I. Introduction[1]

Product safety became an issue of concern for the industrialised nations in the early seventies. More and more nations adopted particular legislation devoted to the protection of consumers from unsafe products[2]. Product safety belongs to the core of consumer protection which is still a relatively young field of public policy[3]. Product safety has developed with the « ascendancy » of the « activist » state, and has undergone substantial changes on its decline. The « ups » and « downs » are reflected in the different approaches to the issue. The Community did not succeed in developing a consistent product safety policy in the hay day of consumer protection although product safety ranked high in the priorities of the first consumer protection programme adopted as early as 1975[4]. The Community stepped into the field of product safety legislation relatively late. Its effort is bound to the overall objective of completing the Internal Market. Thus product safety is inherently connected to trade policy, it should be realised in a « pick-a-pack » procedure[5]. This is best reflected in the strong linkage between the so called New Approach on the Harmonization of Technical Standards and Regulations[6] and the elaboration of the draft directive on product safety[7] as it stands at the time of writing.

Although the Community provides for a modern approach to regulating product safety, the directive might lead at best to a minimum standard for a specific region, the 12 Member States of the Community and to some extent the EFTA

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1 This report has been partly taken from a study carried out by the author under the direction of A. CASSESE, professor at the European University Institute.

2 Cf. the country reports in Ch. JOERGES/J. FALKE/H.-W. MICKLITZ/G. BRUEGGEMEIER, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaften*, 1988.

3 Cf. H.-W. MICKLITZ, *International Regulation on Product Safety*, Typoscript Bremen/Den Haag, 1988 ; same author, *International Regulation on the Export of Hazardous Products*, Bremen/Den Haag, 1988 ; same author, The export of Dangerous Pharmaceuticals, Prospects for Regulation, *Journal of Consumer Policy*, 11 (1988), 29ff.

4 *O.J.*, n° C 92, 25/4/75, 1 et seq.

5 H. W. MICKLITZ, *Perspectives on a Directive on Safety of Technical Consumer Goods*, CMLR 23, 1986, 617 et seq.

6 *O.J.*, n° C 136, 4/6/85, 1 et seq.

7 *O.J.*, n° C 193, 31/7/89, 1 et seq.

Countries[8]. Seen from an international perspective some form of harmonized product safety legislation within at least twelve highly industrialised countries might have a strong impact on the international floor. It could initiate a process which would help to reduce the still existing differences in product safety legislation.

But reality is different. The major industrialised nations in pursuing their own safety policy have contributed to considerably differing regulatory concepts on access to the market as well as to post market control rules. These effects are manifold, but one thing is certain : differing rules separate markets and raise moral objections. The New Approach defines common market access rules, which should be modified under the directive. The latter, however, tries at the same time to overcome separations of markets resulting from differing post market control actions by setting up a European mechanism to withdraw unsafe products from the Internal Market[9]. This effect has been and still is one of the major justifications of the EEC's initiative[10]. Though the Community could live in harmony, the rest of the world would be confronted with Community wide valid post market control actions[11]. They might serve, economically speaking, as a trade barrier and morally are seen to enhance tendencies to use those countries which do not yet have product safety legislation allowing for the control of imports from the EEC to serve as dumping ground for all Community-wide « banned or severely restricted products »[12].

The following tries to highlight the most important tendencies to overcome the differences in product safety regulation internationally, to strike down separation of markets and to challenge the argument that (European) manufacturers are using the rest of the world and mostly third world countries, as dumping grounds, for products which can no longer be marketed in the Community. The most ambitious objective certainly is to find out whether a human right is the offing guaranting world wide protection of consumers against unsafe products whatever their nationality might be. This presentation draws heavily on the author's commitment in the initiative launched by the President of the Commission to develop a catalogue of Human Rights along the line of the

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8 While it is mere speculation whether the EFTA countries would be willing to follow the EEC to the same extent as in the product liability issue, cf. *Produkthaftpflicht International*, 1/1990.

9 Cf. for a preliminary analysis, H.-W. MICKLITZ (eds), *Post market Control of Consumer Goods*, Part III, 1990.

10 Cf. Ch. JOERGES et al., loc. cit., 451 et seq.

11 According to the draft Community wide action would cover only emergency situations.

12 Cf. this terminology seems to be well established in the international debate, though raising serious doubts as to its exact meaning.

completion of the Internal Market[13]. Such a fundamental right to safety would at least in theory impede the marketing of products which are restricted or even banned domestically. It might take decades to come to the establishment of such a fundamental right. That is why less ambitious efforts of international organisations to get away with differing product safety legislation might well be of much greater importance. Two kind of approaches should be investigated : incentives to harmonize product safety legislation world-wide, and incentives which accept more or less the existence of differing standards and try to develop rules which bridge the regulatory gap of differing standards : safety specific export regulation.

