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# No Purchase Necessary

Drury Stevenson†

Marco A. Olsen, *Analysis of the Stockholm Convention on Persistent Organic Pollutants* (2003).

If laws without sanctions are no laws at all, as some would say, the recent Stockholm Convention on Persistent Organic Pollutants<sup>1</sup> (the “Convention”) could be placed in the category of harmless collective goodwill gestures, a collaborative effort in toothless public relations. Why, then, did the United States quarrel and negotiate as if national interests were at stake?

Professor Marco Olsen offers a glimpse into an answer in his brilliant new book, *Analysis of the Stockholm Convention on Persistent Organic Pollutants*.<sup>2</sup> His concise treatise is the only book to date on the subject but is

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1. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, S. TREATY Doc. No. 107-5, U.N. Doc. UNEP/POPS/CONF/2, 40 I.L.M. 532, available at [http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf) (last visited Oct. 27, 2004) [hereinafter Stockholm Convention]. The Stockholm Convention went into effect May 17, 2004. The full text of the treaty, as well as other helpful background information and updates, are available at the Convention’s official website: <http://www.pops.int/>. The Stockholm Convention is not to be confused with the Stockholm Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1466 [hereinafter Stockholm Conference], which was the very first United Nations environmental conference, Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15 AM. U. INT’L L. REV. 583, 595 (2000), but did not focus specifically on organic pollutants, see *supra* Stockholm Conference. The 1972 Stockholm Conference did, however, lead to the creation of the International Register of Potentially Toxic Chemicals (“I.R.P.T.C.”) in 1976, a data bank of information about various manmade substances, the potential health hazards they posed, and the points of production and use for each. Linda A. Malone, Symposium: “Green Helmets”: A Conceptual Framework for Security Council Authority in Environmental Emergencies, 17 MICH. J. INT’L L. 515, 526 n.49, 534 n.79 (1996) (noting that the United Nations Environmental Programme (“U.N.E.P.”), which was responsible for the creation of the I.R.P.T.C., originated from the Stockholm Conference); *IRPTC in the 1990s*, at <http://www.chem.unep.ch/irptc/irptc/moreirpt.html> (last visited Oct. 27, 2004). This registry, and the international discussion it created, was undoubtedly part of the impetus for more specific attention on Persistent Organic Pollutants nearly thirty years later. See Erin Perkins, *Hazardous Materials and Energy: The Stockholm Convention on Persistent Organic Pollutants: A Step Toward the Vision of Rachel Carson*, 2001 COLO. J. INT’L ENVTL. L. & POL’Y 191, 191–92 (noting that I.R.P.T.C. Director James Willis called the Stockholm Convention the “biggest achievement in international chemicals safety ever” due to its emphasis on Persistent Organic Pollutants or “POPs”). For more information on the I.R.P.T.C., see generally U.N.E.P. Chemicals’ Programme, at <http://www.chem.unep.ch/irptc> (last visited Oct. 27, 2004).

2. MARCO A. OLSEN, *ANALYSIS OF THE STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS* (2003).

sufficiently comprehensive to give the reader a thorough grasp of the background, terms, and ramifications of the agreement. Olsen's writing is detailed and systematic, yet his style is clear and accessible enough to provide a basic introduction to the field of international environmental law. It is the first monograph on an important new treaty and is a smart addition to any library.

Olsen's book is as timely as it is well-written. The Bush Administration has proposed a bill to make the Convention's terms the law of the land in the United States;<sup>3</sup> Democrats have sponsored a rival proposal that goes further and automatically incorporates by reference any future terms amended to the Convention.<sup>4</sup> Regardless of which proposal wins, the Convention is soon to be a legal reality confronting American corporations and exporters. The Convention took effect on May 17, 2004, ninety days after being ratified by its fiftieth country.<sup>5</sup> Significantly, the Convention calls for the elimination of certain dangerous pesticides (such as dichloro-diphenyl-trichloroethane or "DDT") that have been banned in developed countries for years.<sup>6</sup>

The Stockholm Convention was the culmination of a long series of other treaties and international conferences addressing interrelated topics. The United Nations Food and Agriculture Organization ("F.A.O.") began creating international rules for the transport and disposal of pesticides as early as 1985 with its International Code of Conduct on the Distribution

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3. POPs and PIC Implementation Act of 2002, S. 2507, 107th Cong. (2002).

