CONTROL

Christine Godt<sup>123</sup>

I. Introduction to the problem

The question at the heart of international toxics control is how and where do we effectively regulate? The increasing internationalization, not to say globalization, of economic activities confronts us with the dilemma that the problems of the international production and trade of chemicals have become as internationalized as the economic structures of the chemicals industry, while the regulatory frame is still confined to the single national state. Regulation is limited by the principle of state territoriality; whereas economies and the problems they create are „debordered“ (Kohler-Koch 1998). However, if the regulated target is not congruent with the regulating entity, regulation risks to be fragmentary; at worst, it becomes ineffective.

We face five different problems which are ultimately intertwined. First, we are confronted with a vast number of international activities in toxics control. Their terms of reference is not always precisely defined. Competencies often overlap. Second, conceptionally we have difficulties in assigning the problems of toxics control to a specific forum. The distinction of international and regional problems has become fuzzy. Therefore, the allocation of competencies attributed to international as opposed to national entities in the vertical order has become problematic. While realizing the need for more international regulation, we also become aware that state regulation is indispensable. Third, assuming we decided on a specific level where we want to regulate, we would face the problem of allocating the proper policy context of the regulation: generally, an economic or environmental context. This is closely connected with the fourth problem, the need to decide on the type of regulation, either a traditional inter-state convention or a new type of single-issue, inter-/supranationalised regime. Fifth, the more internationalized regulation becomes, the less democratically controlled the final decision will be. This poses urgent problems of legitimacy in international law making.

In this article, I will first give an overview of the existing fora structuring them according to their institutional type and according to the international level (II.).

123 Dr. jur., Senior Researcher, Zentrum für Europäische Rechtspolitik, Universität Bremen

Then, I will analyse the problems of determining the appropriate regulatory level in the vertical sense (III.). Subsequently, the problems of finding the right administrative (horizontal) setting and problems of regulatory strategy will be examined (IV.). Finally, the question will be posed whether and how the international structures produce regulation that meets the standards of democratic legitimacy (V.).

II. Existing fora of international chemicals control

Current international toxics control takes place in a vast number of institutions and fora that can be broken down into three types of activities. The first group comprises the collection and exchange of data. Here, one central institution is the Prior Informed Consent (PIC) Procedure which makes the export approval for hazardous substances dependent upon the prior notice to the importing state. The general procedure was convened in the so called PIC London Guidelines and the FAO Guidelines. PIC has been the core element of the more farther-reaching Basel Convention<sup>124</sup>. Only recently the informal guidelines have been replaced by the formal "Rotterdam" Convention of Sept. 11, 1998. Apart from PIC, there are various efforts to bundle the governmental assessment of the information on the risks of chemicals. In a concerted effort, the United Nations (UN), the Organization of Economic Cooperation and Development (OECD) and the European Community (EC) are building up a number of data banks on hazardous characteristics of existing chemicals. Important are the Pollutant Release and Transfer Register (PRTR), the Screening Information Data Set (SIDS), International Register of Potentially Toxic Chemicals (IRPTC) PC Database, the Global Information Network on Chemicals (GINC), the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), and the Investigation on High Production Volume (HPV) on Existing Chemicals and the EC Regulation 793/93 on Existing Chemicals<sup>125</sup>. However, the sheer number of initiatives is deceptive, especially with respect to the risk assessment of existing chemicals. Between 1993 and 1999, only 20 substances have been examined under the EC Reg. 793/93, of which control measures were proposed for only 10 substances – but none has been issued yet. This governmental exchange of scientific data is supplemented by the exchange of regulatory information, such as the OECD's Programme on the Mutual

124 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, 28 I.L.M. 656 (1989); reprinted in Hoog/Steinmetz (eds.) 1993, pp. 471-91; supplemented by the Second Conference of Parties in 1994, banning the export of hazardous substances and waste from OECD countries to Non-OECD Countries, Dec. II/12, UNEP/CHW.2/30, now Art. 4 A of the Convention.

125 Reg. 793/93, Off.J. L 84 of April 5, 1993, pp. 1-75, corrected by Off.J. of September 3, 1993, p. 34.

Acceptance of Data (MAD), its Harmonization Programme of Classification and Labelling, the EXICHEM Database on regulatory activities of OECD member countries, the Complementary Information Exchange Procedure (CIEP), and the UN-Intergovernmental Forum on Chemical Safety (IFCS).

A second group of activities can be characterized as the formulation of principles. High profile accrues to the Agenda 21 adopted by the 1992 UN Conference on Environment and Development (UNCED)<sup>126</sup>. Another example of such formulation activity is the UN Code of Ethics on the International Trade in Chemicals.

The third group is focussed on regulatory activities such as restrictions or bans. Judged by the limited attention to this group in literature, it appears erroneously to be of minor importance. In the EC, the regulatory frame is set by Directive 76/769<sup>127</sup> and 88/379<sup>128</sup>. Restrictions are issued as national regulations that are orchestrated by the „comitology“ procedure inside the DG III. Beyond the EC, high-profile exceptions are the Vienna Convention with the Montreal Protocols<sup>129</sup>, aiming to reduce the production and emission of atmospheric ozone-depleting substances, the Basel Convention, which has introduced an approval procedure for the export of hazardous substances and waste for the member states, and the ongoing negotiations on Persistent Organic Pollutants (POP)<sup>130</sup>, aimed at prohibiting and restricting the production and use of the most hazardous persistent organic chemicals world-wide.

The organizational and rule-setting capacity of each forum differs distinctly according to the "vertical level", indicating the progressively larger dimension in territorial terms. At our disposal are five different levels to which toxics control can be assigned. Beyond the national states, there are the European Union, the OECD, the World Trade Organization (WTO) and the UN Framework. It is the national state that is still conceived of as the central sovereign entity of democratic law making. The main body of national European chemicals regulation, however, has originated on the EC level. Most

126 On the exchange of information: Chapter 19 of Agenda 21, Programme Area C; on risk assessment: Chapter 19 of Agenda 21, Programme Area A; on policy consultation: Chapter 19 of Agenda 21, Programme Area E; on harmonization: Chapter 19 of Agenda 21, Programme Area B.

