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Introduction

Prior Informed Consent ("PIC") is an important and timely topic because it raises and melds significant issues in the international community beyond those that involve the protection of human health and the environment.

PIC is considered by many as both arising from and being an extension of several United States laws, specifically the Toxic Substances Control Act ("TSCA") of 1976. This is because TSCA includes provisions on export notification and conditions requiring the United States Environmental Protection Agency ("EPA") to implement specific measures to control potential hazards associated with chemical substances or mixtures that present or will present an unreasonable risk of injury to health or the environment. TSCA subjects those persons or companies seeking to export a chemical deemed hazardous by the EPA to a notification process as part of an information sharing procedure for the benefit of the receiving government. The exporter is obligated to notify the EPA of its export plans prior to the actual export. In turn, the EPA provides the importer with information regarding their potential imports.

Another U.S. law with a PIC mechanism is the Federal law governing the management of hazardous waste known as the Resource Conservation Recovery Act ("RCRA"). RCRA requires exporters of hazardous waste to give the EPA sixty days notice prior to the planned export. The State Department, acting for the EPA, gives notice to the receiving or importing government, at which point the importing government must provide written consent to the import. The EPA will provide exporters with information on the receiving government's consent (with or without conditions) or objections.

TSCA and RCRA are detailed examples of how the "prior" aspect of PIC is used in practice, however, the question remains as to how "informed" parties are and what constitutes "consent." Consider for instance an importer attempting to bring a chemical substance into Brazil. In Brazil, the importer of a chemical substance from the United States receives a federal register notice and several documents about that substance. These documents can consist of dozens or perhaps hundreds of pages of highly technical information. At this point, it is unclear what the Brazilian government actually does with this information, begging the question of whether or not informed consent can be given.

This article presents an overview of the current context of PIC by highlighting various international PIC instruments. These include multinational agreements and their PIC provisions as well as international examples to demonstrate PIC's complexity in practice. This article concludes with future PIC developments and challenges facing the growing international community.

Current Context

While the PIC notion is rooted in U.S. domestic law, it is important to recognize that it is an evolving idea incorporating a growing number of multilateral environmental agreements ("MEAs"). The current context of PIC includes the following components: international trade, role of governments, economic and technological advancements, resource constraints, and MEAs.

International trade continues to expand dramatically. Although foreign direct investment flows dropped slightly in 2003, the amount of money that large multinational corporations are moving from developed to developing countries far outweighs what the public sector is investing. Put in this context, economic activity is high as goods are continually crossing borders between nations with the help of corporations. One key indicator demonstrating this expansion is the significant increase in the value of goods moving internationally since the World Trade Organization was established in 1995.

It is important to note the role of governments and the challenges they are presented with when creating international regimes to address the rise in international trade in a growing global environment. For example, the United Nations ("UN") consists of 191 Member States, of which nearly two thirds were not recognized countries when the UN was founded in the 1940s. The diversity of resources, languages, economies, and national priorities for all 191 countries makes global consensus on common approaches nearly impossible.

Recent technological advancements present important cross currents to consider when looking at PIC regimes in different countries. These advancements range from what testing methodologies can be used to evaluate and manage potentially hazardous chemicals to new technologies leading to an expansion of trade in genetically modified crops. There are also differences in capacity between governments and industries. For instance, the United States, Australia, and Europe have a relatively high level of technical sophistication, legal capacity, and a robust regulatory regime in comparison to developing countries. Similarly this capacity difference can also be exemplified by the number of environmental protection employees in the United States compared to China. The U.S. EPA employs roughly 18,000 people while China's State

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Environmental Protection Administration has approximately 2,000 employees in a country whose population is over four times as large as that of the U.S. Another example of the imbalances faced by many countries is their level of business expertise, the advantage here clearly in the developed world.

Lastly, there is an expanding universe of products and materials covered by MEAs such as waste recyclables, hazardous waste, commercial chemicals, pesticides, living modified organisms, and genetically modified crops. MEAs are significant because they are the international instruments that implement PIC requirements worldwide.

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Multilateral Agreements Employing PIC

A growing number of organizations and MEAs have incorporated PIC provisions. Many of these multinational agreements establish a basic PIC framework to address specific transboundary environmental problems or materials crossing international borders through trade. These include:

- OECD decisions governing movements of trade in hazardous waste destined for recycling within the OECD area;
- The Convention on Biological Diversity working on an access and benefit sharing ("ABS") regime. The current program in place is voluntary, but there has recently been a commitment to develop a binding legal regime;
- The Cartagena Protocol addressing trade in living modified organisms, including crops (PIC is applied for the first time to imports of these organisms by another country);
- The Stockholm Convention on Persistent Organic Pollutants ("POPs");
- The Rotterdam Convention requiring exporters of listed banned or restricted chemicals and pesticides to obtain the prior informed consent of importers before trading. The Convention promotes the safe import of chemicals through various forms of assistance and through ensuring that exporters comply with the requirements to safely manage the import and export of hazardous substances.