4. POPs Implementation Act of 2001, S. 2118, 107th Cong. (2002) [hereinafter the "Jeffords Bill"]. For an analysis of both the recent Bush Administration proposal and the Jeffords Bill, see generally Pep Fuller & Thomas O. McGarity, *Beyond the Dirty Dozen: The Bush Administration's Cautious Approach to Listing New Persistent Organic Pollutants and the Future of the Stockholm Convention*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2003). Fuller and McGarity are critical of the Bush proposal because it implements only the existing terms of the Convention (which focus on the elimination of twelve identified pollutants) without a provision that would allow Convention committees or delegates to add additional chemicals to the list with an automatic application to American law. *Id.* at 10-11. Fuller and McGarity argue that this limitation betrays the Convention's goals and purposes. *Id.* at 4 (arguing that the approach of the Jeffords Bill is "more consistent with the language and spirit of the Stockholm Convention and more sensible as a matter of domestic law"). The Stockholm Convention drafters envisioned a committee of delegates that could add additional toxic chemicals to the list of the original twelve (provisions found in Article 8), rather than changing incrementally by undertaking another series of global meetings. *Id.* at 8-9, 14-15.

The merits of such a committee is frequently an issue with international treaties; on the one hand, it seems tedious and expensive to send delegates to meetings and negotiations each time a minor amendment or update is necessary, coupled with the hassle of repeated ratifications. On the other hand, environmental activists could dominate committees and try to foist onerous new prohibitions onto the participants.

5. Stockholm Convention, *supra* note 1, art. 26, § 1, 40 I.L.M. at 550 ("This Convention shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession."). At the time of writing, over 150 countries are signatories, while eighty-one have ratified the treaty. See Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, at <http://www.pops.int/documents/signature/signstatus.htm> (last visited Oct. 27, 2004).

6. Stockholm Convention Annex A, *supra* note 1, Annex A, 40 I.L.M. at 551-54.

and Use of Pesticides.<sup>7</sup> In 1989, the Code was amended to include an important provision, which required “informed consent” by the recipients of pesticide shipments about the hazards that pesticides pose.<sup>8</sup> Compliance, however, was voluntary.<sup>9</sup> Similarly, in 1987, the United Nations Environmental Programme (“U.N.E.P.”) produced its London Guidelines for the Exchange of Information on Chemicals in International Trade, which paralleled the guidelines of the F.A.O.’s 1985 Code, but focused on voluntary information exchange by users of pesticides, rather than by producers or shippers.<sup>10</sup> The real lineage of the Stockholm Convention begins with what is popularly known as the Rio Earth Summit of 1992 (formally titled the United Nations Conference on the Environment and Development, or “U.N.C.E.D.”), which identified international collaboration on chemical management as a top priority.<sup>11</sup> Agenda 21 of the Rio Earth Summit<sup>12</sup> led to the formation of the Intergovernmental Forum for Chemical Safety (“I.F.C.S.”) in 1994,<sup>13</sup> which met in Manila in 1996 and made recommendations resulting in the creation of the International Negotiating Committee (“I.N.C.”).<sup>14</sup> The I.N.C. began treaty negotiations in earnest,

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7. OLSEN, *supra* note 2, at 52 (citing FAO Res. 6/89, COAG, Report of the Conference of FAO, 95th Sess., U.N. Doc. C/89/Rep. 120 (1989)).

8. *See id.* at 52–54.

9. *See id.* at 54 (noting that the Code “does not contain any mechanisms to enforce implementation, but rather relies upon collaborative efforts by all participating partners”).

10. *See id.* at 52–55. Besides these voluntary, “soft law” developments, a few binding treaties on other subjects overlapped with some of the provisions of the new Stockholm Convention: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (focusing primarily on the dumping of hazardous wastes in Africa); the 1990 International Labour Organization’s Chemicals Convention (No. 170, 1990) and Recommendation (Number 177, 1990), *reprinted* in *International Labour Conventions and Recommendations 1919–1991* (International Labour Organization ed., 1992) (focusing on the rights of workers exposed to hazardous chemicals in the workplace); the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773 (1991) (establishing a total ban on the import of hazardous wastes into Africa); the 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, June 24, 1998, 37 I.L.M. 505, 513–29 [hereinafter L.R.T.A.P. POPs Protocol], (focusing on industrial smog crossing national borders, including airborne forms of some chemicals covered by the Stockholm Convention); and the Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, 38 I.L.M. 1 (1999) (creating binding requirements of “prior informed consent” by recipients of certain hazardous chemicals and pesticides). *See id.* at 63–75.

11. *See* OLSEN, *supra* note 2 at 55–57, 77–78 (stating that “it was not until 1992 that the absence of clear rules establishing acceptable global and regional standards . . . was first addressed” and that the U.N.C.E.D. “was the initial cornerstone of recognizing POPs on the global level”).

12. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. GAOR, 47th Sess., U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted* in 31 I.L.M. 874.