127 Referring to hazardous chemicals, Off. J. L 262 of September 27, 1976, p. 1. Has been frequently amended since.

128 Referring to hazardous preparations, Off J. L 187 of July 16, 1988, pp. 14-30.

129 Vienna Convention for the Protection of the Ozone Layer, 26 I.L.M. 1516 (1987); Montreal Protocols (1987/1991); both reprinted in Hoog/Steinmetz (eds.) 1993, pp. 492-526.

130 Negotiation Documents available via internet under <http://irptc.unep.ch/pops/>...

of the rules have, in turn, been conceived and co-ordinated by the OECD<sup>131</sup>. This organization, currently comprised of 29 member states, sharing the principles of market economy, has been explicitly designed as a non-regulatory think tank and co-ordinative institution. It has developed into the most influential organization for the devising of policies of toxics control, advising member states on regulatory strategies and fostering their close co-operation, especially in North America, Europe and Japan - thus corresponding to economic networks.

While the OECD concentrates on the interests of the most industrialized countries, the WTO serves as a forum of debate for more than 130 contracting parties, developed and developing countries alike. Since its reorganization in 1994, it has become the driving force of global economic integration by enlarging its regulatory scope from trade in goods to trade in services and finance as well to the protection of intellectual property, and by judicializing its procedures. The attempt, in the Uruguay Round (1986-1994), to negotiate a specific GATT environmental policy chapter or a specific side agreement according to the NAFTA model failed. The framework is still determined by the justification clause of Art. XX of GATT, allowing for national deviations from the general free trade principles. GATT has only been supplemented by the environmentally relevant agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS). These lack specific provisions on environmental and health protection. However, at the interface of trade and environmental concerns special entities have been created within the WTO<sup>132</sup>. Especially, the Committee on Trade and Environment (CTE) is supposed to work in a way that is complementary to the other, primarily responsible organizations, such as the United Nations Environmental Programme (UNEP), supporting them in regard to overlapping questions of environmental protection and trade liberalisation. Thus, regulatory activities of the WTO with respect to environmental protection are still minor. In contrast to the WTO, the mission of the United Nations (UN), currently joined by 185 Member States, is universal and global, thus unquestionably concerned with environmental policies. Chemicals policy is covered by various UN suborganizations, such as UNEP, FAO and ILO. However, in contrast to the WTO, the UN is much less oriented towards legal regulation, which is due to the fact that there is no system of rules like GATT and the Dispute Settlement Understanding (DSU). Thus, within the UN framework, conventions are negotiated that need to be

131 The central policy instrument is the OECD's Chemicals Programme, which has existed since 1971 and is administered by the environmental directorate; for detailed programme information, consult: <http://www.oecd.org/ehs/chem2.htm>.

132 See: <http://www.wto.org/environ/environm.htm>; esp. the reports of the Committee on Trade and Environment (CTE).

ratified by national parliaments. This time-consuming procedure is often exploited to delay or prevent the national implementation of internationally agreed terms.

### III. Vertical assignment of competencies in chemicals regulation

#### 1. Defining the problem of competence: The national state and denationalisation

International regulation of toxics control as such is not a new phenomenon. Already in 1919, the International Labour Organization (ILO) issued recommendations concerning the risks of lead poisoning and white phosphorus. However, the quality of international regulation has changed over the last years. Due to the fading capacity of national states to regulate the problems that occur within their boundaries, the latter have increased their co-operative activities in order to develop internationally co-ordinated problem solutions. Internationalization has also made it harder to distinguish between national and international topics, thus fundamentally threatening the idea of sovereignty and undermining the concept of a meaningful division of national and international competencies. In chemicals control, economic internationalization is additionally supplemented by ecological internationalization. The chemical depletion of the ozone layer and the global climate change are international by the very nature of the global commons. This is, however, also true of the problems of chemicals' persistency and accumulation. Some toxics like DDT, for example, can travel long distances from where they have been emitted. In contrast to watercourse conflicts, the places where chemicals finally re-emerge are contingent and diffuse. An effective and meaningful chemicals regulation must therefore rely on international rule setting.

The new quality of international governmental activities has been described as a change from mere consultation to co-operative, mutual rule setting via international organizations (Riedel 1997, p. 97). The problem, however, is how to assign competencies and safeguard the legitimacy of democratic rule.

#### 2. Multi-level governance structure - general remarks

The tectonics of this newly evolving regulatory structure has been described as a "multi-level system" (Jachtenfuchs and Kohler-Koch 1996), indicating interconnectedness of different regulatory levels and new conflicts of competency. The new regulatory quality can be described by two central features. First, international regulation does not absorb the rule-setting competencies of national sovereign states. Although their powers to solve

problems are reduced, they remain indispensable (Zürn 1998, p. 334). With respect to the international sphere, their role has changed from law making to moderating (R. Mayntz and F. W. Scharpf, 1995). Second, various governance structures interfere with each other; there is regulation "by, with and without government" (Zürn 1998, p. 334). Rules are established by entities without state quality (Risse-Kappen 1996; Zürn and Wolf 1999)<sup>133</sup>.