The Basel Convention is discussed in greater detail in the following section because the Convention has explicit provisions that illustrate how PIC is applied in MEAs and how it can be applied in future MEAs.

The Basel Convention

The Basel Convention, with 159 signatories, came into force over a decade ago. The Basel Convention sets up a PIC regime for the transboundary movement of hazardous waste, addresses which materials are deemed hazardous, and specifies the criteria for environmentally sound management.

The Basel Convention absorbed what the U.S. law had done several years earlier, when it implemented prior informed consent provisions in RCRA. For example, before Country A authorizes a shipment of hazardous waste to Country B, there must be a government-to-government dialogue where the receiving country must give prior written consent to the import. The Basel Convention incorporates a PIC system where consent for imports of covered waste is required. Basel also creates a legal obligation on both the sending and receiving government, stipulating that the waste be managed in an environmentally sound manner.

A more recent development is the pending Basel ban amendment. This amendment prohibits a developed country, such as Canada or Norway, from sending hazardous waste for disposal or recycling to a developing country. However, such an extreme measure eliminates any possibility for PIC and emphasizes the assumption that developing countries cannot under any circumstances properly dispose of or recycle hazardous waste.

It is interesting to note the evolution of the PIC notion from a time where there was no consent, then prior and written consent between governments, followed by prior and written consent upon assurance of sound environmental management, and now toward a system where many argue that nearly two-thirds of the governments around the world cannot be trusted to engage in a meaningful PIC discussion, therefore they should not be allowed to consent. This evolution means that PIC must be evaluated not only from the perspective of government-to-individual, but also from that between governments-to-nations. Now questions arise over how accurate and complete prior informed consent actually is between governments and nations.

Key Considerations

Given the previous examples of PIC and the difficulties it presents to nations, particularly those adhering to international environmental agreements, it is important to evaluate the concept itself more carefully in order to more fully understand the complexities it embodies and the myriad of potential implications it poses for governments and nations worldwide. In analyzing the PIC concept, it is important to consider the following fundamental components:

- What does "prior" mean? The "prior" part of PIC looks at the activity before action. More specifically, "prior" addresses what steps need to be taken when an import is about to take place that could create a risk or a hazard in the importing country.

- How "informed" must a party be to provide meaningful consent? Differences in languages as well as differences in technical capacity can lead to problems in determining and receiving meaningful consent. For example, the published rules under TSCA are complex and would challenge many U.S. lawyers who are trained to understand them. How would this translate for developing countries whose second or third language is English and who lack the resources to comprehend such complex rules? Another example is the Basel Convention that lists covered waste streams. Sophisticated governments with sufficient resources can run a Toxic Characteristic Leaching Procedure ("TCLP"), which is an "analytical method that simulates sanitary landfill contaminant leaching in waste samples" and is used to test a substance to see if it exhibits hazardous characteristics. However, in many countries governments may need to use a less sophisticated approach to hazardous waste identification. For example, Annex 8 of the Basel Convention includes commonly traded materials that are generally presumed hazardous in most instances while Annex 9 lists generally traded materials that are not typically deemed hazardous. These lists demonstrate a need for governments to simplify the approaches in determining hazardous waste. Governments also face the challenge of creating an international regime that appreciates what a sophisticated developed country can do versus what might be acceptable to a developing country.

- How do we secure meaningful "consent"? This idea was addressed during discussions on the Cartegena Protocol on Biosafety in reference to a Biosafety Clearing House. Under the Clearing House, governments and individuals can post technical information, risk studies, and impact assessments on particular seeds and commodities in a central database, which the public can access via the Internet. While this would be an effective way to disseminate information internationally, some governments have raised concerns that their ministries did not have computers.

- Whose consent? Another problem that arises with "consent" is who gives "consent" in MEAs? Is it the national governments with some involvement by the subnational government? Are private parties able or required to seek consent directly from governments? Who is engaged or consulted at this point in the international regime is important. There are also varying degrees of public participation and involvement among competing industries and indigenous people and concern arises whether information is properly disseminated to the public and individual level. And a fundamental question is whether people trust the government to get the right answer (to get proper information and thereby be able to give informed consent).

An interesting case study exploring the complexities of PIC is occurring in Chile where Goldman Sachs found that it owned a large track of land, thousands of acres, in Tierra del Fuego. They wish to give the biologically unique land to the Chilean people as a national park for future generations to enjoy. While to many foreigners this may sound wonderful, some local citizens may have reservations about turning a large portion of their country into a park at the behest of foreigners. Should indigenous peoples, local fisherman, or miners in Chile have the opportunity to voice their concerns? Should they have a veto over the project?

A similar situation is faced by native people in Alaska regarding opening up the Alaskan Wildlife Refuge to drilling. While a Washington, D.C. lawyer may want to keep this area as a wilderness preserve, what choices would or should the local people make? There is a need for caution on the part of all stakeholders as "results-oriented thinking" can often compete with balanced engagement, dialogue, and consent in the context of who should be consulted and who has the authority to withhold consent.