13. *See id.* at 60.

14. *See id.* at 83.

with five international meetings over the next several years.<sup>15</sup> With the text of the treaty nearly completed, the Conference of the Plenipotentiaries<sup>16</sup> convened in Stockholm on May 22-23, 2001 to finalize the terms and formally adopt the treaty.<sup>17</sup>

Olsen's book provides a colorful account of the crisis the Stockholm Convention addressed: worldwide use of persistent organic pesticides. Designated "POPs" in the alphabet soup of acronyms that make up environmental law, Persistent Organic Pollutants are pesticides that do not biodegrade for generations; once applied, they remain in the environment for several centuries.<sup>18</sup> Worse, they also migrate through the air, waterways, and up the food chain.<sup>19</sup>

The Stockholm Convention singles out twelve notorious POPs, fittingly called "the dirty dozen."<sup>20</sup> Olsen explains that all roads for the dirty dozen lead to the polar ice caps.<sup>21</sup> Air and ocean currents constantly push there, and compounds that are fat-soluble rather than water-soluble (as these pollutants are) accumulate fastest in creatures carrying the most body fat—those living in cold climates.<sup>22</sup> Hence walruses, whales, and arctic fishermen are among those that suffer the greatest indirect effects.<sup>23</sup> More immediately impacted are subsistence-wage plantation workers in Guatemala and similar nations where unregulated work conditions frequently leave them covered in toxic powder at the end of a workday.<sup>24</sup>

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15. These I.N.C. negotiation meetings occurred in Montreal (1998), Nairobi (1999), Geneva (1999), Bonn (2000), and Johannesburg (2001). *See id.* at 83-103. Parallel to these sessions, there were also two meetings of a "Criteria Experts Group" in Bangkok (1998) and Vienna (1999) to focus on scientifically-based criteria and procedures to identify and add other pollutants to the final document. *See id.* at 86-87, 90-91.

16. The Plenipotentiaries included representatives of 118 countries, nine U.N. bodies and agencies, four intergovernmental organizations, and more than 100 nongovernmental organizations. *Id.* at 102.

17. *See id.* at 102-03.

18. *Id.* at 2-4.

19. *Id.* at 3-4.

20. *Id.* at xi, 2-3. The "dirty dozen" are: DDT, aldrin, dieldrin, endrin, chlordane, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls, polychlorinated dibenzodioxins, and polychlorinated dibenzofurans. *Id.* at 3. Olsen's book includes an entire chapter (chapter 2, approximately thirty pages) with a subheading devoted to each of the twelve, describing its molecular structure, commercial use, toxicity, side effects, and where and how the substance is currently produced. *See id.* at 13-41.

21. *See id.* at 39-41.

22. *Id.*; *see also* Sarah R. Hamilton, Note, *Toxic Contamination of the Arctic: Thinking Globally and Acting Locally To Protect Arctic Ecosystems and People*, 15 *COLO. J. INT'L ENVTL. L. & POL'Y* 71, 81-85 (2004) (discussing the high concentrations of POPs and other pollutants, such as heavy metals and radiation, in the Arctic region, resulting in some of the highest levels of marine animal contamination on Earth).

23. *See* OLSEN, *supra* note 2, at 38-41, 108 (discussing 450 Inuits in Canada who have a disproportionately high incidence of birth defects traced to POPs in their food supply and noting the effect that POPs have on arctic mammals).

24. *See id.* at 39 (discussing the use of banned pesticides by developing countries); Nancy S. Zahedi, Note, *Implementing the Rotterdam Convention: The Challenges of Transforming Aspirational Goals into Effective Controls on Hazardous Pesticide Exports to Developing Countries*, 11 *GEO. INT'L ENVTL. L. REV.* 707, 711-12 (1999) (discussing the misuse of highly toxic pesticides by Guatemalan farmers).

Of course, pesticides are used because they are invaluable for killing insects that carry diseases (especially malaria) or devour crops needed for subsistence. In fact, the inventor of DDT received a Nobel Prize for his lifesaving discovery.<sup>25</sup> Today, Stockholm signatories are scrambling to remove DDT from stockpiles and storerooms.<sup>26</sup> It is like a pendulum swinging between pestilence and pesticides; currently pesticides are the least favored.