The legal consequences are multifold, only three of them will be mentioned here. First, new forms of inter-state agreements emerged, such as the Vienna Convention with its Montreal Protocols and the Basel convention<sup>134</sup>. They have overcome the tight concept of sovereignty by various instruments, for example by "opting out". This concept allows for the adoption of amendments of conventions only by international law rules. Ratification is not necessary, unless a signatory notifies its waiver. Five different models of "opting out" have already evolved<sup>135</sup>. This cuts back on the general rule of unanimity and allows for vertically differentiated regulations. Second, apart from inter-state law, a new type of supranational law has developed. Whereas the working principle of most international organizations is still strictly intergovernmental, supranational legal systems, such as the EC and the WTO, have distinctive characteristics. In addition to EC directives that are binding on member states without parliament's approval, EC regulations are binding even on citizens; the EC treaty provides for directly effective basic freedoms<sup>136</sup>; the legal order is safeguarded by the judicial entities of the European Court of Justice and the WTO Dispute Settlement Bodies; majority vote in intergovernmental decision making is possible. Third, the obvious deficiencies of democratic control in international regulation have led to emerging models of participatory compensation by civil society institutions (Falk 1995; Held 1995 a) and to the demand for access to information in the possession of international organizations.

133 A good example of this emerging phenomenon is the Codex Alimentarius Commission (a joint FAO, WHO Commission), proposing food quality standards. The norms convened are not binding. However, via Art. 3 (3.2.) Sanitary and Phytosanitary Agreement (SPS) of the WTO, they have become binding, see Godt 1998.

134 See fnn. 7 and 8; for a precise analysis of the problems of international environmental agreements as conceived prior to the negotiations of Basel and Montreal, see Sand, 1990; and after RIO 92, Sand 1992.

135 Ott 1998, p. 161.

136 The basis is the doctrine of direct applicability of the institutional treaty; recognized in the EC since 1963 (EC), C 26/62, van Gend & Loos). The WTO framework is still a much debated question, see Stoll 1997.

### 3. Multi-level toxics control

With respect to toxics control, there are two concise legal principles that can be deduced from this general, theoretical analysis: First, as governments lose some of their capability to steer responsible care regarding toxics, the responsibility shifts to industry (Mayntz and Scharpf 1995). Consequently, it is up to industry to provide information about the toxicity of the chemicals it markets and to minimise the risks to the environment and health. One consequence would be to revise the decision to leave the risk assessment of existing chemicals to governments and allow industry to market those substances that were already on the market in 1981 until final proof of an unacceptable risk has been provided<sup>137</sup>. In this way, the general ignorance with respect to existing chemicals and their toxic threat could be diminished. A convention that sets an agreed, step-by-step time frame for different chemicals groups could progressively reverse the "burden of proof" to be imposed on industry. If a convention with general application cannot be established because of the different interests of the contracting parties, one could provide it with opting-out procedures allowing for its "general" acceptance but a the possibility of a drawback for countries with different needs, thus respecting both sovereignty and the multi-level-nature of toxics control.

Second, international as well as national regulation is legitimate and necessary. Often the argument is made that international toxics control is to be confined to "real" international problems, like the depletion of the ozone layer and climate change. This implies that there are still purely domestic regulatory issues. Due to the growing difficulty of distinguishing between domestic and international problems in the global economy, this argument has become problematic (Held 1995 b, p. 99). Persistent chemicals that travel long distances from where they have been emitted, either due to trade or purely environmental conditions, are only deficiently regulated in the state where they finally re-emerge, causing problems. Adverse effects of producing and trading in hazardous chemicals are only arbitrarily defined by national borders. At the same time, while realizing the need for international regulation, we face the dilemma that we have no proper international processes at our disposal. Regulatory competencies are still in the hands of the national sovereign states. Due to the unanimity rule, the inter-state process is often too clumsy. Influential economic interests may succeed in blocking restrictive decisions at an early stage. On the national level, conflict constellations are different; they may even make regulatory activity

137 As a consequence of the 6th amendment to the Dir. 67/548/EEC of 1979, obliging industry to give notification of new substances including the data relevant to health and environment. This Dir. was later replaced by Dir. 76/769/EEC which introduced the approval for new substances.

compelling. If a proposal is convincing, it might proceed to the international level. Otherwise it will be dropped, and due to its limited scope, the ultimate damage might not be too costly. Good governance relies on experimental regulation. Regulatory quality and progress depend on limited spheres of creativity. Thus, we rely on national regulatory entities, both as basic rule-setting entities and pioneers of innovative law making. Evidence for this were the nickel and PCP cases (Ginzky and Winter 1999, pp. 24, 107; Falke/Winter 1996, pp. 572-574), where restrictions started on the national level and "made their way up".

The analysis of multi-level governance structures has shown that these features are typical of the new regulatory structures. The legal consequence will be to widen the narrow territorial "impact principle" by a more problem-oriented approach, either driven by a problem definition or by the responsible addressee who has the capacity for solving the problem. Thus, the regulatory power of a national state remains basically untouched, but it allows for formulating international rules, and thus for the emergence of an interconnected, parallel structure which denies clear-cut competencies<sup>138</sup>. The determination of the proper regulatory level is confined to selecting the most favourable dynamics. An international system that safeguards the possibility of decision making is either an intergovernmental majority rule, albeit democratically problematic, or a unanimity system that allows for "opting-out".

To sum up it can be said that the observation of an emerging interconnected system of rule-making challenges both formerly made decisions and traditional dogmatic principles, such as the order of competencies. Consequently, former decisions need to be rethought in the light of the new developments. It is the task of the legal profession to adapt the legal system to the changes in the real world and to smoothen simple and crude principles by innovative ideas that are apt to resolve the emerging problems in a sophisticated and subtle way.