II. International solutions — a fundamental right to safety[14]

Consumer safety in particular and consumer protection in general today, belongs to a set of well-established policies and has even reached the constitutional

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13 H.-W. MICKLITZ, Consumer Rights, Postscript 1989, in A. CASSESE (ed.), *Towards 1992 and beyond : Human rights and the European Community.*

14 In our analysis of the existence of a consumer right, we distinguish three approaches which determine the debate on consumer protection. These approaches remain the same notwithstanding the level of protection, and regardless of its national, european or international socio-legal context.

(1) Rights : proclaiming rights in order to shape the normative structure of consumer protection encounters problems which are common to all « social » rights. The endangering of rights stems to a large extent from the activities of private actors and organizations. The state can only be blamed for facilitating such activities. A right must, therefore, be understood as a right to protection by the State which expresses itself through an imposition of duties on private actors.

(2) State objectives : the alternative to proclaiming fundamental rights is to lay down protectionist objectives (Staatsziele). This technique may be considered as a means of avoiding the difficulties in relating legitimate objectives of protection to fundamental subjectives rights.

(3) Procedural rights : one common aspect of consumer and environmental protection deserves particular mention. Irrespective of the technique employed, the delineation of protectionist measures will always have to be weighed against other concerns. The consumer's right to safety may be in conflict with his own economic interests. Granting rights or codifying state objectives will have an impact on the assessment of such conflicts, but cannot dispose of them. Because of this difficulty, one must question the degree to which rights should be shaped as « procedural » rights (i. e. access to information, participation in decision-making procedures, consumer remedies and other forms of judiciary mechanisms). The three approaches to protection should not be understood as mutually exclusive. Each of them has its merits and its disadvantages.

level[15]. And even on the international level, efforts might be reported pointing in the very same direction.

The development of international conventions as well as international soft-law demonstrates a phenomenon that can be found in the constitutions of Western industrialized countries :

— on the one hand there are the « old » international conventions on human rights in the classical sense. Rights granted to individuals appear as defensive rights only. The right to safety, if any, emerged only as a consequence of development of case law at the European Court of Human Rights ;

— on the other hand there are the « new » approaches, programmes and recommendations, which often do not obtain the quality of a legal convention but remain in the form of international soft law recommended for application only and providing for statutory responsibility to protect citizens against health hazards.

One major difference persists, however. The procedural[16] concretization of a right to safety pales into insignificance. Having a European perspective in mind, two types of problems must be kept in mind : (1) whether and to what extent the Community is bound by the Human Rights Convention[17] and (2) whether and to what extent international soft law might be integrated into Community law[18]

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15 In Spain, Portugal, Brazil and Uruguay.

16 Cf. explanation in footnote 14.

17 Cf. J. H. H. WEILER, The European Court at Crossroads : Community Human Rights and Member State Action, in F. CAPOTORTI et al. (eds), *Du droit international au droit de l'intégration — Liber Amicorum Pierre PESCATORE*, 1987, 821 seq. ; J. H. H. WEILER, Eurocracy or Distrust : some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities, *Washington Law Review*, 1986, 1103 seq.

18 Cf. inter alia, M. BOTHE, Soft law in den Europäischen Gemeinschaften, in *Festchrift für H. J. Schlochauer*, 1981, 761 seq. ; U. EVERLING, Probleme atypischer Rechts — und Handlungsformen bei der Auslegung des Europäischen Gemeinschaftsrechts, in R. BIEBER/G. RESS (eds), *Die dynamik des Europäischen Gemeinschaftsrechts*, 1987, 417 seq.

1. Protective and defensive rights to safety — the « old international Conventions » and the jurisprudence of the European Court of Human Rights

The European Convention on Human Rights does not provide for a right to safety. Article 2 (1) mentions the right to life only[19]. Recent developments in the case law of the European Court of Human Rights however, seem to indicate that the Court is willing to accept the existence of protective rights[20]. Two cases have been reported, in which the Court finally accepted the statutory obligation to take appropriate action, in order to protect the freedom of assembly and to respect privacy[21]. The Court did not refer to Article 1 but grounded its decision on a further development of the specific rights as shaped and defined in Articles 8 and 11. One might understand the approach of the Court as an attempt to deviate protective statutory obligations in specific cases, as far as individual rights granted under the Convention might be interpreted in such a far-reaching sense. The Court, however, seems to refute any idea of accepting a general statutory responsibility to protect the citizens of its' signatory states.

It seems possible that the European Court of Human Rights might accept a right to safety if it becomes involved in a specific and appropriate case. Legal doctrine discusses the possibility of derogating from the Human Rights Convention, and an overall state obligation to protect individuals against third party intervention[22]. Such a right to protection might be grounded in Article 5, the right to freedom and to security (safety). This interpretation of Article 5 presupposes the possibility of transforming the classical defensive right of Article 5 into a protective right, in the sense of securing safety against health hazards. The overall majority however rejects « such an interpretation of Article 5[23] ». It restricts the right to protection to those situations in which individuals claim protection against interference with their physical integrity by the state.