POPs can thus kill mosquitoes, Guatemalan farmhands, and Inuit fishermen in the same application, as the resilient chemicals migrate between the north and south poles. The crusade to eradicate POPs, not surprisingly, has originated in countries with arctic territories (Canada, Sweden, etc.) and in tropical climates, including areas of Central America, Africa, and Southeast Asia.<sup>27</sup> In between the members of this rather unusual, climate-diverse consortium are the industrial nations that manufacture the "dirty dozen" to sell to the southern developing countries.<sup>28</sup> Most of these industrial states banned the use of these chemicals within their own borders in the 1970s and 1980s, bowing to internal political pressure created by exposés like Rachel Carson's book *Silent Spring*.<sup>29</sup> Production continued, however, for export to nations with nascent agricultural systems and pandemic insect-borne diseases.<sup>30</sup>

The Stockholm Convention mandates a phaseout of the production and export of the "dirty dozen" except for extenuating circumstances, such as malaria epidemics, that require drastic, immediate action.<sup>31</sup> One fascinating section of Olsen's book offers charts that indicate the origin of production for each chemical.<sup>32</sup> Interestingly, different industrialized nations specialize in manufacturing different chemicals; for example, Germany has a corner on the market of heptachlor<sup>33</sup> (it is apparently not produced in the United States), while the United States appears to be the major producer of chlordane.<sup>34</sup> This presents an opportunity for a type of competi-

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25. *Id.* at 23 (discussing Swiss chemist Paul Muller's discovery of DDT's properties as an insecticide and resultant 1948 Nobel Prize).

26. *See id.* at 2-3, 22-25.

27. OLSEN, *supra* note 2, at 40-41, 69, 98, 100. *See generally* Evan T. Bloom, *Establishment of the Arctic Council*, 93 A.J.I.L. 712 (1999) (discussing the formation of the Arctic Council, a cooperative forum of eight states with territory in the Arctic region, including Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States).

28. *Id.* at 6-8 tbls. 1-2, 44.

29. *See* OLSEN, *supra* note 2, at 25, 43-45 (discussing RACHEL CARSON, *SILENT SPRING* (1962)); *see also* Erin Perkins, *The Stockholm Convention on Persistent Organic Pollutants: A Step Toward the Vision of Rachel Carson*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 191, 191-92.

30. OLSEN, *supra* note 2, at 43-44.

31. *See id.* at 107; Stockholm Convention, *supra* note 1, Annex B, 40 I.L.M. at 554-56 (allowing disease vector control use of DDT under certain circumstances).

32. *See* discussion in OLSEN, *supra* note 2, at 6-8 tbls. 1-2, 44.

33. *See id.* at 7 tbl. 2. For an example of U.S. litigation that deals with the effects of a heptachlor contamination of a home as a termiticide, *see Villari v. Terminix Intern., Inc.*, 692 F. Supp. 568 (E.D.Pa. 1988).

34. Although Chlordane was banned in the United States for most uses in 1988, OLSEN, *supra* note 2, at 21, it was applied as a pesticide (termite control) in approxi-

tive environmental game: Germany could spearhead a crusade for more draconian measures against chlordane, which would harm chemical companies in the United States that compete in other areas with German chemical firms (few companies produce only one chemical). U.S. corporations, conversely, are more likely to lobby for strong international regulations against heptachlor, partly to inconvenience their German rivals. As mentioned above, Sweden, which does not need the pesticides but faces environmental contamination from them, has played the part of both victim and vanguard in the area of pollutant regulation.<sup>35</sup> Given that its chemical firms produce none of the proscribed contaminants, Sweden stands to potentially benefit from the treaty.<sup>36</sup> In theory, savvy environmentalists could use strategic market forces to pit the chemical interests against each other, eventually covering all their bases.

Of course, it is also possible that U.S. chemical companies want German firms to produce heptachlor, rather than switch to a product that American companies currently sell. Competitors in industries with high entry barriers sometimes agree, tacitly or explicitly, to carve out geographic territories or to have exclusive product lines, giving each the benefits of a limited monopoly. Rival chemical companies in that case are fearful of being forced to compete over the remaining permitted product lines and thus may have collusive incentives to oppose any of the regulations (even those that affect their overseas competitors). By fending off socially harmful coordination games, a treaty can become particularly valuable. The question of what products remain legal, however, leads to another possible strategic twist, as well as my only quibble with Olsen's book. The "dirty dozen" have been banned domestically for years; presumably the manufacturers have developed alternative products to replace them in the pesticide market. Olsen does not mention such substitutes, but one would imagine they either exist or are being developed by the same chemical conglomerates that brought us chlordane and the rest. Encouraging or forcing the elimination of existing pesticide stockpiles creates an

