January 1985

Remarks (as panelist) on "International Transfer of Hazardous Technology and Substances: Caveat Emptor or State Responsibility? The Case of Bhopal, India."

David A. Wirth
Boston College Law School, wirthd@bc.edu

and effective international assistance in establishing standards and in providing guidance to developing countries, must not be lost. A comprehensive common data bank on toxic substances must be made available for all countries. Effective inspection and certification services to provide reviews of safety procedures of hazardous facilities must be made available. Perhaps the emerging law of state responsibility could be extended to cover the needs of developing countries in assuring that industrialized countries, which permit export of technologies or substances banned or severely restricted domestically, must be held liable internationally if such technology or substances cause harmful effects in another country. An international fund must be established to assist victims of Bhopal-type disasters.

REMARKS BY DAVID A. WIRTH*

As a result of such incidents as the Seveso episode in Europe and the Bhopal tragedy in India, public attention has focused on the question of international trade in hazardous substances. Many recent multilateral undertakings addressing exports of hazardous substances have been in the form of nonbinding principles and guidelines. This approach has been widely employed in the international environmental field, and several of the best examples of its applicability concern exports of hazardous waste, chemicals and pesticides. In discussing these particular cases, I will also describe the potential contributions of nonbinding principles and guidelines to international law as a general matter.

There is relatively little that can be characterized as comprising a traditional body of law establishing international standards for exports of substances prohibited or regulated in the country of origin. There are few, if any, multilateral agreements or decisions of international tribunals addressing this matter. Customary norms are in early stages of development. Two approaches have surfaced to address the problem of an absence of international standards in this area. One is the elaboration of nonbinding principles and guidelines by such organizations as UNEP and the OECD. A second is development of domestic legislation concerning exports of domestically regulated or prohibited substances.

These two areas—nonbinding guidelines and domestic legislation—do not necessarily express currently accepted universal norms. Guidelines and principles are explicitly nonbinding, and domestic legislation is binding only as a domestic matter. For this reason, it is probably better to consider guidelines and domestic legislation not to be, strictly speaking, sources of international law, within, for example, article 38 of the Statute of the International Court of Justice. It might be preferable to think of them as forerunners of more generally accepted principles.

That these instruments are intended to have some effect on international law, however, is readily apparent from the attitude of international organizations and domestic legislatures that address such questions as international trade in hazardous substances. Nonbinding international instruments and domestic legislation can lay a foundation for broad acceptance of certain principles. Ultimately this process may result in general agreement on a customary international norm or inclusion of particular principles in binding instruments such as multilateral conventions. Moreover, what guidelines and domestic legislation lack in terms of binding international character, they more than make up in their dynamic and progressive nature. Typical sets of guidelines not only restate the existing domestic legal situation for many countries, but also establish

*Attorney Adviser, Office of the Legal Adviser, U.S. Department of State. Mr. Wirth spoke in his personal capacity; his remarks do not represent positions of the Department or the U.S. Government.

long-term goals that few, if any, states may be prepared to undertake immediately. Domestic legislation can also be a rapid means of implementing new principles and responding to urgent situations.

In discussing the contributions of nonbinding principles and guidelines to the development of international law, 1972 can be taken as a useful starting point. That was the year of the U.N. Conference on the Human Environment in Stockholm, which produced a declaration containing 26 principles. The 21st principle asserts the responsibility of states, consistent with the right to exploit their natural resources, "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Principle 21 has now been repeated and cited in so many different contexts that it has become a reasonable candidate for consideration as part of customary international law. As such, it is probably the best example of how a nonbinding statement can take on a life of its own as a substantive legal principle. The 1972 Stockholm Conference also laid the foundation for the establishment of UNEP. As a result of the adoption of the 1981 Montevideo Program by UNEP's Governing Council, UNEP's Environmental Law Program has convened many ad hoc working groups to elaborate guidelines on such issues as hazardous waste, chemicals and pesticides.

The OECD was established in 1960 with the primary purpose of coordinating economic policies and harmonizing trade practices. It consists of 24 members, primarily countries with industrialized market economies. Besides the Western European states, the United States, Canada, Japan, Australia and New Zealand are members. Members cooperate primarily by taking decisions, which are binding instruments for those members that agree to them, and by adopting recommendations, which embody nonbinding principles. The OECD's Environment Committee and its numerous working groups on such issues as hazardous waste and chemicals have been very active in elaborating decisions and recommendations for adoption by the OECD Council.

There have been substantial initiatives within UNEP, the OECD and other organizations in several areas particularly relevant to the issue of the international transfer of hazardous substances: hazardous waste, chemicals and pesticides. These examples also provide a good opportunity to describe the effect of U.S. legislation on these multilateral undertakings.