## IV. The horizontal dimension

### 1. Administrative organization of toxics control

The analysis of the vertical dimension of international toxics control has to be supplemented by a search for the proper organizational setting in the horizontal dimension, one of the oldest questions in administrative science. Currently, chemicals control is allocated to administrative bodies for trade, industry,

138 A first description of a new kind of competence order in a multi-level government system has been formulated by Held 1995 b, pp. 113-4.

agriculture, labour, public health, consumers, and environment<sup>139</sup>. In Europe, competencies are mostly split. A good example of how contingent the work can be shared is the EC competence order which assigns the notification of new chemicals (Dir. 67/548/ECC) and the hazard assessment of existing chemicals (Reg. 793/ 93) to the Directorate-General for the Environment (DG XI), whereas the competence to issue restrictions (Dir. 76/769 for hazardous chemicals; Dir. 88/379/EEC for hazardous preparations) is with the Directorate-General for Industry (DG III). However, this arrangement is being subjected to constant critique (H. Ginzky and G. Winter, 1999, pp. 269-70), although it is not discussed in the Commission's Report of November 1998<sup>140</sup>.

Still another approach has been adopted by the UN. Although various UN organizations like FAO, UNEP, ILO, WHO, UNIDO, UNITAR<sup>141</sup> deal with chemicals control issues, new international entities have been formed for the management of chemical data and co-ordination of risk policies. The Intergovernmental Forum on Chemical Safety (IFCS) and the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), for example, were created to integrate different aspects and competencies. IFCS, founded in Stockholm in April 1994, is a non-institutional mechanism for co-operation among governments, intergovernmental and non-governmental organizations for the promotion of chemicals risk assessment and an environmentally sound management of chemicals. IOMC was established in 1995 to co-ordinate the efforts of international and intergovernmental organizations (UNEP, ILO, FAO, WHO, UNIDO, and OECD) for the assessment and management of chemicals. Until a new entity is formed, organizations of the UN take joint responsibility, like FAO and UNEP for the Persistent Organic Pollutants (POP) Convention, which is still being negotiated.

However, especially in toxics control, high-profile political confrontations over the assignment of competencies do not necessarily occur on the same vertical

139 In the EC: DG I (External Relations) DG III (Industry), DG V (Employment, Industrial Relations, Social Affairs), DG VI (Agriculture), DG VII (Transport), DG VIII (Development), DG XI (Environment, Nuclear Safety, Civil Protection), DG XII (Science, Research, Development), DG XXIV (Consumer Policy and Consumer Health Protection); for Germany, see the instructive booklet edited by the Ministry of the Environment, Nature Protection and Reactor Security, "Verzeichnis der national und international zuständigen Stellen für Chemikaliensicherheit".

140 EC Commission, Report on the Implementation and Reform of EC Chemicals Regulations, SEK (1998) 1986 fin.

141 FAO: UN Food and Agricultural Organization; UNEP: UN Environmental Programme and its entities, UNEP Industry and Environment (UN/IE) and UNEP Chemicals; ILO: International Labour Organization; WHO: World Health Organization; UNIDO: UN Industrial Development Organization; UNITAR: UN Institute for Training and Research.

level (e.g. for the EC level: DG III or DG XI; for the UN: UNEP, FAO or WHO), but in a "cross-wise" fashion. It is a highly controversial question whether chemicals restrictions should be administered by WTO or UNEP. This shows that mere organizational considerations conflict with power-oriented political interests.

In general, organizational decisions rest on two competing principles: There is either an **integrative** approach avoiding organizational frictions, or an approach favouring a decentralised decision making, thus fostering **specialization** and avoiding premature compromises. There are pros and cons for both principles. The ultimate decision depends on the regulatory evolution, on the maturity of the law in question, economic developments, and the actual problems focussed upon.

In the specific case of chemicals control, an argument for a solution based on a trade-related organization lies in the nature of envisaged measures: bans and restrictions are trade-specific. Efficiency aspects may also support an integrative solution, giving credit to the fact that economic and political dynamics centre upon global trade liberalisation. Another argument is connected with environmental concerns. If environmental policy is assigned to an isolated, specialized administration, there is the risk of marginalising the policy field. This may speak against a splitting of economic and environmental competencies. It coincides with the goal of trade and environmental policies integration, and also corresponds with modern regulatory analysis that command-and-control regulation gives way to more sophisticated economic policy instruments which are often administered by the economic Directorates due to their specific economic nature. In order not to lose sight of the ultimate goal of environmental protection, it is important to strengthen the environmental capacities inside the economic entities.

An argument against chemicals administration being integrated into economic departments is the risk of early watering down of environmental goals under the impact of general free-trade principles. This could impede an ambitious environmental agenda. It could also conflict with the goal of a well-articulated conflict management involving environmental and economic interests put forward by opposed administrative bodies. Additionally, organizational overload should be taken into account. The primary goal of the WTO is the promotion of free trade. Fostering economic activities and environmental protection at the same time might involve such an overload.

Currently, the primary problem of allocating competencies for international chemicals control is the choice between two alternatives, WTO and UNEP. UNEP is a suitable candidate as its task is to protect the global environment. Its various secretariats in Nairobi, Geneva and Washington have built up a

considerable environmental expertise<sup>142</sup>. Additional responsibility for chemicals control would strengthen UNEP as an organization. A WTO-based administration of chemicals control can be supported by two different sets of arguments. One is concerned with the role of environmental policy in UNEP and WTO. In order to raise the importance of environmental concern in chemicals policies, they need to be integrated into industrial policies. The other concerns the organizational position of UNEP within the UN framework. UNEP is one of its weakest entities. Assigning environmental policy exclusively to UNEP may therefore imply the risk of its marginalization. The weakness of UNEP is due to at least three factors. First, economic and industrial issues involving environmental concerns are dealt with by other entities, especially in the WTO, in spite of UNEP's Industry and Environment Centre (UN IE) in Paris. Thus, UNEP's activity is largely limited to nature protection. Second, the tendency of marginalization is emphasised by the location of UNEP's headquarters in Africa, which means it is involved in questions of development rather than industrial policies. Third, UNEP's position is mirrored by its limited funding. If chemicals control were allocated to UNEP, it may become side-tracked.

