

**PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT
REGARDING THE ILLEGAL EXPORT OF DANGEROUS PESTICIDES
UNREGISTERED IN THE UNITED STATES**

SUBMITTED BY

THE CENTER FOR BIOLOGICAL DIVERSITY

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

TABLE OF CONTENTS

I. SUMMARY OF THE REQUESTED REGULATION	1
II. HISTORY OF THE REGULATION IN QUESTION	3
III. REASON FOR THE REQUEST	8
A. Introduction.....	8
B. The United States has binding obligations to provide prior informed consent regarding exports of delisted or unregistered pesticides under treaties which it has signed or ratified.	11
1. <i>OECD legal instruments</i>	11
2. <i>Rotterdam Convention on Prior Informed Consent</i>	13
3. <i>Basel Convention</i>	14
4. <i>Bamako Convention, Central American Agreement, and Waigani Convention</i>	16
5. <i>Stockholm Convention</i>	17
6. <i>Minamata Convention</i>	18
C. The United States has a duty to ensure prior informed consent as a matter of customary international law.	19
1. <i>United States-Mexico-Canada Trade Agreement</i>	20
2. <i>Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management</i>	20
3. <i>Cartagena Protocol on Biosafety</i>	21
4. <i>Nagoya Protocol</i>	22
5. <i>Chemicals Convention (ILO C170)</i>	22
6. <i>Agenda 21 (UNCED, 1992)</i>	23
D. Prior informed consent is a legal tradition rooted in U.S. domestic law.	26
1. <i>Toxic Substances Control Act</i>	26
2. <i>Resource Conservation Recovery Act</i>	27
IV. DESCRIPTION OF FEDERAL REGULATIONS REQUESTED.....	28
V. CONCLUSION	29
ADDENDUM – PROPOSED AMENDED RULE.....	32

I. SUMMARY OF THE REQUESTED REGULATION

Petitioners request that the Environmental Protection Agency (EPA) initiate rulemaking procedures to require prior informed consent for the export of pesticides unregistered in the United States, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). “Prior informed consent” (PIC) is a widely accepted legal concept that has been defined by many U.S. statutes including FIFRA, U.S. multi-lateral agreements, and other international treaties and agreements. PIC is discussed and analyzed at length in this petition, and is a central legal requirement we believe EPA is not defining and interpreting correctly as it relates to unregulated pesticides produced in the United States and exported to corporations and other entities in foreign nation-states.

Amended U.S. pesticide export regulations are needed to ensure that the government of the importing nation is properly and fully informed of the risks associated with the transportation and use of certain hazardous pesticides. Petitioners believe that the amendment of certain EPA regulations is required to make the international transportation of pesticides safer and in accordance with FIFRA and binding multilateral law. Petitioners believe that the most effective way for the executive branch to make the international transportation of pesticides safer is to require the prior informed consent of the government of the importing nation, prior to the shipment of pesticides. More specifically, Petitioners seek to amend language in EPA regulations 40 C.F.R. § 152.3 and 40 C.F.R. § 168.75.¹ This petition is filed under FIFRA and the Administrative Procedure Act (APA), 5 U.S.C. § 553(e).

Enacted in 1947, FIFRA was created with the express goal of regulating the registration, distribution, sale, and use of pesticides in the United States.² FIFRA creates a requirement that before a pesticide can be distributed or sold, the pesticide in question must first be registered with the EPA. For a pesticide to be registered under FIFRA, the applicant in question must show that using the pesticide according to specifications “will not generally cause unreasonable adverse effects on the environment.”³ The term “unreasonable adverse effects on the environment” is defined as: “(1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346a of title 21 [(of the Federal Food, Drug, and Cosmetic Act)].”⁴

FIFRA § 17 governs the import and export of pesticides.⁵ FIFRA § 17 states that, notwithstanding any other provision in the subchapter, any pesticide that is prepared and packaged to the specifications of a foreign purchaser, intended solely for export, will not “be

¹ See generally 40 C.F.R. § 152.3 (2012); 40 C.F.R. § 168.75 (2007).

² See *Summary of the Federal Insecticide, Fungicide, and Rodenticide Act*, Environmental Protection Agency, <https://www.epa.gov/laws-regulations/summary-federal-insecticide-fungicide-and-rodenticide-act> (last visited Nov. 22, 2022).

³ See generally 7 U.S.C. § 136(bb) (1996).

⁴ *Id.*

⁵ See generally 7 U.S.C. § 136o (1996).

deemed in violation” of FIFRA.⁶ If an unregistered pesticide is prepared solely for export, then the foreign purchaser must sign a statement acknowledging that the purchaser understands that the pesticide in question is not registered under FIFRA.⁷ Significantly, the last sentence of § 17(a) reads: “A copy of that statement shall be transmitted to an appropriate official of the government of the importing country.” This petition argues this “statement transmitted to an appropriate official” requirement in FIFRA incorporates prior informed consent as a matter of binding domestic and international law.

FIFRA §17(b) and (c) further incorporate and embrace the notice function this petition argues should be implemented for foreign governments. Section 17(b) reads: “Whenever a registration, or a cancellation or suspension of the registration of a pesticide becomes effective, or ceases to be effective, the Administrator shall transmit through the State Department *notification thereof to the governments of other countries and to appropriate international agencies.*”⁸ This section of FIFRA specifically requires that foreign governments and international agencies be notified if the registration status of a pesticide changes and that, upon request, the notification “include all information related to the cancellation or suspension of the registration of the pesticide and information concerning other pesticides that are registered under section 136a of this title and that could be used in lieu of such pesticide.”⁹ This petition similarly argues that appropriate notice and information be provided to foreign governments for unregistered pesticides. Section 17(c)(1) also incorporates a prior informed consent process for importation of pesticides and devices into the United States, requiring that samples of pesticides or devices be provided for examination, and if that examination shows that the sample is adulterated, misbranded, or otherwise violates FIFRA, or is injurious to health or the environment, the pesticide or device may be refused admission into the country.¹⁰ When you read sections (a), (b), and (c) together it is clear that Congress was aware and supportive of the notion of prior informed consent, which is further supported by the development of both conventional and customary international law discussed in detail by this petition.

Petitioners discuss the deficiencies of the current EPA regulations in this petition and request that the current regulations be amended under FIFRA to require prior informed consent for banned or unregistered pesticides in order to make the international transportation of pesticides lawful and safer. Revised regulatory language is proposed in the Addendum.

Petitioner the Center for Biological Diversity (“Center”) is a non-profit environmental advocacy group with over 1.7 million members and supporters that seeks to protect plants and animals in their natural ecosystems. The Center has long advocated for more protective pesticide safeguards because of these chemicals’ impacts on human health, native biological diversity, and global sustainability. Contact information for Petitioner’s counsel is located at the end of this petition.

⁶ See generally *id.*

⁷ See generally 40 C.F.R. § 168.75 (2007).

⁸ 7 U.S.C. § 136o(b) (emphasis added).

⁹ *Id.*

¹⁰ 7 U.S.C. § 136o(c)(1).

Co-petitioner Center of International Environmental Law (“CIEL”) is a not-for-profit legal organization that conducts education, training, research, and advocacy to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL has worked actively to address the human health and environmental impacts of toxic substances for nearly three decades, including by supporting the progressive development and effective implementation of international and domestic law relating to the governance and transboundary movement of hazardous chemicals.

II. HISTORY OF THE REGULATION IN QUESTION

FIFRA was originally enacted in 1947; since then, it has been amended several times with two specific periods changing the statute.¹¹ The 1947 version of FIFRA was much broader than the statute’s current incarnation, requiring that products be registered—by USDA, not EPA—prior to interstate or international shipment, and requiring warning labels on shipments of pesticides.¹² Under the 1947 version of FIFRA, the language regarding export of pesticides read as follows: “Notwithstanding any other provision of sections 135–135k of this title, no article shall be deemed in violation of said sections when intended solely for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser.”¹³

In 1972, Congress amended FIFRA, transferring the authority to regulate pesticides from the USDA to the EPA.¹⁴ This shift in pesticide law was spurred, in part, because of the increasing congressional concern regarding the short-term and long-term effects of the application of pesticides on workers, consumers, and wildlife not targeted by pesticides.¹⁵ The new 1972 FIFRA amendments required that pesticides be registered prior to use.¹⁶ Furthermore, the 1972 amendments directed the EPA to begin the process of registering old pesticides to ensure safety.¹⁷ Under the current FIFRA regulations, registration of pesticides occurs when, based on the scientific data and assessment of the risks and benefits, it is determined that the product’s use is acceptable.¹⁸ Apart from some subsequent amendments, the 1972 version of FIFRA remains the primary regulatory mechanism for pesticide use domestically.

As part of the 1972 amendments, Congress also required EPA to notify foreign governments and relevant international agencies “whenever a registration, or a cancellation or

¹¹ See Jerry H. Yen, Robert Esworthy, & Linda-Jo Schiero, *Pesticide Law: A Summary of the Statutes*, Cong. Res. Serv. 2 (last updated Nov. 14, 2012), <https://crsreports.congress.gov/product/pdf/RL/RL31921/19> (noting that the 1947 version of FIFRA was a continuation of pesticide laws enacted in 1910).

¹² See *id.*

¹³ See 7 U.S.C. § 135a(b) (1952) (noting that the 1947 FIFRA export provisions would be later amended, and the language altered).

¹⁴ Yen et al., *supra* note 11, at 2–3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ See 7 U.S.C. § 136(bb) (1996).

suspension of the registration of a pesticide becomes effective, or ceases to be effective.”¹⁹ In April, 1978, the U.S. General Accounting Office (GAO) delivered a report on the “Need to Notify Foreign Nations of U.S. Pesticide Suspension and Cancellation Actions,” detailing serious and systemic deficiencies in the implementation of that provision by EPA and the State Department.²⁰ Beyond simply documenting these failures, however, GAO observed that informing potential importing countries regarding the regulatory status of pesticides they might import had significant value for both the country of import²¹ and for the people of the United States:

[Countries of import] benefit because they are alerted to some pesticides’ unreasonable hazards and often follow the U.S. lead, which lessens exposure of their workers and citizens. The U.S. benefits when a nation restricts using these pesticides on U.S. food and fiber imports.²²

The GAO recommended, inter alia, that EPA develop an appropriate system with the State Department for timely and efficient dissemination to foreign nations of information on pesticide suspensions and cancellations, and further observed that the latter recommendation “may be most effectively implemented if EPA can provide direct notifications to appropriate foreign officials.”²³

In addition to reminding EPA of its own duty to report to Congress within 60 days regarding agency actions taken in response to GAO’s report,²⁴ the GAO also testified directly to Congress on the matter in July 1978, while Congress was actively deliberating on the 1978 amendments to FIFRA. In a detailed statement before the House Committee on Government Operations, Henry Eschwege summarized GAO’s finding that the existing notification process was ineffective, inconsistent, and poorly implemented.²⁵ He testified that, even when agency actions were not final, pesticide registrations were voluntarily withdrawn, or not all product uses were canceled, the regulatory actions at issue had “both national and international implications [for which] notifications should have been made.”²⁶

As GAO observed in July 1978, and as remains true today, “[a]ctions on relatively minor pesticide uses in the U.S. may be significant uses in one or more foreign nations because of

¹⁹ Pub. L. No. 92-516, §17(b), 86 Stat. 973, 995 (Oct. 21, 1972), <https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg973.pdf>.