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mately thirty million homes before that date. Entry, 2051 *Chlordane—Neurotoxicity*, 8 OCCUPATIONAL MED. DIG. 17 (1996), WL 8 No. 2 OCCMEDDI 17. Subsequent studies show substantial neurophysiological problems in tested subjects who were exposed to the chemical in or near their apartments. See, e.g., *id.* (citing Kaye H. Kilburn & John C. Thornton, *Protracted Neurotoxicity from Chlordane Sprayed to Kill Termites*, 103 ENVTL. HEALTH PERSP. 690, 690-94 (1995)). For additional legal discussion of Chlordane, see *Texas High Court Declares Landlord's Contamination Claims Against Chlordane Maker Time-Barred*, 1997 ANDREWS TOXIC CHEMICALS LITIG. REP. 25,281 (1998), WL 1997 ANTCLR 25281 (discussing Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529 (Tex. 1997)); *Toxicologist on Chlordane Exposure*, 10 EXPERT WITNESS J. 8 (1998), WL 10 No. 10 EXPWITJ 8 (discussing incompleteness of toxicologist's affidavit in Vardaman v. Baker Center, Inc., 711 So. 2d 727 (La. Ct. App. 1998)); *Home Seller Has No Duty To Disclose Chlordane Contamination*, 9 N.Y. REAL EST. L. REP. 6 (1995) (discussing holdings of New York case law on seller liability); Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453, 502 (2001) (noting incompleteness of toxicologists affidavit in Vardaman v. Baker Center, Inc., 711 So. 2d 727 (La. Ct. App. 1998)).

35. See *supra* note 27 and accompanying text.

36. OLSEN, *supra* note 2, at 45-48.

immediate demand for new supplies of pesticide—a potential windfall for the manufacturer.<sup>37</sup> This may be the best explanation for why the chemical industry has acquiesced to ratification of the Convention, rather than balking. It may stand to gain more than it loses under the treaty. Perhaps subsequent editions of Olsen's book could include some hard data about replacement product lines from the manufacturers of the original POPs.

The Stockholm Convention, like many other treaties, contains no enforcement mechanism or penalties for noncompliance.<sup>38</sup> It is puzzling that some countries, most notably the United States, invested resources to fight doggedly over the use of certain terms or phrases in the final text (most notably changing "precautionary principle" to "precautionary approach").<sup>39</sup> One wonders why they bothered, if the consequences for

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37. Once a factory is outfitted to produce a new alternative to DDT, one of the biggest obstacles to increasing its market would be the existing stockpiles of DDT, perhaps its own former product, in developing countries. Also, given that the manufacturers already must produce the alternative product for its domestic market, it is likely to be more efficient to manufacture only one, not two, pesticides. This can be achieved by creating a large overseas market for its domestic product.

38. See OLSEN, *supra* note 2, at 117, 123; see also Joel A. Mintz, *Two Cheers for Global POPs: A Summary and Assessment of the Stockholm Convention on Persistent Organic Pollutants*, 14 GEO. INT'L ENVTL. L. REV. 319, 332 (2001). Mintz laments the lengthy time allowance for ratification, *id.* at 331, although the requisite number of countries (fifty) has ratified the Convention since his writing, with France finally giving in as a last holdout, see <http://www.pops.int/documents/signature/signstatus.htm>. He also expresses concern over the two-decade phase-out periods for certain pollutants, most notably polychlorinated biphenyls (PCBs), and that phaseout methods are supposed to consider a cost-benefit analysis. See Mintz, *supra*, at 331 (discussing Annex C of the treaty).

39. See OLSEN, *supra* note 3, at 99–100. Olsen explains that "precautionary principle" is a term of art used in other treaties (and forerunner conventions to Stockholm) that functions as a type of rule of jurisprudence, requiring that tough cases always be resolved in favor of protecting the environment (as opposed to economic feasibility or other considerations). See *id.* at 99–100, 109. The diluted phrase "precautionary approach," on the other hand, implies a "lesser degree of importance or applicability." *Id.* at 100. See also DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* 405–407 (2d ed. 2002) ("[M]any commentators also argue that the precautionary principle acts to switch the burden of [scientific] proof necessary for triggering policy responses from those who support prohibiting or reducing a potentially offending activity to those who want to continue the activity.").

The precautionary principle is a source of ongoing debate in other arenas besides the Stockholm Convention on POPs, as indicated by a spate of recent articles. See, e.g., Jonathan H. Adler, *More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 TEX. INT'L L.J. 173, 194–204 (2000) (arguing that application of the precautionary principle to biotechnology generally stifles valuable research and development); John S. Applegate, *The Prometheus Principle: Using the Precautionary Principle To Harmonize the Regulation of Genetically Modified Organisms*, 9 IND. J. GLOBAL LEGAL STUD. 207, 207–09 (2001) (arguing that the precautionary principle should be applied in the context of genetic modification practices); John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 15–16 (2002) (arguing that the strength of the verbal formulation has been steadily diluted or eroded even as it has been more widely used); Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANS-NAT'L L. 323, 323, 365–70 (2002) (arguing that procedures should be implemented to foster democratic decisionmaking about assumption of environmental risks); Stephen Charest, *Bayesian Approaches to the Precautionary Principle*, 12 DUKE ENVTL. L. & POL'Y

ignoring inconvenient provisions would be nil.