## 2. Regulatory instruments reconciling the integration and specialization principles

The narrow reasoning, based on the alternatives of an integrated approach of administering chemicals control inside trade organizations or its "out-sourcing" to specialized departments, can be broadened by considering a third possibility. Both, the principles of specialization and integration could be observed by founding new entities according to the model of the most recent international environmental agreements like the Basel Convention (see Ott 1998, pp. 71, 122), the Vienna Convention with its Montreal Protocols (in detail Gehring 1990, Biermann 1998, p. 129; Ott 1998, pp. 47, 111; Schuppert 1998, p. 23) and the Climate Change Framework Convention<sup>143</sup> (Biermann 1998, p. 185). Their overall success is due to an ensemble of elements which form an „international environmental regime“ (Gehring and Oberthür 1997, p. 223), a term used to differentiate them from traditional-style, inter-state agreements. First, they created their own dynamics through mandatory re-negotiations within a given time frame, administered directly by the Conference of Parties and by their own secretariat. Second, focussing on a "single issue", they were able to cut back on

142 See the declaration of UNEP Executive Director Klaus Töpfer to enhance the co-operation between UNEP and WTO by gathering information on the environmental impacts of free trade, The Gallon Environment Letter, March 19, 1999.

143 UN Framework Convention on Climate Change of May 9, 1992; UN Doc A/A.C. 237/18 (Part II)/Add 1; reprinted in Hoog/Steinmetz (eds.) 1993, pp. 584-607.

the principle of sovereignty by various means. They set up their own dispute settlement, thus securing compliance; they made states submit to majority rule and fostered co-operation with industry. Third, deviating from the one-rule-for-all principle, mechanisms were invented to differentiate the rights and duties between various countries. Thus, not only was acceptance achieved, but economic dynamics became combined with environmental policy goals in a reinforcing manner. Through the instrument of "joint implementation", problems were also defined as being common problems while the obligations to solve them were differentiated according to the various countries' capacities. The instrument of "technology transfer" solved technical problems such as the lack of equipment, finance and know-how, thus overcoming structural difficulties resulting from the North-South Conflict. In sum, the lesson is: being more flexible and dynamic means being more successful (Ott 1998; Gehring 1994).

One could object that an increasing number of isolated, specialized regimes might render the international system even more intricate. This could lead to an inconsistency of rules, duplication of work, organizational frictions and confront the parties with an unsatisfactory administrative jungle. Such an objection could be elaborated by pointing out various initiatives aimed at codifying environmental law (Rehbinder, in this volume). However, international organizations have become too cumbersome. The general intergovernmental unanimity rule either blocks decisions or only allows for decisions based on the smallest denominator and exchange of information<sup>144</sup>. There is no room left for flexible, differentiated, creative solutions. By contrast, international regimes, defined as rule-driven forms of co-operation for conflict resolution (Elfinger et al. 1990, p. 264), allow for co-operation in case of conflicting interests (Zürn 1992, pp. 153, 218). In a limited policy area, governments are more willing to experiment with new mechanisms. Thus, international regimes can respond to internationalized problems beyond the inter-state system. The incremental evolution of the law is typical of transition phases responding to unprecedented situations. International administrative law is still embryonic. Principles will still need to be evolved and new rules checked. Gradually, these will be inferred from the growing, albeit disintegrated body of law. It is predictable that the legal situation will be felt to

144 Like the Rotterdam Prior-Informed-Consent (PIC) Convention, leaving the regulatory sovereignty of each state, and trade interests, untouched. In the follow-up process of the London Guidelines on PIC (as amended in 1989) (<http://www.chem.unep.ch/ethics>), the Convention was adopted and opened for signature at a Conference in Rotterdam on September 10, 1998. It was signed on September 11, 1998 by 61 States and one regional economic integration organization. The Convention was opened for signature for one year at UN headquarters in New York on September 12, 1998. It will enter into force 90 days after the submission of 50 instruments of ratification.

be intransparent at a certain time. Then, the call for harmonisation and codification will be heard. But until then, specialized new entities will drive the evolution of law and international co-operative problem solving.

### 3. Transferring modern regulatory models to toxics control

These new environmental regimes can serve as models for a general international chemicals control. However, experiences can only be transferred, if the problem and the interests involved are comparable. A joint feature of all environmental regimes is that they tackle one single, clearly defined problem, such as the depletion of the ozone layer by a specific group of chemicals (CFCs). They are problem solving-oriented and do not deal with a specific policy area. This is not the case, for example, in regard to the global loss of biodiversity that accounts for several implementation problems of the Convention on Biodiversity (Henne 1997, pp. 190-1). In general, toxics control could face the same dilemma, if it proves impossible to pin-point the most urgent problems. Too many substances are used in industries which are too diverse, for purposes which are too different to subject them to a single rule. However, if it were possible to sort out a group of specific chemicals to be used in well-defined productions or products in specific industries, one could devise a single-issue convention that might trigger off comparable dynamics like the international environmental regimes mentioned above.