²⁰ GAO Doc. CED-78-103, Need to Notify Foreign Nations of US Pesticide Suspension and Cancellation Actions, Report to Environmental Protection Agency (April 20, 1978), <https://gao.justia.com/environmental-protection-agency/1978/4/need-to-notify-foreign-nations-of-u-s-pesticide-suspension-and-cancellation-actions-ced-78-103/CED-78-103-full-report.pdf>.

²¹ *See id.* at 4 (explaining that “such information is of great interest to nations which do not have resources to extensively evaluate pesticides before use”).

²² *Id.* at 1.

²³ *Id.* at 4.

²⁴ *Id.* at 5.

²⁵ Federal Efforts to Notify Foreign Nations Regarding Pesticide Suspensions and Cancellations, Testimony of Henry Eschwege, Director, Community and Economic Development Div., GAO, before the House Committee on Government Operations: Commerce, Consumer and Monetary Affairs Subcommittee (July 11, 1978), <https://www.gao.gov/assets/106550.pdf>.

²⁶ *Id.* at 5.

differences in climate, crops, and pests.”²⁷ Moreover, Mr. Eschwege informed the Committee, accurate and timely information on worldwide pesticide usage was, at that time, generally not available.²⁸ This lack of data, coupled with “inherent problems in predicting changes in significant worldwide pesticide usage patterns underscores the very real need to notify foreign nations of virtually all pesticide suspension and cancellation actions.”²⁹

After recounting numerous examples of the necessary information not being communicated clearly, effectively (or even legibly) by EPA or not reaching the most relevant officials in importing countries,³⁰ GAO reiterated the recommendations from its earlier reports, along with the observation that the “most effective way would be to have EPA provide direct notifications to appropriate foreign officials, concurrent with notification to the Department of State.”³¹

FIFRA would later be amended in December 1978, because of Congress’ desire to streamline the registration process for pesticides.³² Congress was very much aware of both this GAO Report and the testimony of experts such as Mr. Eschwege; the final legislative language reflects his caution on this topic. Pursuant to the 1978 amendments to FIFRA, products that contain the same active ingredients are grouped together.³³ FIFRA directs the EPA, when analyzing the safety of proposed pesticides, to analyze the safety of the pesticides not based on the individual product, but rather to examine the safety of the various groups of pesticides.³⁴ The 1978 amendments further directed EPA to suspend the registration of certain products if the producer of the products failed to submit the required testing data by a specified time. The 1978 amendments addressed the provisions of FIFRA regarding the export of pesticides, creating the language which exists in FIFRA § 17 today.³⁵

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Providing an example of EPA’s inconsistent application of its criteria for foreign nation notifications, the testimony included that “EPA notified foreign nations on its revocation of leptophos tolerances . . . even though there were no pesticide registrations suspended or canceled because leptophos was never registered for use in the U.S.” *Id.* at 6. The EPA stated that “although notification of tolerance revocations is not covered by the Act, it felt this action was within the spirit of the Act and that there was *sufficient worldwide interest to warrant notice.*” *Id.* at 6–7 (emphasis added). The GAO Report further stated that “We believe EPA’s rationale in the leptophos notification should be extended to all significant pesticide regulatory actions.” *Id.* at 7. In another instance of inconsistency, “an official at one embassy [said] he did not routinely forward notifications on chemicals not registered in the host country because it may adversely affect U.S. exporting.” *Id.* at 8. Conversely, “[f]oreign officials in 14 countries expressly told [GAO] that they wanted to receive timely notifications on U.S. pesticide regulatory actions; none said that they did not want notifications. Representatives from less developed nations were particularly anxious to receive such timely data because they did not have the funds or expertise to perform the types of hazard evaluations being done by EPA. They rely heavily on U.S. registration as a guide for allowing use in their country.” *Id.* at 8–9. “Foreign nations want to receive timely and concise notifications on U.S. actions to aid them in their regulatory functions.” *Id.* at 10.

³¹ *Id.* at 11.

³² Yen et al., *supra* note 11, at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ See U.S. EPA Office of Inspector Gen., *EPA Needs to Comply with the Federal Insecticide, Fungicide, and Rodenticide Act and Improve Its Oversight of Exported Never-Registered Pesticides*, at 1 (Nov. 10, 2009), <https://www.epa.gov/sites/default/files/2015-11/documents/20091110-10-p-0026.pdf>.

In 1988, FIFRA was amended further, again targeting the registration process for pesticides. The 1988 amendments altered the established EPA procedures for authorizing additional registration fees and established the Reregistration and Expedited Processing Fund in the U.S. Treasury to receive the fee payments.³⁶ Furthermore, Congress amended FIFRA § 4 to require agricultural chemical producers to pay a one-time reregistration fee for each active ingredient and product registrants to pay an annual fee for each product registered.³⁷ The Reregistration and Expedited Processing Fund was intended to supplement appropriations to offset the cost of reregistration.³⁸

The Food Quality Protection Act of 1996 (FQPA) established a new, more stringent safety standard for pesticide residues on food, increasing protection for children.³⁹ The FQPA directed the EPA to examine pesticides that presented the greatest risk for minors, mandating a review process for all registered pesticides at least once every 15 years.⁴⁰ The FQPA also authorized collection of new and existing fees to support reregistration.⁴¹

When FIFRA § 17 was amended in 1978, Congress did not explicitly address the issue of “prior informed consent” because, at the time, “prior informed consent” as a legal doctrine was still in its infancy. Nonetheless, the common-sense notion of informing the government of an importing nation regarding dangerous pesticides before the harm occurs is consistent with § 17 and the Congressional language clearly authorizes prior informed consent as a delegated authority to the agency. Amending EPA’s export regulations requiring prior informed consent is now legally necessary because of binding international law on the issue of “prior informed consent” and the harm that ignoring PIC imposes on innocent parties.

To implement FIFRA, EPA has developed a series of regulations to carry out its directives under the statute. Under 40 C.F.R. § 168.69, EPA outlines the labeling requirements for the export of registered pesticides.⁴² EPA then developed a series of regulations to address the issue of unregistered pesticides exported to foreign purchasers under 40 C.F.R. § 168.75.⁴³

³⁶ Yen et al., *supra* note 11, at 3–6.

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See 40 C.F.R. § 168.69 (2015) (“(a) Each export pesticide product that is registered under FIFRA section 3 or FIFRA section 24(c) must bear labeling approved by EPA for its registration or collateral labeling in compliance with § 168.66. (b) For the purposes of this subpart, a registered export pesticide product is considered to be any of the following: (1) A pesticide product of composition, packaging and labeling as described in its registration under FIFRA section 3; (2) A pesticide product that has been modified in compliance with the notification or non-notification provisions of § 152.46 of this chapter, and any associated procedures issued under § 156.10(e) of this chapter, regardless of whether such modification has been made for the pesticide product’s registration under FIFRA section 3; (3) A pesticide product initially registered by a State under FIFRA section 24(c), and whose Federal registration has not been disapproved by EPA under § 162.164 of this chapter. (c) The text of the labeling of the export pesticide product must be provided in English and, if applicable, the following foreign languages: (1) The predominant or official language of the country of final destination, if known; and (2) The predominant or official language of the importing country.”).

⁴³ See 40 C.F.R. § 168.75 (2007) (noting that § 168.75 outlines the requirements under § 17 of FIFRA for the export of an unregistered pesticide to a foreign purchaser); see also 40 C.F.R. § 168.70 (2015) (“(a) Any export pesticide product that does not meet the terms of § 168.69 is an unregistered export pesticide product for purposes of this

The present regulations are not sufficient to adequately ensure the safe export of pesticides from the United States to a foreign nation. Under the current incarnation of § 168.75(c), EPA only requires communication between the exporter, EPA, and foreign purchaser regarding the purchasing agreement as currently outlined in the regulations.⁴⁴ Section 17(a)(2) of FIFRA, however, states that “a copy of the statement [(the foreign purchaser agreement)] be transmitted to an appropriate official of the government of the importing country.”⁴⁵ As currently written in the regulations, Petitioners argue that the communication with the importing government is insufficient because there is no requirement of prior informed consent by the government of the importing country prior to the importation of the unregistered product, only that a copy of the current foreign purchaser agreement be sent after the fact. Petitioners argue the current way in which EPA defines foreign purchaser is inadequate because “foreign purchaser” currently does not include any verification that the substance can legally be imported into the country of import by said foreign purchaser. Currently, there is no clear definition in EPA regulations that adequately defines the term “foreign purchaser.”⁴⁶ Under FIFRA § 2, “foreign purchaser” is not included in the list of definitions, and thus EPA has the discretion to clarify this important term.⁴⁷

subpart. (b) Each unregistered export pesticide product must bear labeling that complies with all requirements of this section or collateral labeling in compliance with § 168.66. (1) The labeling must comply with all of the prominence and legibility requirements of § 156.10(a)(2) of this chapter. (2) The labeling must comply with all the language requirements in §§ 168.69(c) and 156.10(a)(3) of this chapter. (3) The labeling must bear the following information: (i) The name and address of the producer, in accordance with the requirements of § 156.10(c) of this chapter; (ii) The net weight or measure of contents, in accordance with the requirements of § 156.10(d) of this chapter; (iii) The pesticide producing establishment number, in accordance with the requirements of § 156.10(f) of this chapter; (iv) An ingredients statement, in accordance with the requirements of § 156.10(g) of this chapter, except that: (A) The ingredients statement need not appear in a second language besides English if English is the official or predominant language in the importing country and the country of final destination, if known; and (B) An export pesticide product intended solely for research and development purposes, (and which bears the statement “For research and development purposes only. Not for distribution, sale, or use,” or similar language) may bear coded ingredient information to protect confidentiality. (v) Human hazard and precautionary statements in accordance with the requirements of subpart D of part 156 of this chapter. The statements must be true and accurate translations of the English statements. (vi) The statement “Not Registered for Use in the United States of America,” which may be amplified by additional statements accurately describing the reason(s) why the export pesticide product is not registered in the United States, or is not registered for particular uses in the United States. (c) This section also applies to all unregistered pesticide products and devices that are intended solely for export and that are transferred, distributed, or sold between registered establishments operated by the same producer according to § 152.30(a) of this chapter if: (1) The transfer, distribution or sale occurs between a point in the United States and a point outside the United States, or (2) The transfer occurs within the United States solely for the purpose of export from the United States.”).