The paradox here is somewhat reminiscent of the familiar “no purchase necessary” line used in contests as marketing ploys, where most contest entrants make a purchase anyway. The ubiquity of these “no purchase necessary” contests indicates that companies find them to be effective marketing; the contests would disappear if there was no payoff for the resources that are invested into the marketing and prizes. Many people apparently buy the associated product merely because of the game and not because they would have bought it anyway. Otherwise, the contest would be unnecessary. “No purchase necessary,” a disclaimer added to satisfy various regulatory requirements, for some reason does not undermine consumers’ inclination to make a purchase.

Like a contest with no strings attached, the Stockholm Convention comes with no punishments for noncompliance and therefore no apparent downside for signatories or parties.<sup>40</sup> The question remains, then, whether a law can have any real upside without a corresponding downside. In the process of achieving benefits, most domestic laws impose costs. Criminal laws, for example, impose not only penalties on wrongdoers, but also greatly complicate the planning and preparation of even the most successful (undetected) crimes. This makes perpetration of the crimes more costly, even where they go unpunished. There is also a chilling effect that falls on perfectly legal activities that fall near the boundary of the rule—people steer clear of breaking the law by forfeiting choices that could come close to a violation. Similarly, administrative regulations carry not only civil penalties for violations (sometimes criminal as well), but also impose burdensome costs on industries. The downside to such laws (whether statutes or binding regulations) is viewed as a necessary evil to achieve the upside, such as protection of property or personal safety.

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F. 265, 267-68 (2002) (discussing the distinction between ambiguity and true uncertainty in forecasting environmental harms, and the problems with using a single principle for these two disparate problems); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U. L. REV. 1315, 1316-17 (2003) (arguing, *contra* Sunstein, *infra*, that the precautionary principle is a necessary “corrective to cognitive biases” that mistakenly prioritize immediate, concrete concerns over long-term, uncertain harms); Bernard D. Goldstein & Russel Lynn S. Carruth, *Implications of the Precautionary Principle for Environmental Regulation in the United States: Examples from the Control of Hazardous Air Pollutants in the 1990 Clean Air Act Amendments*, 66 LAW & CONTEMP. PROBS. 247, 247 (2003) (arguing that the precautionary principle may be problematic due to “potential inhibition of the development of more effective air pollution control technology[,] . . . the inhibitory effect on further research[,] . . . and the loss of focus on those hazardous air pollutant compounds and sources that provide the greatest likelihood for toxicity and misplaced focus on individual rather than population exposure”); Don Mayer, *The Precautionary Principle and International Efforts To Ban DDT*, 9 S.C. ENVTL. L.J. 135, 136-38 (2002) (arguing that divergent interpretations and applications of the precautionary principle result in unpredictable results for attempts to ban DDT worldwide); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1011 (2003) (arguing that the precautionary principle appropriately caters to various cognitive biases).

40. See OLSEN, *supra* note 3, at 117, 123. It is possible, of course, that noncompliance could eventually affect trade partnerships or future memberships in free trade organizations, but the Stockholm Convention itself does not contain such provisions.

Granted, the Stockholm Convention's requirements, to the extent that they are honored voluntarily, contain costs for those currently selling—and those using—the twelve POPs. These costs, however, are unlike the costs incurred by those complying with criminal or administrative prohibitions because they are not incurred in lieu of the costs of liability. This could mean either that these laws (and others that similarly lack enforcement provisions) are ineffective, or that we have found a new means of inducing people to do the right thing without threatening them. The latter would be a law with upsides but no downsides; could this be imported from the international law setting to less exotic areas like protecting property rights and eliminating interpersonal violence?

The “no purchase necessary” puzzle in international treaties overlaps with the issue of “soft law” and “hard law” in global rulemaking.<sup>41</sup> “Soft law” is an agreed-upon standard of conduct implicitly intended to be normative, while explicitly lacking official consequences for violators. “Soft law” seems like an oxymoron to those who have a more economic perspective on the law—there is neither clear deterrence nor anything objective to shape individual incentives. This is not to say that norms do not motivate decisions, but where parties have voluntarily hammered out the rules themselves, the rules are more likely to reflect the parties' preexisting preferences or values rather than to mandate something novel.