Another common feature of environmental regimes are common interests that coincide and mutually reinforce each other. This does not mean that interests cannot be opposed. As the river conventions with their typical problem of upper and lower riparian states (like the Rhein Conventions, see Bernauer, Moser 1997) have demonstrated, conflicting interests do not necessarily impede a mutually satisfactory solution to the overall problem. A central aspect is the definition of a shared problem. As all modern environmental regimes have shown, conflicting interests can be reconciled by innovative mechanisms (e.g. "joint implementation" in the Climate Change Convention [Ott 1997, p. 209]; "technology transfer" in the Montreal Protocols and the Biodiversity Convention [Biermann 1998, p. 143]). However, discrepancies are not easily overcome, as the negotiations of the Biodiversity Convention showed (Henne 1997, Henne 1998, p. 117). Disagreement over the problem definition also impaired the initial negotiations for a far-reaching Persistent Organic Pollutants (POP) Convention<sup>145</sup>. Developing countries perceived the restrictions on

145 Draft POP Convention (Version January 29, 1999), on [http://irptc.unep.ch/pops/POPs\\_Inc.../final\\_report/INC2-6finrep-en.html](http://irptc.unep.ch/pops/POPs_Inc.../final_report/INC2-6finrep-en.html). The annexed lists of chemicals include hazardous substances like DDT, Dieldrin, tributyl tin, HCBs or PCBs.

pesticides as being exclusively in the interest of the industrialized world which exports (domestically banned) hazardous substances to developing countries from where these substances return via imported agricultural or manufactured products. Some countries have opposed a future convention in order to protect their own chemical markets. Some have argued that they rely on these chemicals as effective agents against insects due to specific ecological conditions<sup>146</sup>. The inability to agree on the definition of basic common interests has led to a restriction of the POP Convention to about twelve substances.

However, the definition of specific chemicals groups may satisfy this second condition of co-operative interests, thus qualifying for a special international chemicals control regime. Any future POP Convention could be devised as a framework convention, or a convention of the first generation, to be supplemented by subsequent agreements on specific chemicals groups. If such a convention includes its own dispute settlement procedure, it will perfectly match the WTO framework - regardless of whether they establish their own conflict resolution or have recourse to the WTO Dispute Settlement Body<sup>147</sup>. According to the WTO shrimp ruling of the Appellate Body of October 1998<sup>148</sup>, a binding Multilateral Environmental Agreement (MEA) supersedes the general GATT rules. And while the WTO Dispute Settlement upholds them, the MEA's dispute settlement will ensure compliance with the specific chemicals agreement. The international judicialization of environmental regulation is extremely important. As international economic law evolves, environmental regimes need to evolve in parallel. This is of special importance with respect to implementation via (individual) judicial review on the basis of the evolving doctrine of direct effect (Stoll 1997; Petersmann 1997; Charney 1997; Stone Sweet 1994; Petersmann 1991). As there is no parliamentary control to ensure a proper balance of individual and diffuse interests, it is essential to enable access to international judicial bodies for individuals and diffuse interests alike.

To sum up it can be said that, reflecting on the proper entities for toxics control, we are not left with the existing organizations that are defined by their location in the vertical dimension and the pre-existing policy areas in the horizontal dimension, which is mainly a decision between economic and environmental administrative entities. A third group has emerged, as indicated in the

146 E.g. DDT as an effective insecticide against the mosquito in hot and humid regions like Mexico.

147 This is still an open question, see the Report of the Committee on Trade and Environment to the WTO Singapore Ministerial Council which favours a specific MEA dispute settlement.

148 US Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS 58/AB/R (October, 12, 1998): <http://www.wto.org>.



following matrix as the group above "New Forms of Regimes". The examples given do not properly fit into the common horizontal and vertical co-ordinates. Basel, Montreal and IFCS have modified the traditional rules of intergovernmental rule setting. More than ever before, SIDS involves the private sector industry, as do the numerous voluntary agreements induced by the EC Commission. On the national level, the German Packaging Regulation ("Green Dot") serves as an example of a new type of regulation, fostering a close co-operation of industry and government and combining market with regulatory instruments. Those regimes are single problem-oriented and establish their own institutions according to the purpose they are to serve.

#### Multi-level-structure in the vertical and horizontal dimensions

(simplified: exemplary entities only)

UN	UNIDO	UNEP IPCS	Basel Montreal IFCS <sup>149</sup>
WTO	WTO	CTE	--
OECD	Eco. Dir.	Env.Dir.	SIDS
EU	DG III	DG XI	e.g. Voluntary Agreements
Nat'l	Ministry for Economics	Ministry for Environmen	e.g. Nat.l. Packaging Regulati
	Economics/Trade	Environment	New Forms of Regimes

#### V. Legitimacy of international regulation

Having analysed the vertical and horizontal dimensions of international toxics control, we now turn to the question of whether the given international regulatory processes meet the current standards of democratic legitimacy. As international regulation is hardly controlled by national parliaments, but is subject to the rules of foreign policy, democratic legitimacy and control have always been problematic. This has been a growing concern since the internationalization of rule making has been increasing. Often, even national ratification of international agreements is no longer necessary.

149 International Forum on Chemical Safety.

#### 1. Conditions of legitimate international law making

What are the standards of democratic legitimacy? Traditionally, these require the consent by a national state's citizens. Four elements of the notion of democratic self-government are undisputed: egalitarian mass participation, decision generation through representation and majority rule, elite accountability and fixed rights and procedures (Offe 1998). However, with respect to international regulation, these conditions become problematic. The idea of a legitimizing consent by constituencies defined by a bounded territory crumbles in regard to international interconnectedness. This raises questions of whose consent is necessary and to whom elites are accountable. Therefore, new forms and levels of governance are being advocated (Held 1995 a, p. 223; Held 1995 b, p. 102). With respect to the requirements of democratic legitimacy, the traditional criteria have been rephrased to (1) public access to the regulatory process<sup>150</sup>, (2) rule of law in the sense of integrity (non-contradictoriness) and a balancing of private and public rights<sup>151</sup>, and (3) reflexivity of law (Neyer 1999)<sup>152</sup>. Refraining from deeming these conditions prerequisites for "democratic legitimacy", he qualifies them as "communicative power". These new concepts of participatory structures on the international level demand the participation of civil society institutions (Falk 1995). Thus, in international environmental regulation, the participation of non-governmental environmental organizations (NGOs) has become a central factor (Schmidt, Take 1997; Hobe 1999).