⁴⁴ See 40 C.F.R. § 168.75(c) (2007).

⁴⁵ See 40 C.F.R. § 168.75 (2007).

⁴⁶ See 40 C.F.R. § 152.3 (2012).

⁴⁷ See 7 U.S.C. § 136 (1996).

III. REASON FOR THE REQUEST

A. Introduction

Current EPA regulations and practice on the export of unregistered pesticides are incompatible with the legislative text and purpose of the FIFRA provisions. This becomes even more apparent in light of accepted understandings of “notice” that have developed since 1978, and the fundamental change in pesticide trade since that time. The regulatory, scientific, and public health context with respect to pesticides and hazardous substances has shifted profoundly in the 65 years since FIFRA’s original adoption, and in the more than four decades since the statutory language of FIFRA §17 was amended to its current form. In that period, the proportion of pesticides shipped in international trade has increased exponentially. Since 1960, the value of global pesticide exports has increased by 15,000 percent—reaching \$41 billion in 2020.⁴⁸ More fundamentally, as pesticide usage in North America and Europe leveled off in recent decades as consumers and regulators seek safer alternatives, pesticide exports have shifted heavily to countries in the Global South.⁴⁹ At the same time, U.S. imports of agricultural produce have also grown exponentially. Agricultural products treated with exported pesticides are often imported into the United States, creating a significant exposure pathway for domestic populations as well. Amidst this fundamental change in circumstances, EPA’s current implementation of FIFRA §17 is no longer fit for purpose and is incompatible with the requirements of global public health and human rights, the protection of U.S. consumers, and applicable legal standards under both international and domestic law.

A study published in *The International Journal of Occupational and Environmental Health* concluded that the United States exported nearly 1.1 billion pounds of pesticides that have been identified as harmful carcinogens, between 1996–2000.⁵⁰ Between 2001–2003, the United States exported around 28 million pounds of pesticides that were not allowed to be used in the country.⁵¹ Research has found that most unregistered pesticides are exported from the United States to developing nations, prompting the UN Special Rapporteur on Toxic Waste to call out the United States on its “immoral” practice of exporting banned pesticides.^{52,53} As a subsequent Special Rapporteur reiterated in a 2019 report on *State’s duty to prevent exposure to hazardous substances and wastes (toxics)*, “States continue to export banned pesticides, industrial chemicals and chemical mixtures to countries known to have poor records of human rights and environmental protections,” and such exports are fundamentally incompatible with the

⁴⁸ CIEL, Fossils, Fertilizers, and False Solutions--How Laundering Fossil Fuels in Agrochemicals Puts the Climate and the Planet at Risk (October 2022) at 1.

⁴⁹ *Id.*

⁵⁰ See UN Human Rights Investigator Deems U.S. Export of Banned Pesticides “Immoral”, Earthjustice (Dec. 17, 2001), <https://earthjustice.org/news/press/2001/un-human-rights-investigator-deems-u-s-export-of-banned-pesticides-immoral> [hereinafter Earthjustice Press Release].

⁵¹ See Carl Smith, Kathleen Kerr, & Ava Sadripour, *Pesticide exports from U.S. ports, 2001–2003*, Int’l J. Occup. & Env’tl. Health 14(3): 176–86 (Jul.–Sept. 2008), doi: 10.1179/oeht.2008.14.3.176.

⁵² See Nathan Donley et al., *Pesticides and environmental injustice in the USA: root causes, current regulatory reinforcement and a path forward*, BMC Pub. Health 22, 708 (2022), <https://doi.org/10.1186/s12889-022-13057-4>.

⁵³ See Earthjustice Press Release, *supra* note 50.

protection of human rights.⁵⁴ The Office of the Vice President’s National Performance Review of the EPA concluded—after extensive research—that developing nations do not possess the appropriate administrative means to ensure the development of effective laws governing the import, use, and transportation of pesticides.⁵⁵ Recent research has estimated that around 385 million occupational pesticide-related injuries occur every year around the world, the bulk of which happen in developing countries.⁵⁶ The practice of commonly exporting harmful, unregistered pesticides to developing nations was specifically cited as one way in which U.S. pesticide regulations perpetuate environmental injustice in the United States and abroad.⁵⁷

An Expert Group Meeting of the United Nations (UN) Permanent Forum on Indigenous Issues entitled “Combating Violence Against Indigenous Women and Girls” concluded that Indigenous communities remain “uninformed, sickened and killed” from the practice of rich, industrialized countries exporting dangerous pesticides to developing countries.⁵⁸ Researchers at the United States’ leading medical institutions, many of whom are Indigenous themselves, found that the U.S. practice of exporting pesticides banned within our own borders was disproportionately harming Indigenous Peoples around the world.⁵⁹ Known victims of this “Environmental Violence” include the people of the Yaqui Nation in Mexico.⁶⁰ In 2008, the UN Committee on the Elimination of Racial Discrimination encouraged the United States to take “appropriate legislative or administrative measures” to prevent transnational corporations in the United States from harming Indigenous Peoples outside the United States.⁶¹

In 2022, UN Special Rapporteur on Toxic Wastes, Marcos Orellana, reaffirmed this conclusion that toxic exposures constitute a form of environmental violence against Indigenous peoples,⁶² and noted that “toxic agrochemicals have had particularly negative effects on the human rights of indigenous peoples.”⁶³ The Special Rapporteur concluded that “[i]n too many

⁵⁴ UN General Assembly, Implications for human rights of the environmentally sound management and disposal of hazardous wastes, UN Doc. A/74/480 (Oct. 7, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/304/14/PDF/N1930414.pdf?OpenElement> [hereinafter UN Doc. A/74/480].

⁵⁵ See EPA06: *Stop the Export of Banned Pesticides*, Environmental Protection Agency, <https://govinfo.library.unt.edu/npr/library/reports/EPA6.html> (last visited Nov. 22, 2022) [hereinafter EPA06].

⁵⁶ See Wolfgang Boedeker et al., *The global distribution of acute unintentional pesticide poisoning: estimations based on a systematic review*, BMC Pub. Health 20, 1875 (2020), <https://doi.org/10.1186/s12889-020-09939-0>.

⁵⁷ See Nathan Donley et al., *supra* note 52.

⁵⁸ Andrea Carmen & Viola Waghiiyi, “Indigenous Women and Environmental Violence”: A Rights-based approach addressing impacts of Environmental Contamination on Indigenous Women, Girls and Future Generations. Submitted to the United Nations Permanent Forum on Indigenous Issues Expert Group Meeting “Combating Violence Against Indigenous Women and Girls”, at 21–22 (Jan. 18–20, 2012), https://www.un.org/esa/socdev/unpfii/documents/EGM12_carmen_waghiiyi.pdf.

⁵⁹ See Victor A. Lopez-Carmen et al., *United States and United Nations pesticide policies: Environmental violence against the Yaqui indigenous nation*, The Lancet Regional Health - Americas 10, 100255 (June 2022), doi:10.1016/j.lana.2022.100255.

⁶⁰ *Id.*

⁶¹ Committee on the Elimination of Racial Discrimination, Concluding Observations: United States, UN Doc. CERD/C/USA/CO/6, at para. 30 (May 8, 2008), <https://www.ohchr.org/en/documents/concluding-observations/cerdcusaco6-concluding-observations>.

⁶² UN General Assembly, Implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, UN Doc. A/77/183, at para. 2 (July 28, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/429/80/PDF/N2242980.pdf?OpenElement>.

⁶³ *Id.* at para. 68.

instances, States ignore the health and well-being of indigenous peoples when authorizing activities that release hazardous substances in their territories. Companies export highly hazardous pesticides that are banned in their country of origin, and the toxic chemicals are sprayed over indigenous peoples.”⁶⁴ The Special Rapporteur further concluded that “[l]ack of access to information limits indigenous peoples’ abilities to understand and engage in decision-making processes regarding activities that can cause adverse toxic effects.”⁶⁵ The Special Rapporteur thus recommended, *inter alia*: that States “(c) Respect the right to and obtain free, prior and informed consent, including for activities that may impose toxic impacts on indigenous peoples”; that each State further “(g) Ban the production and export of chemicals that are banned for use within the State”; and that they “(n) Ratify and effectively implement the Basel, Rotterdam, Stockholm and Minamata Conventions with a human rights approach, particularly integrating free, prior and informed consent and the rights to participation, information, access to justice, and effective remedy.”⁶⁶

These recommendations echo and reiterate the conclusions of the prior Special Rapporteur, Baskut Tuncak, in his 2019 thematic report on States’ duties to prevent exposure to such substances. To meet their obligations to respect, protect, and promote fundamental human rights, the Special Rapporteur concluded, States must, *inter alia*:

- (b) Adopt laws and policies consistent with their duty under international human rights law to prevent exposure to hazardous substances, protect the most vulnerable and susceptible and prevent discrimination;
- (c) Prohibit the export of chemicals and production processes that are prohibited from use domestically; and
- (d) Prevent the import of chemicals and production processes that are prohibited in the country from which they are exported.⁶⁷

Granting this petition would be an achievable administrative action to help advance these objectives.

Addressing the continued improper export of banned and unregistered pesticides would also serve to protect the people of the United States from an important source of exposure to those pesticides. Often, pesticides that have been banned in the United States are used in developing nations, whose crops are then sold back in the United States.⁶⁸ This fact has created what is known as the “circle of poison,” whereby, unregistered pesticides exported to developing nations are applied to the agricultural products which are then imported into the United States.⁶⁹ To eliminate the “circle of poison,” it is important to ensure that the governments of the foreign purchasers are informed—prior to the export of a pesticide—of the risks, so that the government of the foreign purchaser can make an informed decision as to whether to allow the import.

⁶⁴ *Id.* at para. 118.

⁶⁵ *Id.* at para. 119.

⁶⁶ *Id.* at para. 123.

⁶⁷ UN Doc. A/74/480, *supra* note 54, at 22–23.

⁶⁸ See EPA06, *supra* note 55.

⁶⁹ *Id.*

The custom and practice of prior informed consent arose from the increasing concern the international community had toward the trade of hazardous materials. This concern was further exacerbated by many importing nations lacking the appropriate administrative means to sufficiently monitor the importation of hazardous materials. In response to these concerns, the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO)—beginning in the 1980s—developed a series of voluntary information exchange programs. The FAO and UNEP then officially developed the procedure of prior informed consent. This petition argues that the EPA amend its regulations regarding FIFRA § 17 to properly institute a prior informed consent procedure for the export of harmful pesticides.