“Hammering out” terms sounds like the jargon of contract law, and that is one way to view “soft law”—as a voluntary agreement between individuals staked on mutual trust rather than court enforcement.<sup>42</sup> Mutual trust arrangements contain incentives that are driven by reputation. Breaching the trust may limit one's future opportunities for desirable relationships, while keeping one's word can earn a reputation as a premier trade partner.

International markets, however, are inscrutably complex, at least in the aggregate, and few countries are in a position to boycott major importers like the United States, even when the latter flouts some term of a particular international treaty.<sup>43</sup> The “contract” model of soft law therefore

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41. For an overview of the differing viewpoints on the distinction, see generally Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988) (arguing that soft law is best understood as a mechanism to promote cooperation between international actors); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997) (arguing that “soft law” must be viewed as both moral normativity and rational pursuit of self-interest); Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 INT'L LAW. 1433 (2001) (arguing that the form of the rule is less significant than the means of inducing compliance, citing examples of extralegal “persuasion” by the International Monetary Fund).

42. For more discussion of recent international environmental agreements and their relation to contract principles, see generally Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843 (2002).

43. See Joel P. Trachtman, *Decision: GATT Dispute Settlement Panel: International Trade—Quantitative Restrictions—National Treatment—Environmental Protection—Application of GATT to U.S. Restrictions on Import of Tuna from Mexico and Other Countries*, 86 A.J.I.L. 142-148 (1992) (describing how Mexico withdrew from a legitimate complaint

seems overly simplistic.<sup>44</sup>

The Stockholm Convention is a treaty,<sup>45</sup> not an informal agreement or joint resolution, which means it falls somewhere between “soft law” and “hard law.”<sup>46</sup> There is no accepted term to describe this in-between position—it is an awkward spot between innocuous well-wishing and coercive enforcement, between laws that are “hard” and those that are “soft.” (“Firm law”? “Semi-soft”?). The possibility for such an in-between category raises interesting questions about the function of laws generally. Even without incentives like coercion or stigmatization, the rules have an aspirational function that manages to influence behavior over time. By making norms “international law,” environmentalist ideals are elevated to a benchmark status for behavior. Perhaps this benchmark of conduct will later mutate into a mandate backed by force; or perhaps it provides a moral “higher ground” for certain parties in future international agreements. Corporations can boast of their voluntary compliance with the guidelines for public relations purposes. If nothing else, it offers a definitive demarcation line between “good” and “bad,” right and wrong, when it comes to making, selling, or using pesticides—helping individual actors characterize their choices in these terms.<sup>47</sup>

Credos about what makes a country virtuous are not taken very seriously, however, even if mushy treaty provisions fetch universal assent more easily.<sup>48</sup> The primacy of state sovereignty makes the power of effete rules to encourage compliance even more mysterious.

Eric Posner and Jack Goldsmith have published a series of important articles explaining the puzzle of “soft” and “semi-soft” international law

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against the United States for GATT violations—centering on a tuna embargo against Mexico—for fear of jeopardizing the NAFTA negotiations that were then underway).

44. The Stockholm Convention was intended to go further than “soft law.” See Mintz, *supra* note 38, at 330 (arguing that “the Convention’s action-forcing provisions do seem likely to reduce the production and use of POP-laden products”). Specific provisions allow for (or even call for) subsequent amendments to delineate enforcement mechanisms. For more detailed discussion of these specific provisions, see *id.* at 330–32.

45. See Handl et al., *supra* note 41, at 372–73 (discussing the significance of treaty status for the outcome of subsequent litigation).

46. See OLSEN, *supra* note 2, at 49–61.

47. For more discussion of the view that international law helps shape norms, see generally Joseph F. C. DiMento, *Process, Norms, Compliance, and International Environmental Law*, 18 J. ENVTL. L. & LITIG. 251 (2003) (arguing in favor of a New Model holding that international law’s primary function is to foster collective action resulting from nations’ gravitation toward shared norms rather than from fear of sanctions).

48. From the standpoint of everyday politics, it is understandable why noncoercive rules are expedient for international treaties, where everyone is concerned about preserving sovereignty. See Handl et al., *supra* note 41, at 375 (recounting the observations of earlier commentators that soft law is able to “overcome deadlocks in the relations of states that result from economic or political differences among them, when efforts at firmer solutions have been unavailing” and that “[a] substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing, countries”).

using a classic rational choice approach.<sup>49</sup> Their model eschews moral or normative explanations for voluntary compliance with unenforceable treaties and instead posits very plausible self-interested reasons for the phenomenon.<sup>50</sup> Applying their model to the Stockholm Convention, the United States and European nations must have had something to gain. Some suggestions have been posited above, such as the creation of a new, expansive market for replacement products by eliminating existing stockpiles of pesticides.<sup>51</sup> This would also help explain the American insistence on the “precautionary approach” verbiage instead of the “precautionary principle”;<sup>52</sup> the latter could have been used to obstruct the introduction of new pesticide products until the seller could prove their environmental safety. Similarly, Article 6 of the Convention calls for extensive reporting of the location and size of existing POP stockpiles in developing nations,<sup>53</sup> information that other countries may find strategic.