These requirements mirror the dilemma of international rule making: The need for international regulation, but the unavailability of proper democratic control in the traditional sense of parliamentary control. Participation of civil society institutions is conceived to fill this gap. However, in most European national jurisdictions, a sharp distinction is made between administrative and legislative processes. Private and public participation is only reserved for administrative decisions, which are defined as (mostly individual, sometimes general) concrete procedures. Public participation in administrative rule making is only conceived of as safeguarding democratic control regarding those modern decisions that have shifted from the legislature to the executive, though they are legislative by nature, but too technical for the parliamentary process. Legislative regulation, which are defined as abstract and general rules, is exclusively entrusted to representative parliamentarism. International rules of legislative quality are rendered legitimate only by a subsequent approval by the national parliament. Public participation is conceived of as interfering with the

150 Following *Cohert/Rogers* 1992; *Giddens* 1997 and *Pollack* 1997.

151 Following *Dworkin* 1995.

152 Following *Charney* 1997, and *Stone Sweet* 1994.



formation of electoral will. To advocate civil society participation in international rule making means breaking with the traditional division between administrative and legislative procedures and transfers the participatory concept to legislative decisions in the international context. It means resorting to the same concept that served to mitigate the democratic deficit identified in administrative decision making in the 80s.

What, generally, are the arguments supporting the legitimacy of NGO participation? Looking at them, it is clear that they are not all deducible solely from the principle of democracy, but also from the principle of power sharing and from the efficiency principle of "good governance" in the executive branch. It follows that public participation is not only a means to administrative accountability in the narrow sense. The following matrix shows that NGO participation serves various control functions that safeguard "good governance" in a broad sense. It is a legitimating as well as useful instrument of governmental control.

#### Synopsis of Reasons for Environmental Organizations' Participation

Efficiency	Democracy	Principle of Shared/Limited Powers
Information for the executive	Self-Governance requires participation (Rousseau)	Aggregation of the public interest
Acceptance	Mitigation of organizational weaknesses of public interests	Control of government (Accountability)
Improvement of decisions' quality by improved balancing	Parity of interests involved	
Improvement of decisions' quality via alternative proposals	Transparency as prerequisite of public opinion building	Representing the environmental interest
Mitigating the "Agency-trap" (Pressure Group)		

## 2. Participatory structures of the existing fora?

To what extent are concerned citizens and communities allowed to participate in national and international rule making? On the national level, taking the Federal Republic of Germany as an example, there is the model provision of § 17 of the German chemicals control act (Chemikaliengesetz)<sup>153</sup>, which provides for broad public participation in the administrative process involving restrictions and bans. This provision is a response to the 80s' discussion on the democracy deficit and the shift of an increasing volume of technical, but essential rule making from the legislature to the executive.

No equivalent exists on the EC level. The European Consultative Forum on the Environment established in 1997<sup>154</sup> is, as the name indicates, a purely consultative, not a participatory body, commenting on broad strategies of environmental policy only<sup>155</sup>. The list of 27 participants includes scientists, representatives of industry, administrators and two representatives of environmental organizations<sup>156</sup>. In regard to regulatory decision making, a participatory structure of the EC Committees would be more important. However, the Comitology Conclusion of 1987<sup>157</sup> provides for only three variants of procedure with respect to a structured power balance of the EC organs and member states. A strict distinction is made between regulatory committees and technical meetings. Environmental, industrial NGOs and Trade Unions are invited to technical meetings to discuss specific problems. However, there is no regulatory code that prescribes participation in the Commission. Who is invited is a matter for discretion. The regulatory committees in toxics regulation<sup>158</sup> do not allow for participation and comprise either only member state representatives (Committee for the adaptation to technical progress of

153 § 17 sec. 7 German Code of Chemicals Control: "Die beteiligten Kreise bestehen aus jeweils auszuwählenden Vertretern der Wissenschaft, der Verbraucherschutzverbände, der Gewerkschaften und Berufsgenossenschaften, der beteiligten Wirtschaft, des Gesundheitswesens sowie der Umwelt-, Tierschutz- und Naturschutzverbände." Engl. Translation C.G.: "The participating groups consist of representatives from science, consumer associations, trade unions and occupational insurance associations, the industries involved, public health authorities as well as non-governmental environmental, animal rights and nature protection associations."

154 Commission Decision (97/1 50/EC) of February 24, 1997: Off.J. L 58 (27.2.97), p. 48; also: <http://europa.eu.int/comm/dg11/forum/decision.htm>.

155 See the Forum Reports on: <http://europa.eu.int/comm/dg11/forum/documentation/htm>.

156 According to the Decision (97/1 50/ EC) Art. 3 ( c ), four to seven seats must be allocated to representatives from environmental and consumer organizations; cf. the respective list of members on: <http://europa.eu.int/comm/dg11/forum/members.htm>.

157 Off.J. L 197, p. 33.

158 Overview in Off.J. L from 12.2.1999, p. 496.

Directives on the removal of technical barriers to trade in the sector of dangerous substances and preparations [DG III]; Committee for the adaptation to technical progress on evaluation and control of risks of existing chemicals [DG XI] or just scientists (Scientific Committee on toxicity, ecotoxicity and the environment [DG XXIV])<sup>159</sup>.

On the OECD level, participatory measures are even scarcer. The OECD can resort to two existing consultative bodies, the Business and Industry Advisory Committee (BIAC) and the Trade Unions Advisory Committee (TUAC), both officially recognized since 1962. There is also an Environmental Council, which is invited to those committee sessions to which BIAC and TUAC are also invited. But the Environmental Council has not yet been formally recognized and, consequently, does not yet have access to an official secretariat. In the World Trade Organization (WTO), environmental organizations may enroll for relevant conferences<sup>160</sup>. However, there is no formal procedure for invitations, submitting proposals or the right to be heard. In the UN framework, the chances of NGOs to be heard vary. Similar to the WTO procedure, NGOs may enroll. But their participation is not formally recognized. Thus, depending on the interests of national states, their impact varies considerably. NGO proposals might even be adopted, as in the case of the IUCN proposal for the Biodiversity Convention (Biermann 1998, p. 243), or they may be excluded, as on the occasion of the POP negotiations.