Further supporting the need for change, the United States has even violated other country's stated preferences to not receive imports of dangerous pesticides. U.S. companies under EPA jurisdiction have recently exported the neurotoxic pesticide carbofuran to the African country of Mauritius in 2019 after the country specifically informed the Rotterdam Convention in 2018 that it does not consent to carbofuran imports.⁷⁰ Situations such as this could be avoided altogether with the granting of this petition.

B. The United States has binding obligations to ensure prior informed consent regarding exports of delisted or unregistered pesticides under treaties which it has signed or ratified.

1. OECD legal instruments

The United States is an adherent to the Organization for Economic Cooperation and Development's Council Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations and argues that its compliance with OECD decisions is substantially equivalent to the Basel system, including the legal requirement of prior informed consent, which the United States acknowledges is binding. As the U.S. State Department website explicitly notes:

Article 11 of the Basel Convention provides that, notwithstanding the Convention's non-Party trade restriction, Parties may enter into agreements or arrangements allowing transboundary movement of hazardous wastes or other wastes with Parties or non-Parties, provided that such agreements or arrangements (1) do not derogate from the Convention's requirements for environmentally sound management and (2) stipulate provisions which are not less environmentally sound than those provided for by the Convention. Such Article 11 agreements or arrangements enable Basel Parties to trade in waste and scrap covered by the Convention's PIC procedures with non-Parties (like the United States)[.] The United States has entered into several such agreements or arrangements, as described below.

...

⁷⁰ See Nathan Donley et al., *supra* note 52.

The Organization for Economic Co-operation and Development (OECD) Council Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations serves as an Article 11 agreement that enables the United States to trade certain Basel Convention covered wastes with other OECD countries. Wastes subject to the OECD Control System are listed in Appendices 3 (the Green List) and 4 (the Amber List) of the OECD Council Decision and are incorporated by reference in 40 CFR Part 262, Subpart H; the Appendices partially mirror the Basel Convention Annexes.⁷¹

The introduction of the OECD Decision cited above notes that “[m]ember countries agreed at the Working Group on Waste Management Policy (WGWMP) meeting in Vienna in October 1998 to further harmonisation of procedures and requirements of OECD Decision C(92)39/FINAL with those of the Basel Convention.”⁷² Thus, the OECD system and Basel system, which the United States legally follows, explicitly embrace prior informed consent as a requirement of export of dangerous wastes.

Moreover, in its 1984 Recommendation of the Council concerning Information Exchange related to Export of Banned or Severely Restricted Chemicals, the OECD “recommends that if a chemical is banned or severely restricted in an Adherent, and that chemical is exported, information should be provided from that country to the importing country to enable the latter to make timely and informed decisions concerning that chemical.”⁷³ In developing these Recommendations, the OECD Council explicitly recognized and took into consideration “that OECD Member countries are among the major producers, exporters and importers of chemicals and that, by virtue of the experience and expertise they possess concerning chemicals control, they can assist each other as well as non-member importing countries to make timely and informed decisions about chemicals entering their territories.”⁷⁴ Accordingly, it adopted a series of Guiding Principles on Information Exchange related to exports of banned or severely restricted chemicals. The Guiding Principles included within their scope any chemical subject to a control action by a competent authority in the exporting country:

- i) To ban or severely restrict the use or handling of the chemical in order to protect human health or environment domestically; or
- ii) To refuse a required authorisation for a proposed first time use of the chemical based on a decision in the exporting Member country that such use endanger human health or the environment.⁷⁵

⁷¹ See *Basel Convention on Hazardous Wastes*, U.S. Dep’t of State, <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/basel-convention-on-hazardous-wastes/> (last visited Nov. 30, 2022).

⁷² Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations (OECD/LEGAL/0266) (Adopted on March 29, 1992; Amended on Dec. 31, 2020), *available at* <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0266#backgroundInformation>.

⁷³ OECD, Recommendation of the Council Concerning Information Exchange related to Export of Banned or Severely Restricted Chemicals, OECD/Legal/0210, (adopted April 4, 1984), *available at* <https://legalinstruments.oecd.org/public/doc/33/33.en.pdf>.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 5.

The Guiding Principles provided that the exporting country should provide to relevant officials in the country of import information sufficient to alert the country to the fact of trade in banned or severely restricted chemical taking place, and that, in so far as possible, the country of import be so alerted prior to the export occurring. At minimum, the provided information should alert the importing country: i) that an export is expected; ii) identify the chemical at issue; iii) summarize control actions taken in the exporting country, including identifying prohibited uses of chemicals for which some uses are permitted, and that information on the rationale for the control action “may also be included”; and (iv) the fact that additional information is available on request.⁷⁶ In the view of the OECD, such additional information needed by the importing country would include the exporting country’s rationale for the control action taken, readily available data used to reach its control decision, and such other information regarding the circumstances of export and import as may be agreed by the exporting and importing countries.⁷⁷

Significantly, the OECD’s background note for this instrument expressly confirms that “[t]he subsequent Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) codifies the principles laid down in the Recommendation.”⁷⁸

2. *Rotterdam Convention on Prior Informed Consent*

On September 10, 1998, 72 nations met in the Netherlands to sign the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which would become effective on February 24, 2004.⁷⁹ Through the Rotterdam Convention, the international community sought to universalize and codify the adoption and implementation of prior informed consent procedures with respect to hazardous chemicals and substances as envisioned in the Agenda 21 Plan of Implementation agreed upon by 180 nations, including the United States, at the 1992 United Nations Conference on Environment and Development (Rio Conference).

The Rotterdam Convention was designed to facilitate information exchanges between nations regarding hazardous chemicals.⁸⁰ The purpose of this information exchange was to ensure that nations could make informed decisions regarding the importation and exportation of hazardous chemicals in order to protect human health and the environment.⁸¹ To achieve these

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 6.

⁷⁸ *Id.* at 3.

⁷⁹ See *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, U.S. Dep’t of State, <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/rotterdam-convention-on-the-prior-informed-consent-procedure-for-certain-hazardous-chemicals-and-pesticides-in-international-trade/> (last visited Nov. 22, 2022) [hereinafter U.S. State Dep’t Rotterdam Convention].

⁸⁰ See U.S. State Dep’t Rotterdam Convention, *supra* note 79.

⁸¹ See *id.*; *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, art. 1 (adopted Sept. 10, 1998; revised 2019), available at <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx> (“The objective of this Convention is to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by

goals, the convention created a list of hazardous chemicals requiring exporting nations to secure the informed consent of the importing nations before hazardous chemicals could be exported.⁸² Under the Rotterdam Convention, the legal obligation of prior informed consent would become an integral component of the treaty. Prior informed consent requires that extensive information exchanges occur before an exchange of hazardous chemicals can occur.

Under the Rotterdam Convention, hazardous chemicals are sorted into categories based on the degree to which certain hazardous chemicals are banned or severely restricted in a nation.⁸³ Annex III of the Rotterdam Convention contains a list of hazardous chemicals which are subject to the legal obligation of prior informed consent.⁸⁴ Each of the chemicals listed under Annex III are subject to the prior informed consent doctrine and before an importing nation can decide whether to allow the importation of a chemical listed under Annex III, a decision guidance document must be prepared.⁸⁵ Under Article 12 of the Rotterdam Convention, “[w]here a chemical that is banned or severely restricted by a Party is exported from its territory, that Party shall provide an export notification to the importing Party. The export notification shall include the information set out in Annex V.”⁸⁶ Specifically, under Article 7, decision guidance documents are designed to inform the importing party of the dangers associated with the handling of hazardous chemicals listed under Annex III, pursuant to the guidelines listed under Annex I and V.⁸⁷ Importing nations are required to utilize the information contained in the decision guidance documents to ensure that an informed decision can be made regarding the future import of hazardous chemicals listed in Annex III.⁸⁸ If an importing nation, based on information contained in the decision guidance documents, determines that it will no longer consent to the importation of a chemical listed in Annex III, then the exporting nation must ensure that no further export of the chemical in question occurs without consent.⁸⁹ Currently, 165 parties—representing more than 80% of all UN Member Nations—have ratified the Rotterdam Convention.

The United States has signed the Convention, but has not yet ratified it.⁹⁰ Accordingly the United States is bound as a matter of international law to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.⁹¹

3. *Basel Convention*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) was signed on March 22, 1989, coming into

providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.”).

⁸² See U.S. State Dep’t Rotterdam Convention, *supra* note 79.

⁸³ See Rotterdam Convention, at art. 3.

⁸⁴ See *id.* at art. 11, annex III.

⁸⁵ See *id.*

⁸⁶ See *id.* at art. 12.

⁸⁷ See *id.* at art. 7.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) at Article 18.

effect on May 5, 1992.⁹² The purpose of the Basel Convention can be divided into three core aims: to ensure that the production of hazardous waste is limited and to ensure environmentally sound disposal; to restrict the transboundary movement of hazardous waste; and where transboundary movement is permitted, to ensure the regulation of the transboundary movement.⁹³ Under Article 4 1(c) of the Basel Convention, a party to the convention shall not allow the export of hazardous waste to an importing party, unless the importing party has consented to the import.⁹⁴ Furthermore, under Article 4 2(f), parties to the convention are required to communicate the impact of the transboundary movement of hazardous waste to the parties concerned.⁹⁵

The Basel Convention is among the most widely ratified multilateral environmental agreements, and has been ratified by 190 nations to date. The United States signed the treaty in 1990, but has yet to ratify it.⁹⁶ This means, pursuant to accepted international law, that the United States accepts an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. The U.S. Senate provided its advice and consent to ratification in 1992.⁹⁷ Despite the Senate consenting to the treaty, the United States has not submitted an instrument of ratification on the grounds that the federal government currently lacks the statutory authority to implement all of its provisions.⁹⁸ As discussed in the present petition, however, EPA currently has the statutory authority necessary to implement the provisions of the Basel Convention concerning exports of wastes—or at a minimum to avoid further action inconsistent with the spirit and purpose of that Convention.

Moreover, pursuant to its legal adoption of the OECD prior informed consent guidelines discussed above, the United States has fully embraced prior informed consent of dangerous exports as a matter of binding law. The United States' failure to require adequate information in export documentation for banned pesticides leads to violations of those conventions and underlying national law in contravention of the Basel Convention and the OECD Council Decision and Guiding Principles on stopping illegal trade in pesticides. A detailed legal analysis by one of the co-petitioners demonstrates that exports of banned or unregistered pesticides from any Basel party to any party of the regional conventions discussed below would violate the treaty.⁹⁹ In addition, since OECD is intended as a Basel Article II convention, the same basic analysis applies for OECD members.

⁹² The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted Mar. 22, 1989; revised 2019), *available at* <http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>.

⁹³ *See id.*

⁹⁴ *See id.* at art. 4.