Posner and Goldsmith identify numerous reasons why hegemonic parties may accede to the formalities of a treaty with multiple developing nations, but it seems that most or all of them could be reduced to two general principles: either to draw the others “into the fold,” so as to better coordinate future activities together (isolationism often goes hand in hand with hostility to Western interests), or to “signal” the dominant party’s seriousness and willingness to cooperate, so as to win reciprocal concessions.<sup>54</sup> These strategies are vaguely reminiscent of “dinners and roses” in courtships. Dinner dates are less about food and more about the opportunity to obtain information about the other party—conversation skills, sense of humor, level of romantic interest, etc.—and each dinner makes the next dinner more likely to occur, signaling progress toward a desired relationship. Roses are more complex. Silk flowers last longer and cost more, and may be equally beautiful (they may even be convincingly scented), but are

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49. See Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

50. See *id.*

51. See discussion *supra* notes 40-41 and accompanying text.

52. See discussion *supra* note 39 and accompanying text.

53. See Stockholm Convention, *supra* note 1, art. 6, 40 I.L.M. at 538-39.

54. See, e.g., Goldsmith & Posner, *International Agreements: A Rational Choice Approach*, *supra* note 49, at 116. Goldsmith and Posner state:

Nonlegal agreements serve different functions and can be modeled in different ways. One model is the iterated prisoner's dilemma. Two states, or perhaps more, under threat of mutual retaliation, reciprocally refrain from activities that would otherwise be in their immediate self-interest in order to reap mutual gains from cooperation. Another model is the coordination game, in which states receive higher payoffs if they engage in identical or symmetrical actions than if they do not. A classic example is driving: all parties do better if they coordinate on driving on the right, or driving on the left, than if they choose different actions. When two or more states can generate joint gains by coordinating their behavior, then their gains can be maintained without threats of retaliation, for the agreement is self-enforcing.

*Id.*

considered a less romantic gift. The fact that real roses last only a few days signals either willingness for ongoing expenditures or willingness to expend resources somewhat whimsically on the recipient; sacrificial actions are particularly valuable for signaling coordination in repeat-player games.

The developed nations have long-term incentives to court the undeveloped nations into more treaties, including enhanced cooperation and interdependence. Each treaty leads developing countries to divulge more information about what occurs within their borders (like the locations of large chemical stockpiles in the third world). The United States and Europe may choose to offer token sacrifices ("roses") to signal their willingness to cooperate earnestly (or contribute financially) rather than simply dominating their less sophisticated neighbors.

A final paradox of the Stockholm Convention is the position of the developing nations, who as a block constitute the only remaining market for the banned pesticides. The irony is not that these countries portray themselves as the victims in the situation—everyone does that in international negotiations—but that the biggest customers for POPs would enthusiastically join the campaign to ban them. While it is easy to see why Canada or Sweden would champion the cause, as they have little need for pesticides and are the unfortunate natural repository for them because of their proximity to the polar "drain holes" for these chemicals, the developing countries are a different story.

Signing onto a treaty to get a handout<sup>55</sup> is understandable; requesting a treaty that specifically bans products the nation regularly buys is more puzzling. Of course, developing nations often lack the necessary internal legal structures to control the importation or use of pesticides by private parties, such as wealthy plantation owners. To the extent that these governments are at odds with the local landowners, the ironic plea for America and Europe to shut off the faucet at their end, so to speak, is sensible enough. The underdeveloped nations tend to be smaller nation-states, however, where the landed gentry is in a particularly strategic position to exert influence over their officials and the positions they take at an international convention. If the pesticides are causing obvious harm in developing countries, why was a treaty necessary to stop themselves from buying? There is no purchase necessary.

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55. Articles 12-14 of the Stockholm Convention call for technical and financial assistance to be given from developed countries to those less developed. See OLSEN, *supra* note 3, at 115-16. This also explains some of the "victim" rhetoric used by the willing buyers of the POPs. Victims make good mendicants, and mendicants make good victims—at least for rhetorical purposes. An opportunity for additional foreign aid, funneled through the existing mechanism of the Global Environmental Facility (put in place by other treaties), certainly helps explain their eager participation and ratification, even if little is done locally to implement changes in practice.