In short, from the perspective of democratic legitimacy, the procedural international framework is utterly deficient.

### 3. Participation in international toxics control

What are the principles that govern international rule making, and how do they relate to the demand of participatory control? In the national context, participation is embedded in principles of administrative accountability to citizens and due process. These principles do not apply in the international setting due to the principle of sovereignty. Comparing the structural differences between national and international rule making, two observations seem in order. First, the international activity of states centres upon moderation and co-operation rather than direct rule setting (Mayntz and Scharpf 1995). This remains the task of the national state. However, the results of international consultations generally pass the national legislatures without full-scale discussion because they are presented as internationally agreed terms.

159 Detailed information on agenda and membership:  
[http://europa.eu.int/comm/dg24/health/sc/sct/index\\_en.html](http://europa.eu.int/comm/dg24/health/sc/sct/index_en.html).

160 See <http://www.wto.org>...

Therefore, reflection on participation and democratic control needs to focus on these organizations and their policies. An excellent example is the OECD. Its central characteristic is the fostering of co-operation on mutually agreed terms of regulation. It operates on a consultative, not rule-driven basis. In this capacity, it has become the central organization of toxics control and a think tank for new regulatory concepts in toxics control. Here, international chemicals control policy is being conceived<sup>161</sup>. The initial key idea of distinguishing between new and existing chemicals regulation originated in the OECD. Later it was adopted by the EU and its member states<sup>162</sup>. If it is true that national command-and-control regulation has given way to an internationalized co-operative control and to more sophisticated economic policy instruments, then public participation needs to be involved in these policy-conceiving, "preparatory" processes. It needs to be involved from the beginning and not only when already co-ordinated instruments are about to be nationally implemented. At present, internationalized co-operative "hard policy" decisions are obscured by a "veil of apparently national democratic legitimacy". In order to shed more light on the decision-making process, the structures of international organizations need to be revised in the light of participation. For an adequately informed participation, the availability of documents via internet is not sufficient. Nor are fora, such as the EC environmental forum which only comments on strategic environmental policies in general, sufficient. The committees that conduct negotiations and make decisions require substantial and continuous (ultimately judicial) scrutiny. Only a better-structured process that establishes who may participate, when and under which conditions, will secure a proper balancing of competing interests. From the principle of co-operative international rule making, it follows that democratic control comes too late when the national parliaments have approved legislation. Consequently, democratic control demands that already the prior intergovernmental negotiations need to be opened up for participation by the public, especially by the NGOs.

The second observation concerns the principles fundamental to international regulatory procedures: the principles of state sovereignty<sup>163</sup> and diplomatic secrecy. These principles were used to impede the conception of participatory democratic control, as legitimacy was defined by accountability to national parliaments. However, these principles, which govern the process of intergovernmental arbitration, are not appropriate for emerging supranational

161 See only OECD 1982; OECD 1982; OECD 1982; OECD 1983.

162 OECD 1986; Altstoffkonzeption der Bundesregierung of December 13, 1988 (BT-Drs. 11/6148 Attachment 1); EC Reg. 793/93.

163 Latest example: the Aarhus Convention (within the framework of UN ECE) was negotiated with the co-operation of, though not signed by, Germany; BT-Drs. 13/11120.

co-operation and regulation. State sovereignty still plays a legitimate role with respect to the sovereignty of the electoral body. But the emerging problems are inadequately conceived as conflicts between states. The importance of state sovereignty has diminished in parallel to the disappearance of purely national economies. The individual is now at the centre of international regulation<sup>164</sup>. Consequently, traditional principles need to be replaced by (1) the principle of transparency and (2) the principle of due process<sup>165</sup>. The international regulatory processes have to become transparent. Consequently, working papers should be available and access provided to the results of international secretariats' activities, like the IRPTC lists.

Placing the individual in the centre of international policy making has changed the conflict constellation. The addressees of international politics are not necessarily the states, but also specific economic players. Thus, parallel to changes in national administrative law, modern conflicts cannot be confined to a bipolar relation between governments and the economic players. Regulatory measures are tri-, if not multipolar by nature. This means that not only states and industry should participate, but other stakeholders, too, such as, with respect to environmental regulations, the environmental NGOs. In sum, the shift from the intergovernmental to the supranational principle demands a participation not only of the individual addressees, but also of the public interests concerned, which means, in the context of environmental policies, the participation of environmental NGOs.

## VI. Conclusion

The dilemma of the need for and the widespread unavailability of international "positive integration" in toxics control mirrors the general problems of the process of internationalization. From the overall analysis, three conclusions can be drawn for the context of chemicals control. (1) Despite the decreasing capacity of states to solve problems occurring within their boundaries, the latter are still indispensable as innovative regulatory entities. National and international regulation needs to be conceived of in an interconnected system of various levels without clear-cut, but with parallel competencies. More international regulation is required and more responsibility needs to be transferred to industry. Traditional intergovernmental institutions need to be smoothed by innovative modifications, such as the "opting-out" procedures. Former policies regarding existing chemicals need to be rethought. (2) International toxics regulation needs to balance the principles of environmental capacity building through specialization and of an effective integration of

environmental and economic policies. A way to meet both principles is the form of an international environmental regime, such as the Vienna and Basel Conventions. As models, they should be transferred to the domain of international toxics control. (3) Due to the increasing role of international regulation in chemicals control, the existing processes need to be reformed. Access to information in the possession of international organizations needs to be granted. Rule-making procedures need to allow for transparency and participation of non-governmental environmental organizations.

164 Held 1995 b, p. 106; Falk 1995, p. 170 ff; Petersmann 1991.

165 Putnam 1988.

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