⁹⁵ *See id.*

⁹⁶ *See Basel Convention on Hazardous Wastes*, U.S. Dep't of State, <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/basel-convention-on-hazardous-wastes/> (last visited Nov. 22, 2022).

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *See generally Legal Analysis: The Export of Banned Pesticides to Africa and Central America*, Center for International Environmental Law (2022), https://www.ciel.org/wp-content/uploads/2022/09/Legal-Analysis_Exports-of-Banned-Pesticides_FINAL.pdf [hereinafter CIEL Legal Analysis].

4. *Bamako Convention, Central American Agreement, and Waigani Convention*

While the Basel Convention (and the Rotterdam Convention) impose beneficial disclosure requirements on all parties, the Basel Convention has not sufficiently protected all countries, especially low- and middle-income countries, from the negative impacts on human health, the environment, and the economy that have resulted from decades of receiving hazardous chemicals, pesticides, and e-waste exports from high-income countries.¹⁰⁰ African countries have resolved to change this, developing a dedicated regional convention—the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention), which entered into force on April 21, 1998—to prohibit the import of hazardous waste.¹⁰¹ Similarly, Central American countries have adopted a dedicated instrument—the Central American Regional Agreement on the Transboundary Movement of Hazardous Waste (the Central American Agreement)—to ban the import of hazardous waste. Each of these regional instruments considers substances that are banned or unapproved in their country of production as hazardous waste.¹⁰²

Article 2.1 of the Bamako Convention defines “hazardous wastes” for purposes of the Convention. Article 2.1(d) includes all such “[h]azardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reasons.”¹⁰³ Pursuant to Article 4.1 of Bamako, Parties to the Convention agree to take appropriate measures to prohibit the import of all such hazardous wastes, for any reason, into Africa from non-Contracting Parties. Further, and significantly, any “[s]uch import shall be deemed illegal and a criminal act.”¹⁰⁴

Similarly, Article 1.1 of the Central American Agreement defines hazardous waste for the purpose of the Agreement as substances included in any of the categories of the Agreement’s Annex I, which have the characteristics indicated in Annex II, or that are “considered as such according to the local laws of the Exporting, Importing or Transit State.”¹⁰⁵ Finally, and most salient to this argument, the last part of Article 1.1 defines hazardous wastes as “hazardous substances that have been banned or whose registration has been cancelled or rejected by governmental regulation, or voluntarily withdrawn in the country where they were manufactured for reasons of human health or environmental protection.”¹⁰⁶ The Central American Agreement thus prohibits the import or transit of substances that are banned or unapproved in their country of production from countries that are not parties to the agreement.¹⁰⁷

¹⁰⁰ See *id.* at 4.

¹⁰¹ See Bamako Convention (Apr. 21, 1998), available at <https://www.informea.org/en/treaties/bamako-convention>.

¹⁰² See CIEL Legal Analysis, at 12.

¹⁰³ See *id.* at 12–13; Bamako Convention, at art. 2.1(d).

¹⁰⁴ Bamako Convention, art. 4.1.

¹⁰⁵ See CIEL Legal Analysis, at 13.

¹⁰⁶ See *id.*; Acuerdo Regional sobre movimiento Transfronterizo de Desechos Peligrosos (Dec. 11, 1992), available at https://www.sica.int/documentos/acuerdo-regional-sobre-movimiento-transfronterizo-de-desechos-peligrosos_1_82697.html; see also *Regional Agreement on the Transboundary Movement of Hazardous Wastes*, Ecolex, <https://www.ecolex.org/details/treaty/regional-agreement-on-the-transboundary-movement-of-hazardous-wastes-tre-001167/> (last visited Nov. 22, 2022).

¹⁰⁷ See CIEL Legal Analysis, at 4, 12.

Article 1.1 of the Basel Convention defines hazardous wastes as: “. . . (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.”¹⁰⁸ However, Article 1.1.b of the Basel Convention explicitly refers to the definition of hazardous waste in domestic legislation.

As noted above, the Central American Agreement and the Bamako Convention’s definition of hazardous waste includes banned or non-approved pesticides in the country of manufacture. As reflected in the legal analysis referenced above, this means, at a minimum, that domestic law considers banned or unapproved pesticides hazardous wastes in all of the following countries: Angola, Benin, Burkina Faso, Cameroon, Côte d’Ivoire, Costa Rica, Egypt, Ethiopia, Guatemala, Mali, Morocco, Nicaragua, Panama, Senegal, Sudan, Tanzania, Tunisia, and Togo.¹⁰⁹

Prior informed consent procedures can also be observed in the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes Within the South Pacific Region (Waigani Convention), which opened for signature in 1995 and entered into force October 21, 2001. The stated purpose of the Waigani Convention is to eliminate or reduce the transboundary movement of hazardous wastes through the Pacific.¹¹⁰ Under Article 6 of the convention, an exporting party cannot export hazardous wastes until the exporting party has received:

- The written consent of the importing party;
- Written consent of every transit party;
- Written consent of non-party transit nations;
- Written confirmation that the importing party has a plan for the disposal of hazardous waste; and
- Written confirmation from the exporter.¹¹¹

Transboundary movement of hazardous wastes is therefore not authorized (as defined by the convention) unless the consent of the parties concerned has been given in accordance with the provisions of the convention.¹¹²

5. *Stockholm Convention*

¹⁰⁸ Basel Convention, at art. 1.1.

¹⁰⁹ CIEL Legal Analysis, *supra* note 99.

¹¹⁰ See Waigani Convention (1995), available at <https://www.informea.org/en/treaties/waigani-convention/text>.

¹¹¹ See *id.* at art. 6 (“Each transit Party shall acknowledge within reasonable time, which in the case of Other Parties shall not exceed fourteen working days, the receipt of the notification referred to in paragraph 1 of this Article. Each transit Party shall have sixty days after issuing the acknowledgement to inform the notifier that it is consenting to the movement, with or without conditions, denying permission for the movement or requesting additional information. In the event that additional information has been sought, a new period of twenty one days recommences from the time of receipt of the additional information.”).

¹¹² See *id.* at art. 1 (defining “authorized transboundary movement”).

The Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention) was signed on May 22, 2001, coming into effect on May 17, 2004. The objective of the Stockholm Convention is to protect human health and environmental well-being by limiting human exposure to hazardous chemicals.¹¹³ This is achieved under the Stockholm Convention by prohibiting the production and use as well as the import and export of persistent organic pollutants.¹¹⁴ Article 3, paragraph 2(b) of the Stockholm Convention makes direct reference to prior informed consent procedures.¹¹⁵ The United States signed this Convention in 2001—this means, pursuant to accepted international law, that the United States accepts an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

6. *Minamata Convention*

The Minamata Convention on Mercury was signed on October 10, 2013 and became effective on August 16, 2017.¹¹⁶ It has been ratified by 140 nations. The Minamata Convention on Mercury is an international treaty focused on the human health and environmental impacts from mercury emissions through provisions that relate to the life cycle of mercury, investigating the mining of mercury, and regulating industries where mercury is used and released.¹¹⁷ The Conference took place in Minamata, Japan, a town that saw tens of thousands of citizens suffer from mercury poisoning, which is now known as Minamata disease.¹¹⁸ A key priority of the Convention was to shift investments away from mercury polluting industries such as artisanal and small-scale gold mining, coal combustion, non-ferrous metal production, and cement production.¹¹⁹ Mercury is still present in many common commercial products such as batteries, fluorescent lamps, cosmetics, pesticides, and thermometers.¹²⁰ Article 4(1) of the Minamata Convention requires Parties to prohibit the manufacture, import, or export of mercury-added pesticides from 2020 onward.¹²¹ Under Article 3(6), each party shall not allow the export of mercury except to a Party that has “provided the exporting Party with its written consent,” and to a non-Party who has provided the exporting Party with written consent including certification that shows “the non-Party has measures in place to ensure the protection of human health and the environment and to ensure its compliance with the provisions of Articles 10 and 11.”¹²² The

¹¹³ The Stockholm Convention on Persistent Organic Pollutants (May 22, 2001), *available at* <http://www.pops.int/TheConvention/Overview/tabid/3351/Default.aspx> (“Exposure to Persistent Organic Pollutants (POPs) can lead to serious health effects including certain cancers, birth defects, dysfunctional immune and reproductive systems, greater susceptibility to disease and damages to the central and peripheral nervous systems.”).

¹¹⁴ *See id.*

¹¹⁵ *See id.* at art. 3, para. 2(b) (“That a chemical listed in Annex A for which any production or use specific exemption is in effect or a chemical listed in Annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments . . .”).

¹¹⁶ The Minamata Convention on Mercury (Oct. 10, 2013), *available at* <https://www.mercuryconvention.org/en/resources/minamata-convention-mercury-text-and-annexes>.

¹¹⁷ *See id.*

¹¹⁸ *See Minamata Convention on Mercury, Text and Annexes*, UN Environment Programme (Sept. 2019), <https://www.mercuryconvention.org/sites/default/files/2021-06/Minamata-Convention-booklet-Sep2019-EN.pdf>.

¹¹⁹ *See id.* at 5.

¹²⁰ *See id.*

¹²¹ *See Id.* at Annex A, p. 55.

¹²² *Id.* at 17–18.

United States signed and accepted this treaty on June 11, 2013.¹²³ This means, pursuant to accepted international law, that the United States. accepts an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

C. The United States has a duty to ensure prior informed consent as a matter of customary international law.

Prior informed consent has reached wide acceptance by the international community and thus has become customary international law, which the United States has an obligation to enforce. Customary international law results when a legal principle becomes a general and consistent practice of States because of a feeling of obligation to adhere to the legal principle.¹²⁴ There are two essential elements that must be established to determine if a legal principle has reached the status of customary international law: first, the legal principle in question must be a general and consistent practice of States; ¹²⁵ second, States must follow the legal principle out of a sense of obligation.¹²⁶ A customary norm of international law so established applies with equal force to all States, with the limited exception of nations that have persistently objected to the norm or its obligatory status.

Many of the international multilateral environmental agreements establish a basic prior informed consent structure to address the specific environmental problems that occur when transporting materials across international borders through trade. As discussed above, widely ratified instruments to which the United States is a Party or Signatory reflect this principle, including the Organization for Economic Co-operation and Development (OECD) legal instruments, Rotterdam Convention, Basel Convention, Bamako Convention, Central American Agreement, Waigani Convention, Stockholm Convention, and Minamata Convention.¹²⁷ Other instruments the United States has ratified reflect this principle as well, including the United States-Mexico-Canada Trade Agreement and the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management, as do other widely accepted instruments, such as the Cartagena Protocol, Nagoya Protocol, and ILO Chemicals Convention..¹²⁸ As discussed more fully below, the Rio Declaration adopted by the 1992 United Nations Conference on Environment and Development (UNCED) and its accompanying

¹²³ See *Minamata Convention on Mercury, Party Profiles*, UN Environment Programme, <https://www.mercuryconvention.org/en/parties/profiles> (last visited Nov. 22, 2022).