Initiatives on controlling transborder shipments of hazardous waste were motivated in large part by the "disappearance" from Italy of a number of drums of dioxin from the 1976 Seveso disaster. After a desperate search, the missing drums were finally discovered improperly stored in a village in northern France. Although not extensively publicized in the United States, the Seveso dioxin incident is probably as well known in Europe as Love Canal is domestically.

In February 1984, the OECD Council adopted a decision and recommendation on transfrontier movements of hazardous waste. The recommendation encourages exporting states to insure that importing and transit states are notified of shipments and to obtain assurances that exporters will comply with the laws of the receiving country. UNEP has also been elaborating a set of draft guidelines and principles for the environmentally sound management of hazardous wastes. Unlike the OECD instruments, this document will address all aspects of hazardous waste management, both domestic and international. The most recent round of negotiations took place in December 1984, and another is anticipated toward the end of 1985.

Several new trends have recently emerged in these negotiations. Some Western European countries support a principle according to which hazardous waste should

ordinarily be treated in the country in which it is generated. There is also sentiment developing that certain exports that nonetheless do take place should not leave the exporting country until the receiving country has given its explicit consent. Yet a third principle that has been proposed is that exporting states should assure themselves that exported wastes can be properly managed in the receiving country.

It is interesting to look more closely at the principle of prior consent, under which importing states should agree to receive certain transborder shipments of hazardous waste before they may leave the exporting country. There is a proposal that the draft UNEP guidelines explicitly articulate this requirement. Although the OECD recommendation contains a weaker statement, a principle along the lines of the UNEP proposal is being discussed in the OECD. It appears, however, that no country is yet satisfactorily implementing this principle in practice.

In 1986 the United States will become the first country to implement a prior consent requirement through section 245(a) of the Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act of 1976 (RCRA). The amendment provides that exports may not take place without the prior written consent of the government of the receiving country. However, if a bilateral agreement meeting certain criteria is in place, then the terms of that agreement may supersede certain portions of the RCRA amendment with respect to exports to that country. The Environmental Protection Agency (EPA) and the State Department plan to begin negotiating these agreements in the near future, beginning with Canada.

There is a symbiotic relationship between domestic legislation, such as the RCRA amendment, and multilateral activities, such as the OECD and UNEP initiatives. For example, the United States was the first to adopt the prior consent principle through the new amendment to RCRA. Congress's action has already had an influence on international developments by giving the principle of prior consent greater substance and credibility in international fora.

Recommendations and guidelines may pave the way for more substantial legal undertakings, and hazardous waste is a good example of the potential in this area. Because control of the transborder movement of waste is a priority issue for many European countries, the OECD convened a high-level meeting on this subject in Basel, Switzerland, in March 1985. The participants decided that a multilateral convention, potentially extending to nonmember countries, should be part of further work in this area. It will be interesting to compare the proposals made in the context of negotiating a binding legal document to those in the nonbinding OECD and UNEP instruments. It is quite possible that principles already included in the nonbinding documents will receive more critical scrutiny when the participating states will be legally obligated to comply with those requirements in managing their hazardous waste.

Exports of chemicals and pesticides present another illustrative example of the dynamic state of international environmental law today. In the case of pesticides, substantial concern has arisen about poisonings in Third World countries. Pesticide users in those countries may be unaware of appropriate safety precautions, and the problem is compounded by the fact that those countries often do not have adequate regulatory infrastructure to provide necessary information or protections for their populations. Everyone agrees that the ultimate goal is for all countries to establish their own regulatory structures capable of dealing with problems of chemical and pesticide use within their territories. The question, however, is what to do in the meantime about exports to developing countries of pesticides and hazardous chemicals—of which the primary sources are Western industrialized countries. Concerns become even more

intense in the case of products such as DDT which have been banned in the country of export and may affect the public health and environment not only of the importing state, but also the exporting state through reimportation in the form of residues on foreign food products.

One approach is that of the OECD Council, which in April 1984 adopted a recommendation on information exchange related to export of banned or severely restricted chemicals. The recommendation provides that an exporting state should notify an importing member state of the first shipment of a chemical following a significant regulatory action taken on that chemical by the exporting state. Such an action could be, for instance, a ban on certain uses of a chemical.