Another issue confronting the international community in the future is whether developed countries should take on most or all of the obligations. There has been a tendency under many of the MEAs to push the obligations back onto the developed countries. There also appears to be an underlying notion that the developing world and their governments have neither the resources nor the capacity to engage in aspects of technical and legal enforcement.

Questions still remain as to whether the international community is properly equipped to successfully implement the PIC concept between the developed and developing world.

The obligations are therefore shifted upstream to developed countries such as the United States, Norway, and Canada.

Some believe that developing countries are not in a position to engage in a meaningful discussion on PIC due to the difficulties in implementing these regimes. However, this notion can be problematic when countries such as Chile and China, which have sophisticated and robust economies, are grouped together with countries such as Haiti. There is a need to recognize that at least some developing countries are in a position to take on meaningful obligations.

A final consideration with PIC is whether we are addressing priority risks from an environmental standpoint. The Basel Convention is estimated to address approximately 10% of all hazardous waste generated. Signed in 1989, the Convention's main objectives were to minimize the generation of hazardous waste, reduce the transboundary movement of it, and through greater transparency and monitoring, ensure its proper treatment and disposal. This was intended to be enforced through information sharing mechanisms and the PIC system, in conjunction with the Convention's database, which tracks the increase in the proportion of hazardous waste destined for recycling across borders. But when observing these sharing and tracking mechanisms through a trade and indigenous community's perspective, it is unclear how effective and transparent PIC is internationally. Moreover, the management of hazardous waste generated and disposed of within individual countries presents enormous challenges that are not even addressed at the international level.

Questions to Consider

The following are some important questions that arise out of PIC. While there are no clear answers to them, these questions serve as the starting points for meaningful discussions on PIC.

- Who should the law empower?
- Should the MEAs or the different implementations of MEAs, governments, indigenous people, both?
- Should someone get a veto?
- Are we addressing priority risks from an environmental standpoint?
- What and who are at risk? People, property, environment, biodiversity? Who is covered and who decides? The National government?

Observations

Higher profile events, have been successful in shutting down or reducing the degradation and harm due to activities such as waste dumping in poor and developing countries. However not much progress has been achieved in handling how China or Brazil or other similar countries manage hazardous waste generated domestically. A possible way to address this issue is to keep a watch on the priority risks at the international level where monitoring can be difficult. Whether PIC works outside these basic trade scenarios is still unclear but will certainly pose a challenge in the future as these trade regimes grapple with ideas such as access and benefit under the CBD.

Concluding Thoughts

With PIC now a prominent component of several binding international accords, increasing capacity at the national level is essential to promoting trade and protecting the environment. However, questions still remain as to whether the international community is properly equipped to successfully implement the PIC concept between the developed and developing world. In essence, simply including the PIC concept in international accords is far different from having countries understand, internalize, and implement them.

ENDNOTES: Overview of Prior Informed Consent

[1] 15 U.S.C. § 2601 *et seq.*
[2] 15 U.S.C. § 2605, TSCA § 6.

[3] "Summaries of Environmental Law Administered by the EPA: Toxic Substances Control Act," Congressional Research Service Report RL 30022, prepared by Linda Schierow, *available at* http://www.ncseonline.org/NLE/CRSreports/BriefingBooks/Laws/k.cfm?&CFID=14419994&CFTOKEN=59568301 (last accessed June 20, 2004).

[4] *See* 15 U.S.C. § 2606, TSCA § 7.

[5] 42 U.S.C. § 6901 *et seq.*

[6] For more information *see* the Convention on Biological Diversity homepage *available at* http://www.biodiv.org/doc/publications/guide.asp (last accessed June 19, 2004).

[7] For more information *see* the Cartegena Protocol on Biosafety homepage *available at* http://www.biodiv.org/biosafety/default.aspx (last accessed June 19, 2004).

[8] For more information *see* the Stockholm Convention on Persistent Organic Pollutants homepage *available at* http://www.pops.int/ (last accessed June 20, 2004).

[9] For more information *see* the Rotterdam Convention homepage *available at* http://www.pic.int/ (last accessed June 20, 2004).

[10] For more information on the Basel Convention, *see* the Basel Convention homepage *available at* http://www.basel.int/ (last accessed June 20, 2004).

[11] For more information on the Basel Ban Amendment *see* http://www.basel.int/pub/baselban.html (last accessed June 21, 2004).

[12] For more information on TCLP *see* EPA's homepage on "Frequently Asked Questions: TCLP Questions" *available at* http://www.epa.gov/SW-846/faqs_tclp.htm (last accessed June 22, 2004).

[13] Based on 1999 version of the Basel Convention, the generation of toxic waste was around 440 million tons of which an estimated 10 percent of that waste crossed international boundaries (Jennifer Clapp, "Seeping Through the Regulatory Cracks: The International Transfer of Toxic Waste," Trent International Political Economy Centre Working Paper 01/1, pg 1, citing estimate for traded waste from Christoph Hilz, *The International Toxic Waste Trade*, New York: VanNostrand Reinhold, 1992, pg 20) *available at* http://www.trentu.ca/tipec/clapp1.pdf (last accessed June 21, 2004).