¹²⁴ Black's Law Dictionary (11th ed.) at 484 (defining "international custom" as "[a] uniform and consistent practice in relationships between nations that serves as evidence of a generally accepted law."; and *see, e.g.*, David Hunter et al., *International Environmental Law and Policy* (4th ed.) at 308-309.

¹²⁵ Hunter, *supra* note 124 at 308-309 (explaining that "ICJ has required that practice be both extensive and virtually uniform", but that "[i]t is not necessary that State practice continue over a long period of time" or "be rigorous and consist[ent]" in conforming to the rule at issue).

¹²⁶ J.L. Brierly *The Law of Nations* (6th ed) at 59 (stating that custom, "in its legal sense...is a usage felt by those who follow it to be an obligatory one").

¹²⁷ See Hunter, *supra* note 124 at 310 (discussing how treaties can contribute to the development of customary international law, if the treaty is "of a fundamentally norm creating character", and noting that universal participation in such a treaty would be relevant to its establishment of a customary norm).

¹²⁸ See Melanie Nakagawa, *Overview of Prior Informed Consent from an International Perspective*, 4 Sustainable Dev. L. Pol'y Brief 4, 5 (2004), <https://digitalcommons.wcl.american.edu/sdlp/vol4/iss2/4/>. In short, the U.S. has a duty to ensure prior informed consent as a matter of customary international law, as a matter of international agreement consensus in many fora, the consistent conduct of nation-states over the past several decades.

UNCED Agenda 21, clearly demonstrate that the widespread integration of prior informed consent into international instruments addressing international movement of hazardous chemicals, substances, and wastes—including pesticide—was intended to crystallize this principle as a matter of international law and an agreement within the global community that this principle should be binding on the international community as a whole.

1. *United States-Mexico-Canada Trade Agreement*

Prior informed consent procedures can also be observed in free trade agreements such as the United States-Mexico-Canada Agreement (USMCA).¹²⁹ Entered into force on July 1, 2020, the USMCA is a trade agreement between the United States, Mexico, and Canada, designed to replace the North American Free Trade Agreement (NAFTA). Under Article 24.15, USMCA makes specific reference to prior informed consent procedures.¹³⁰ Article 24.15 states that the parties to the trade agreement acknowledge the importance of genetic resources and agree to honor national laws that establish prior informed consent procedures.¹³¹ By signing and ratifying the USMCA, the United States has officially recognized the legitimacy of prior informed consent as a legal principle in the regulation of trade between States in the context of trade in genetic materials. Read against the backdrop of both the Agenda 21 commitment on prior informed consent, and the repeated, systematic, and consistent integration of prior informed consent in binding multilateral agreements adopted and ratified by the overwhelming majority of the world's nations, this fact further illustrates that prior informed consent has become the relevant international standard in circumstances where a State's rights, people or environment may be adversely affected by trade in a substance or material, and that the US acknowledges the legitimacy of such standards.

2. *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management is a nuclear safety convention that was adopted on September 5, 1997,¹³² and entered into force on June 18, 2001. This Convention followed the negotiations of the Convention on Nuclear Safety, during which it was recognized that the safe management of

¹²⁹ See generally Agreement between the United States of America, the United Mexican States, and Canada (July 1, 2020), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

¹³⁰ See *id.* at art. 24.15.

¹³¹ *Id.* (“The Parties recognize the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party’s international obligations. The Parties further recognize that some Parties may require, through national measures, prior informed consent to access such genetic resources in accordance with national measures and, if access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of such genetic resources, between users and providers.”).

¹³² See Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Dec. 24, 1997), available at <https://www.iaea.org/sites/default/files/infcirc546.pdf>.

radioactive waste was also a subject of great international concern but could not be covered comprehensively in a convention focusing on the safety of civil nuclear power plants.¹³³

Under Article 27 of the Convention, “Each Contracting Party involved in transboundary movement shall take the appropriate steps to ensure that such movement is undertaken in a manner consistent with the provisions of this Convention and relevant binding international instruments. In so doing: (i) a Contracting Party which is a State of origin shall take the appropriate steps to ensure that transboundary movement is authorized and takes place only with the prior notification and consent of the State of destination;”¹³⁴ The United States is a party to the Convention, and therefore is subject to the prior informed consent requirements for transboundary movement of radioactive waste. Read against the backdrop of both the Agenda 21 commitment on prior informed consent, and the repeated, systematic, and consistent integration of prior informed consent in a binding multilateral agreements adopted and ratified by the overwhelming majority of the world’s nations, and in other regional or plurilateral instruments to which the US is Party, this fact further illustrates that the US acknowledges prior informed consent as a principle of international law.

3. *Cartagena Protocol on Biosafety*

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), adopted on January 29, 2000, entering into force on September 11, 2003, was created with the express goal of ensuring the safe transportation and use of living modified organisms.¹³⁵ Under Article 8 of the convention, an exporting nation is required to produce—in writing—a notification to the importing nation or party prior to the movement of living modified organisms through a nation’s territory.¹³⁶ Furthermore, the exporting party is expected to ensure that the information in the notification is accurate.¹³⁷

After the exporting party has communicated with the importing party, the importing party is required to respond in writing to the exporter’s notification.¹³⁸ The importer’s response contains: “(a) The date of receipt of the notification; (b) Whether the notification, prima facie, contains the information referred to in Article 8; (c) Whether to proceed according to the domestic regulatory framework of the Party of import or according to the procedure specified in Article 10.”¹³⁹ It is important to note that if the importing party does not acknowledge receipt of the exporter’s notification, it is not implied consent by the importing party.¹⁴⁰ Under Article 10, the importer’s consent is required before the transboundary movement of living modified organisms

¹³³ See Geoffrey A.M. Webb, *The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management: Development and Technical Content*, 18 J. Radiological Protection 265 (Dec. 18, 1998), <https://iopscience.iop.org/article/10.1088/0952-4746/18/4/004>.

¹³⁴ See Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, at art. 27, para. 1.

¹³⁵ The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Jan. 29, 2000), *available at* <https://bch.cbd.int/protocol/text/>.

¹³⁶ *See id.* at art. 8.

¹³⁷ *See id.*

¹³⁸ *See id.* at art. 9

¹³⁹ *Id.*

¹⁴⁰ *See id.*

can occur.¹⁴¹ The Cartagena Protocol has been ratified by 173 countries, representing 90% of all UN Member Nations.

4. *Nagoya Protocol*

The concept of prior informed consent can also be observed in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity (Nagoya Protocol), which was adopted on October 29, 2010, coming into effect on October 12, 2014.¹⁴² The Nagoya Protocol was designed to ensure legal certainty and transparency for both the users and providers of genetic resources.¹⁴³ To achieve these goals, the Nagoya Protocol ensures greater legal stability regarding the governing of access to genetic resources and encourages benefit-sharing when genetic resources are exported from a nation.¹⁴⁴ Under Article 6 of the Nagoya Protocol, access to genetic resources for their utilization shall be subject to the prior informed consent of the party providing such resources.¹⁴⁵ Furthermore, under Article 7 of the Nagoya Protocol, each party shall ensure that any traditional knowledge held by local and indigenous communities is obtained with the prior informed consent of the community in question.¹⁴⁶ To date, 137 countries, representing nearly 70% of all UN Member Nations, have ratified the Nagoya Protocol.

5. *Chemicals Convention (ILO C170)*

The Chemicals Convention was adopted during the 77th session of the International Labour Convention on June 6, 1990.¹⁴⁷ The purpose of the Convention is the protection of workers from the harmful effects of chemicals as well as the protection of the general public and the environment. The preamble states that “it is essential to prevent or reduce the incidence of chemically induced illnesses and injuries at work by:

- (a) ensuring that all chemicals are evaluated to determine their hazards;
- (b) providing employers with a mechanism to obtain from suppliers information about the chemicals used at work so that they can implement effective programmes to protect workers from chemical hazards;
- (c) providing workers with information about the chemicals at their workplaces, and about appropriate preventive measures so that they can effectively participate in protective programmes;
- (d) establishing principles for such programmes to ensure that chemicals are used safely,”¹⁴⁸

¹⁴¹ *See id.* at art. 10

¹⁴² The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Oct. 29, 2010), *available at* <https://www.cbd.int/abs/>.

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at art. 6.

¹⁴⁶ *See id.* at art. 7.

¹⁴⁷ *See* C170 – Chemicals Convention, 1990 (No. 170), *available at* https://www.ilo.org/dyn/normlex/en/f?p=NOR_MLEXPUB:12100:0::NO::P12100_ILO_CODE:C170.

¹⁴⁸ *Id.*

Further, under Article 19, “[w]hen in an exporting member State all or some uses of hazardous chemicals are prohibited for reasons of safety and health at work, this fact and the reasons for it shall be communicated by the exporting member State to any importing country.”¹⁴⁹

6. *Agenda 21 (UNCED, 1992)*

Agenda 21 is an action agenda for the United Nations, as well as other multilateral organizations and individual governments around the world, initially aimed at achieving global sustainable development by the 21st century. Agenda 21, along with the Rio Declaration on Environment and Development and the Statement of principles for the Sustainable Management of Forests, was agreed and adopted by more than 178 Governments, including the United States, at the UN Conference on Environment and Development (UNCED) held on June 3–14, 1992.¹⁵⁰ The full implementation of Agenda 21, the Programme for Further Implementation of Agenda 21, and the Commitments to the Rio principles were strongly reaffirmed at the World Summit on Sustainable Development (WSSD) held on August 26 – September 4, 2002.¹⁵¹

Prior to Agenda 21, the London Guidelines for the Exchange of Information on Chemicals in International Trade recognized the importance of making information on chemicals readily available to governments for use in risk assessments and regulation.¹⁵² The London Guidelines also introduced a prior informed consent procedure for regulating imports and exports of potentially harmful chemicals.¹⁵³ Agenda 21 acknowledged the importance of “promoting intensified exchange of information on chemical safety, use and emissions among all involved parties,” and specifically called for the full implementation of the prior informed consent procedure.¹⁵⁴ Article 19 of Agenda 21 expressly and specifically envisioned prior informed consent being universalized as law by 2000. Subsequently the Rotterdam Convention was adopted in 1998, creating a legally binding framework for prior informed consent.¹⁵⁵

Chapter 19 of Agenda 21 covers the environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products.¹⁵⁶ Paragraph 19.1 states, in part, that “a great deal remains to be done to ensure the environmentally sound management of toxic chemicals, within the principles of sustainable development and improved quality of life for humankind. Two of the major problems, particularly in developing countries, are (a) lack of sufficient scientific information for the assessment of risks entailed by

¹⁴⁹ *Id.* at art. 19.