After the text of the OECD recommendation was tentatively agreed upon, UNEP convened the first meeting of a working group to discuss draft guidelines for exchange of information on potentially harmful chemicals in international trade. The UNEP draft guidelines were somewhat broader than the OECD recommendation, in particular by addressing "potentially harmful" in addition to "banned or severely restricted" chemicals. The UNEP negotiation also raised the question of a prior consent requirement for chemical exports similar to that for waste. The first UNEP meeting, and eventually UNEP's Governing Council, in 1984 adopted a portion of the guidelines known as the UNEP "Provisional Notification Scheme for Banned and Severely Restricted Chemicals." The Provisional Notification Scheme, which is intended to be implemented by governments on an interim basis, is very similar in its substance to the OECD recommendation. The group held its second meeting in January 1985, at which it continued to discuss the remainder of the guidelines.

FAO has been considering a draft International Code of Conduct on the Distribution and Use of Pesticides. Unlike the OECD and UNEP documents, the draft FAO code will establish a comprehensive scheme for pesticide management, of which the provisions dealing with exports are only a portion. Unlike the OECD and UNEP initiatives, the FAO code is addressed to the private sector as well as to governments. The FAO's Committee on Agriculture recently gave broad and general acceptance to the code, which can be expected to be adopted in final form before the end of 1985.

Occasionally, the argument is made that restrictions on exports infringe the sovereignty of the importing state. Such reasoning is incorrect. The power to import anything it pleases is not an attribute of a state's sovereignty that must be respected by exporting countries under international law. To the contrary, every state has a sovereign right to control exports from its territory. As a practical matter, it is true that an importing state should take measures necessary to control entry into its territory of products that that state considers dangerous. My personal experience in these negotiations suggests, however, that developing countries in many cases would prefer export policies calling for more, rather than less, regulatory action by exporting states.

As in the case of hazardous waste, the United States has the most extensive existing information-exchange scheme for chemicals and pesticides. The United States is the only country fully implementing the OECD recommendation and the UNEP Provisional Notification Scheme. In the case of pesticides, section 17 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires EPA to implement two types of notifications. The first is a notice that is sent to all governments and international organizations worldwide each time EPA takes a major regulatory action on a pesticide, such as cancellation or suspension of a pesticide's registration. The second type of notification required by FIFRA is an export-specific notice triggered the first time a pesticide unregistered for use in the United States is exported to a particular foreign purchaser in a calendar year. Before that export can occur, the foreign purchaser

must sign a statement acknowledging an awareness that the pesticide is not permitted to be used in the United States. The exporter then informs EPA, and EPA, through the Department of State, notifies the government of the importing country.

For chemicals, the principal notification authority is section 12 of the Toxic Substances Control Act (TSCA). Under TSCA and EPA's implementing regulations, EPA is required to notify a foreign government the first time a regulated chemical is exported to that country in a calendar year. The notice alerts the government of the importing country that the chemical is being exported and informs it about the regulatory action EPA has taken. Under both TSCA and FIFRA, only the first shipment of a calendar year is the subject of notification, and the notices might not be transmitted before actual shipment.

As in the case of hazardous waste, there is an interdependent relationship between U.S. domestic requirements and international initiatives in the chemicals and pesticides area. In fact, FIFRA and TSCA established the framework for notification schemes proposed and adopted by international organizations in this area.

Because of their nonbinding character, it is difficult to say what effect, if any, OECD and UNEP principles on hazardous waste, chemicals and pesticides might have in a particular case. However, it is safe to say that the place of nonbinding guidelines and principles has rapidly become well-established in the international environmental field. In UNEP alone, in addition to the subjects discussed above, nonbinding documents addressing land-based sources of marine pollution and environmental impact assessment are being developed. There are also other, as yet untouched, areas remaining on UNEP's Montevideo agenda.

Although the nonbinding character of these documents may suggest their limited utility, it may also be their greatest strength. Elaborating nonbinding principles within UNEP and the OECD gives states an opportunity to develop and gain experience with various approaches to environmental problems in a fairly low-risk context. It is quite possible that this cooperation might be far less productive if the only alternative were binding instruments. The OECD decision and recommendation on hazardous waste, which were adopted simultaneously, serve as a good example. The decision, which is a binding instrument, states only a general obligation. Most of the useful particulars are contained in the nonbinding recommendation. The development of detailed, binding principles may be quite slow, and until then these nonbinding principles and guidelines are helpful standards.

The role of the U.S. Government, and particularly Congress, in this process should not be underestimated. Other nations have repeatedly stressed the catalytic role of the United States for foreign undertakings and international cooperation in the environmental field. For this reason, Congress and the executive branch can be considered important contributors to the development of international environmental law. The international community has accepted many of the positive developments in U.S. environmental law over the past 15 years, and in some cases has provided constructive elaborations as well. Continued and improved coordination between domestic and international initiatives can only help the environment we all live in, both here and abroad.