¹⁵⁰ *See Agenda 21*, UN Sustainable Development Goals, Knowledge Platform, <https://sustainabledevelopment.un.org/outcomedocuments/agenda21/> (last visited Nov. 22, 2022).

¹⁵¹ *See id.*

¹⁵² *Review of implementation of Agenda 21*, UN DESA Sustainable Development in the 21st Century (SD21) Project, at 130 (Jan. 2012), https://sustainabledevelopment.un.org/content/documents/1126SD21%20Agenda21_new.pdf.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See Agenda 21*, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> [hereinafter *Agenda 21*].

the use of a great number of chemicals, and (b) lack of resources for assessment of chemicals for which data are at hand.”¹⁵⁷ To address these problems, Agenda 21 incorporates prior informed consent provisions.

Paragraph 19.4 outlines the six programme areas proposed, which includes the exchange of information on toxic chemicals and chemical risks, and the prevention of illegal international traffic in toxic and dangerous products.¹⁵⁸ Subsection C outlines the need for information exchange on toxic chemicals and chemical risks, including prior informed consent procedures; stating that the basis for action includes:

[Paragraph] 19.35. The export to developing countries of chemicals that have been banned in producing countries or whose use has been severely restricted in some industrialized countries has been the subject of concern, as some importing countries lack the ability to ensure safe use, owing to inadequate infrastructure for controlling the importation, distribution, storage, formulation and disposal of chemicals.

[Paragraph] 19.36. In order to address this issue, provisions for Prior Informed Consent (PIC) procedures were introduced in 1989 in the London Guidelines (UNEP) and in the International Code of Conduct on the Distribution and Use of Pesticides (FAO). In addition a joint FAO/UNEP programme has been launched for the operation of the PIC procedures for chemicals, including the selection of chemicals to be included in the PIC procedure and preparation of PIC decision guidance documents. The ILO chemicals convention calls for communication between exporting and importing countries when hazardous chemicals have been prohibited for reasons of safety and health at work. ...

[Paragraph] 19.37 Notwithstanding the importance of the PIC procedure, information exchange on all chemicals is necessary.¹⁵⁹

Paragraph 19.38 outlines the objectives of the programme area, which are: “[t]o promote intensified exchange of information on chemical safety, use and emissions among all involved parties”; and [t]o achieve by the year 2000, as feasible, full participation in and implementation of the PIC procedure, including possible mandatory applications through legally binding instruments contained in the Amended London Guidelines and in the FAO International Code of Conduct, taking into account the experience gained within the PIC procedure.”¹⁶⁰ Paragraph 19.40 details the data and information activities for the programme, and states in part that “[g]overnments and relevant international organizations with the cooperation of industry should: . . . c. Provide knowledge and information on severely restricted or banned chemicals to importing countries to enable them to judge and take decisions on whether to import, and how to handle, those chemicals and establish joint responsibilities in trade of chemicals between

¹⁵⁷ See *id.* at para. 19.1.

¹⁵⁸ See *id.* at para. 19.4(c), (f).

¹⁵⁹ See *id.* at paras. 19.35, 19.36, & 19.37.

¹⁶⁰ See *id.* at para. 19.38.

importing and exporting countries; d. Provide data necessary to assess risks to human health and the environment of possible alternatives to banned or severely restricted chemicals.”¹⁶¹

Subsection F speaks directly to the prevention of illegal international traffic in toxic and dangerous products. Paragraph 19.68 states that the objectives of this programme are: “[t]o reinforce national capacities to detect and halt any illegal attempt to introduce toxic and dangerous products into the territory of any State, in contravention of national legislation and relevant international legal instruments”; and “[t]o assist all countries, particularly developing countries, in obtaining all appropriate information concerning illegal traffic in toxic and dangerous products.”¹⁶² Paragraph 19.69 details the management-related activities for this program, and states that “[g]overnments, according to their capacities and available resources and with the cooperation of the United Nations and other relevant organizations, as appropriate, should: a. Adopt, where necessary, and implement legislation to prevent the illegal import and export of toxic and dangerous products[.]”¹⁶³

Chapter 20 of Agenda 21 covers the environmentally sound management of hazardous wastes, including prevention of illegal international traffic in hazardous wastes. Paragraph 20.4 states that “[t]here is international concern that part of the international movement of hazardous wastes is being carried out in contravention of existing national legislation and international instruments to the detriment of the environment and public health of all countries, particularly developing countries.”¹⁶⁴

These provisions speak directly to the issues presented in this Petition and demonstrate the need for prior informed consent provisions in order to make the transboundary movements of hazardous substances safer. One hundred eighty (180) countries, including the United States, participated in the adoption of the Rio Declaration and Agenda 21, representing substantially all of the UN Member States recognized at that time. In 1993, soon after their adoption, the EPA stated that Agenda 21 and the other products of the Rio Conference “represent an experimental process of *building consensus on a "global workplan"* for the economic, social, and environmental tasks of the United Nations as they evolve over time.”¹⁶⁵ As detailed in the foregoing sections, the Rotterdam Convention, the Basel Convention, and the instruments that followed were the direct result of that consensus-building, crystallization and codification process with respect to the shared global goal of securing “full participation in and implementation of the PIC procedure, including possible mandatory applications through legally binding instruments.”¹⁶⁶

¹⁶¹ See *id.* at para. 19.40.

¹⁶² See *id.* at para. 19.68.

¹⁶³ See *id.* at para. 19.69.

¹⁶⁴ See *id.* at para. 20.4.

¹⁶⁵ Kathy Session, *Products of the 1992 Earth Summit*, EPA Journal (April/June 1993), <https://www.epa.gov/archive/epa/aboutepa/products-1992-earth-summit.html> (emphasis added).

¹⁶⁶ Agenda 21, *supra note* 154, at para. 19.38.

D. Prior informed consent is a legal tradition rooted in U.S. domestic law.

Prior informed consent has become a general and consistent practice of the United States because prior informed consent is also present in U.S. statutory and administrative law, such as in the Toxic Substances Control Act and Resource Conservation Recovery Act.

1. Toxic Substances Control Act

The legal doctrine of prior informed consent has been incorporated into U.S. environmental statutes for decades.

The Toxic Substances Control Act (TSCA) was designed to address the harmful risks associated with hazardous chemicals by giving EPA the authority to regulate harmful chemicals.¹⁶⁷ There are numerous regulatory mechanisms in place under TSCA; however, § 12 addresses the issue of exporting hazardous chemicals.¹⁶⁸ TSCA § 12(b) creates an export notification process for hazardous chemicals and establishes an infrastructure for information exchange.¹⁶⁹ Under § 12(b), an exporter must notify EPA if he or she exports or intends to export a chemical when:

- The submission of such information is required under TSCA § 4 or 5(b);
- He or she has been ordered to under TSCA § 5;
- A rule requires notification under TSCA § 5 or 6; or
- When an action is pending under TSCA § 5 or 7.¹⁷⁰

For chemicals subject to TSCA section 5(f), 6, or 7 actions, exporters must notify EPA of the first export for each calendar year.¹⁷¹ For chemicals subject to TSCA sections 4, 5(a)(2), 5(b) or 5(e), the exporter is required to submit notice to EPA only for the first export to a foreign nation.¹⁷²

Furthermore, under TSCA § 12, the exporter is required to communicate with EPA and the importing nation prior to the export of chemicals.¹⁷³ TSCA requires EPA to send a notice to the government of the importing country, no later than five working days after receipt of notification from the exporter, for each chemical that is subject to TSCA under sections 5(f), 6, or 7 actions.¹⁷⁴

EPA must send a notice to the government of the importing country no later than five working days after receipt of the first notification from any exporter for each chemical that is

¹⁶⁷ See *Chemicals Under the Toxic Substances Control Act (TSCA)*, Environmental Protection Agency, <https://www.epa.gov/chemicals-under-tsca> (last visited Nov. 22, 2022).

¹⁶⁸ See Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697 (1976).

¹⁶⁹ See 15 U.S.C. § 2611(b).

¹⁷⁰ See *TSCA Requirements for Exporting Chemicals*, Environmental Protection Agency, <https://www.epa.gov/tsca-import-export-requirements/tsca-requirements-exporting-chemicals> (last visited Nov. 22, 2022).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

regulated under TSCA section 4, 5(a)(2), 5(b), or 5(e) actions.¹⁷⁵ The EPA notice to the importing government includes the following information:

- Identification of the regulated chemical,
- Summary of the EPA regulatory action taken, or data under TSCA sections 4 or 5(b),
- EPA official to contact for further information, and
- Copy of the pertinent Federal Register notice.¹⁷⁶

2. *Resource Conservation Recovery Act*

Another U.S. federal statute that illustrates the application of prior informed consent procedures in domestic law is the Resource Conservation and Recovery Act (RCRA).

Under RCRA, exporters of hazardous waste are required to adhere to specific export/import requirements.¹⁷⁷ Exporters must inform the EPA, in writing, at least 60 days before the hazardous waste can be exported to the importing nation.¹⁷⁸ The notification is required to export hazardous waste for one year. After EPA receives an export notification, the agency is required to forward the notification to the importing nation and nations in which the shipment must travel through before reaching the importing nation.¹⁷⁹ Such notification to the importing nation and nations of transshipment must include the following information:

- Exporter's identification;
- The foreign facility receiving the hazardous waste;
- Foreign importer identification;
- Intended transporter;
- Ports of the country of import and any countries of transit;
- Whether the export covers a single shipment or multiple;
- Start and end dates for shipments;
- Description of all the hazardous waste being transported;
- Specification of the recovery or disposal operations;
- "Certification/Declaration signed by the exporter that states: I certify that the above information is complete and correct to the best of my knowledge. I also certify that legally enforceable written contractual obligations have been entered into and that any applicable insurance or other financial guarantee is or shall be in force covering the transboundary movement."¹⁸⁰

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See Information for Exporters of Resource Conservation and Recovery Act (RCRA) Hazardous Waste*, Environmental Protection Agency, [https://www.epa.gov/hwgenerators/information-exporters-resource-conservation-and-recovery-act-rcra-hazardous-waste#:~:text=Exporters%20must%20provide%20notification%20in,Export%20Tracking%20System%20\(WIETS\)](https://www.epa.gov/hwgenerators/information-exporters-resource-conservation-and-recovery-act-rcra-hazardous-waste#:~:text=Exporters%20must%20provide%20notification%20in,Export%20Tracking%20System%20(WIETS)) (last visited Nov. 22, 2022).

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

After receiving the consent from all importing parties and parties of interest, EPA is required to issue an acknowledgement of consent.¹⁸¹ Exporters cannot finalize shipments of hazardous waste, until the exporter receives an acknowledgment of consent letter from the EPA.¹⁸² If the importing country or any transit country objects to the importation of the hazardous waste or withdraws its prior informed consent, EPA must notify the exporter, and the export covered by the notification is prohibited.¹⁸³

IV. DESCRIPTION OF FEDERAL REGULATIONS REQUESTED

The Petitioners formally request that the EPA:

1. Amend EPA regulations, to include, under 40 C.F.R. § 152.3, a definition of “foreign purchaser” which includes explicit prior approval by the relevant national government of the importing nation of the pesticide.
2. Amend EPA regulations, to include, under 40 C.F.R. § 168.75, a definition of “foreign purchaser” which includes the national government of the importing nation.
3. Amend EPA regulations, to include, under 40 C.F.R. § 168.75(c)(1)(v), a requirement to inform the foreign purchaser whether any active ingredients in the product:
 - a. are not allowed for use in any product in the United States;
 - b. are considered by the EPA to be hazardous to humans, known water or air contaminants, or hazardous to aquatic or terrestrial animals;
 - c. are currently listed, or a candidate for listing, on Annex III of the Rotterdam Convention or Annexes A or B on the Stockholm Convention, and;
 - d. have any other known public health or environmental impacts that are reasonably known to occur from the use of the product.
4. Amend EPA regulations, to include, under 40 C.F.R. § 168.75(c)(1), a requirement of the signature and consent of the relevant government agency or office of the foreign purchaser agreeing to the importation of the product with all prior statements.

An amended copy of the proposed new regulations at 40 C.F.R. § 168.75 are attached to this petition as an addendum.

This petition demonstrates that Congress intended for prior informed consent to apply to domestically unregistered pesticides exported from the United States abroad under FIFRA, that Congress has re-affirmed this commitment to prior informed consent in various ways, that the United States has entered into treaties and other international agreements that make prior informed consent binding upon the EPA, and that prior informed consent has risen to the level of customary international law. The petition also provides a strong basis to conclude that such rulemaking is necessary to provide for the welfare of humankind when handling the shipment of

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See id.*

pesticides internationally. FIFRA grants EPA the authority to regulate the registration, distribution, sale, and use of pesticides in the United States.¹⁸⁴ Here, the EPA should amend the current regulatory scheme governing the export of unregistered U.S. pesticides. Establishing a requirement for exporters to receive the prior informed consent of the government of the importing nation will ensure that EPA's regulatory scheme is consistent with current statutory and treaty law. Amending these regulations would also constitute good policy well within the power of EPA to administratively effectuate within its statutory powers given by Congress.

Currently, under FIFRA § 2, there is no definition listed for the term "foreign purchaser" as it appears in FIFRA § 17.¹⁸⁵ Furthermore, under EPA regulations defining the terms under FIFRA, there is not a given definition of what constitutes a "foreign purchaser".¹⁸⁶ Therefore, Petitioners argue that EPA regulations be amended to include a definition of a "foreign purchaser" that includes, not only the private entity purchasing the pesticides, but the government of the importing nation. Currently under the EPA regulations, there is no requirement of prior informed consent. Petitioners argue that informed consent includes informing the importing purchaser and government of all of the known potential hazardous effects of the products and their active ingredients. By amending its regulations, EPA would ensure that the government of the importing nation would receive information critical to determining whether a pesticide should be imported into its borders. Furthermore, by amending the definition of "foreign purchaser," no export would be permitted until EPA receives a purchaser acknowledgment statement, signed by the government of the importing nation.¹⁸⁷ Such an amendment would ensure that the government of the importing nation is informed of the ingredients of the pesticide and the known hazards prior to the import. By correcting the regulations in this way, EPA would be bringing the United States into compliance with internationally recognized prior informed consent procedures. Furthermore, any import would require the signed consent of the government of the importing nation.

V. CONCLUSION

This petition sets forth facts that show the export of harmful unregistered pesticides poses a risk to the environment and human health, and is contrary to current law. Over the past decades and century, the use and sale of harmful pesticides has increased. The current regulatory standard by which the United States regulates the export of pesticides is inadequate to properly maintain the health and well-being of the citizens of the United States and vulnerable populations and communities in other countries. To ensure that adequate protections are in place, it is vital that relevant government officials within the importing nation be informed as to the risks associated with the transportation, storage, and use of potentially harmful pesticides before the trade of that dangerous pesticide occurs. By amending EPA regulations to include prior informed consent, EPA can ensure that importing nations are equipped with the information to

¹⁸⁴ See generally 7 U.S.C. § 136 (1996).

¹⁸⁵ See *id.*

¹⁸⁶ 40 C.F.R. § 152.3 (2012).

¹⁸⁷ See generally 40 C.F.R. § 168.75 (noting that a purchaser acknowledgment statement includes the active ingredients of the pesticide in question and the Chemical Abstract Services Registry number for each active ingredient).

protect their people and environments against exposure to harmful pesticides. EPA has the authority from Congress to make this change, and has an obligation to the international community to uphold the prior informed consent standard and process for the export of dangerous substances.

Prior informed consent has become a customary international standard for the trade of hazardous materials which pose a threat to human health and the environment. The Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade was developed with the express goal of ensuring an adequate exchange of information regarding the shipment of hazardous chemicals. The United States is a signatory to the Rotterdam Convention and has a responsibility to take appropriate administrative measures to avoid action incompatible with the object and purpose of that treaty. The United States has recently violated this international treaty by exporting carbofuran to Mauritius in 2019 after the country specifically informed the Rotterdam Committee in 2018 that it does not consent to carbofuran imports.¹⁸⁸ By amending the regulations of FIFRA § 17, the United States would be honoring the good faith commitment to implement the Rotterdam Convention instead of actively undermining it.

In addition, our legal analysis demonstrates that exports of banned or unapproved pesticides, without adequate governmental notice, from any Basel Party to any other nation-state that possesses clear pesticide import prohibitions, like those effectuated by the Bamako and Waigani Agreements, is a violation not only of Basel, of which the U.S. is a signatory, but also of the OECD Council Decision and Guiding Principles, which are binding upon the United States.

In 1978, Congress intended to create a regulatory scheme whereby EPA would receive documentation of consent from the importing party. This intent created the current regulatory and reporting scheme for unregistered pesticides exported to foreign nations. However, since 1978, the international and domestic requirements for the consent of hazardous materials have evolved. Under customary international law, prior informed consent has become the standard, requiring an importing nation to consent to the import of hazardous material. Petitioners argue that EPA regulations regarding the export of hazardous pesticides should reflect this evolution of consent. The export of potentially hazardous pesticides, unregistered under FIFRA, must be accompanied, prior to the export, by the informed consent of the national government of the importing party.

The “circle of poison” exists because improperly regulating the export of pesticides can directly have an immediate impact on the health of American citizens. Furthermore, current regulations dictating the export of dangerous pesticides are responsible for disproportionate harms to Black and Indigenous communities, and other people of color domestically and abroad. By amending EPA regulations regarding FIFRA § 17, EPA can further promote Environmental Justice principles and better protect people in the United States and abroad from exposure to dangerous pesticides.

¹⁸⁸ See Nathan Donley et al., *supra* note 52.

Our proposed rule, in sum, tangibly benefits all Americans and their health and safety, and protects many more millions if not billions of people, and their environments, around every part of the world.

Thank you. We look forward to hearing from you.

Sincerely,

/s/ WJ Snape, III

William J. Snape, III
Senior Counsel, Center for Biological Diversity
Professor and Director, American University, Washington College of Law (AU WCL)
Program on Environmental and Energy Law (PEEL)

Address of Petitioner:

Center for Biological Diversity
Attn: William Snape and Nathan Donley
1411 K Street, Suite 1300
Washington, DC 20005

Phone: 202-536-9351

Email: bsnape@biologicaldiversity.org
wsnape@wcl.american.edu
ndonley@biologicaldiversity.org

Dated: March 8, 2023

** The lead legal author thanks Cecilia Diedrich (AU WCL '19) and Kevin Fountain (AU WCL '23) for their significant contributions to this petition.

ADDENDUM – PROPOSED AMENDED RULE
(All proposed changes are in ***underlined***.)

40 C.F.R. § 168.75(c)(1)

§ 168.75

(c) Procedures. An exporter of an unregistered pesticide product must submit a purchaser acknowledgement statement to EPA, ***within 60 days after the export of the specified unregistered product***, containing the information stated in paragraph (c)(1) of this section, and a statement signed by the exporter certifying that the exportation did not occur until the signed acknowledgement statement had been obtained from the purchaser ***and relevant government officials in the purchaser's country***. If the foreign purchaser signs a purchaser acknowledgement statement in their own language, it must be accompanied by an English translation when it is submitted to EPA by the exporter. These statements shall be submitted in accordance with one of the two options for submission described in paragraph (c)(2) of this section.

(1) Contents of the purchaser acknowledgement statements. The purchaser acknowledgement statement must include the following information in a format that is clearly understandable:

- (i) Name, address, and EPA identification number, if applicable, of the exporter.

- (ii) Name and address of the foreign purchaser.

- (iii) Identity of the product and the active ingredient(s), including:
 - (A) The Chemical Abstract Services (CAS) Registry number for each active ingredient.

 - (B) The chemical nomenclature for each active ingredient as used by the International Union of Pure and Applied Chemists (IUPAC).

 - (C) Other known chemical or common names; or if the export involves a research product, a code name or identification number that can be used by EPA to identify the product from the exporter's records. If a code name or identification number is used, additional information must be attached to the certification statement submitted with the purchaser acknowledgement statement which will enable EPA to identify the product.

This attached information may be claimed as confidential, and EPA will not forward this information with the purchaser acknowledgement statement to foreign governments.

(iv) If known or reasonably ascertainable, the country or countries of final destination of the export shipment, *i.e.*, where the exported pesticide is intended to be used, if different from the country of the foreign purchaser's address.

(v) A statement that indicates that the foreign purchaser understands that the product is not registered for use in the United States and cannot be sold in the **United States, and whether or not:**

(A) Any of the active ingredients in the product are not allowed for use in any product in the United States in any way;

(B) Any active ingredients in the product are considered by the EPA to be hazardous to humans, a known water or air contaminant, or hazardous to aquatic or terrestrial animals;

(C) Any active ingredients in the product are currently listed, or a candidate for listing, on Annex III of the Rotterdam Convention or Annexes A or B of the Stockholm Convention; or

(D) Any other known public health or environmental impacts are known to occur from the use of the product.

(vi) The signature of the foreign purchaser.

(vii) The date of the foreign purchaser's signature.

(viii) The signature and consent of the relevant government agency or office of the foreign purchaser agreeing to the importation of the product based on the documentation required by this section.