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19 Cf. K. DOEHRING, Zum « Recht auf Leben » aus nationaler und internationaler Sicht, in *Festschrift für H. MOSLER Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit und Menschenrechte*, 1983, 145 seq.

20 Cf. G. ROBBERS, *op. cit,*. (note 101), 25 seq.

21 EGMR 13/8/1981, EuGRZ 1981, 559 seq. and decision n° 16/1983/110, 16/3/1985 EuGRZ 1985, 297 seq.

22 Cf. D. MURSWIEK, Die Pflicht des Staates zum Schutz vor Eingriffen Dritter nach der Europäischen Menschenrechtskonvention, in H. J. KONRAD (ed.), *Grundrechtsschutz und Verwaltungsverfahren unter besonderer Berücksichtigung des Asylrechts — Internationaler Menschenrechtsschutz*, Referate der 23. Tagung der Wissenschaftlichen Mitarbeiter der Fachrichtung « Öffentliches Recht », 22/26 Februar 1983 in Berlin, Schriften zum öffentlichen Recht Band 484, 213 seq.

23 Cf. D. MURSWIEK, *op.cit.*, (note 148), with references in Fn 29.

Accepting protective rights requires the closer definition of conditions under which protection may be claimed. The European Court of Human Rights remains quite reluctant in its two decisions on the shaping of appropriate procedures, to define the core of the statutory obligation granting the right of assembly and the right of privacy. The Court underlines that States, though under an obligation to take measures, are free to choose between appropriate actions. The measures taken, however, must be effective so as to guarantee the respect of privacy[24]. The decision of the European Court of Human Rights was based on an individual complaint. The linkage between the statutory obligation to protect privacy and the individual complaint is striking : the individual right to claim protection corresponds to the statutory obligation. Taking into consideration the development of the German case law on the emerging right to safety, the European Court of Human Rights needs to go only one step further and it would confirm the position taken by the German Constitutional Court in its Mülheim-Kärlich decision[25].

2. State objective and « right to safety » in international conventions

A possible development of the Human Rights Convention might be more successful. More definite answers on the existence of a right to safety can be found in the « new » international conventions[26]. Here, finely-tuned objectives are formulated, although their finer details, however, are cumbersome. The International Covenant on Economic, Social and Cultural Rights recognizes in Article 12 the right to physical and mental health :

> *« 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for :*
>
> *(a) The provision for the reduction of the stillbirthrate and of infant mortality and for the healthy development of the child ;*
>
> *(b) The improvement of all aspects of environment and industrial hygiene ;*

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24 Cf. G. ROBBERS, *op. cit.*, (note 101), 25 seq.

25 BVerfGE 53, 30 seq.

26 Particular value in this respect : D. RAUSCHNING, Ein internationales Recht auf Schutz der Umwelt ? in *Festschrift für W. Weber*, 1974, 719 seq.

> *(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases ;*
>
> *(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness ».*

The wording of Article 12 makes clear that the so-called « right to physical and mental health » constitutes an obligation on the part of the signatory States to take appropriate action in the interests of individual citizens. The reading of Article 12 and the general obligation laid down in Article 2 (1) :

> *« to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. »*

leave no doubt that the Convention is not self-executing and that it does not grant individual rights to citizens[27]. That is why the Convention, though in existence since 1976, cannot substantially contribute to the formulation of a right to safety.

The same holds true with respect to the European Social Charter[28]. Part 1 underlines the signatory parties' willingness to employ all appropriate means of statutory and bilateral policy in order to attain the prerequisites from which it is possible to make use of the right to, inter alia,

> *« ...benefit from any measures enabling him to enjoy the highest standard of health attainable ».*

In somewhat stronger and/or much more concrete vein, Article 11 then formulates a right to the protection of health :

> *« With a view to ensuring the effective exercise of the right to protection of health, the Contracting Party undertakes, either directly or in cooperation with public or private organisations, to take measures designed inter alia,*
>
> *1. to remove as far as possible the causes of illhealth ;*
>
> *2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health ;*
>
> *3. to prevent as far as possible epidemic, endemic and other diseases ».*

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27 Cf. D. RAUSCHNING, *op. cit.*, 152, 722.

28 Cf. D. RAUSCHNING, *op. cit.*, (note 152), 722-723.

The legal quality of the different rights shaped under the Social Charter is subject to a controversial debate in legal doctrine[29]. Some deny the self-executing character of the Social Charter with the reference to Part III. Here, quite concealed in the Charter, it is made clear that the signatory States agree on the Charters' pure international character, whose performance is subject only to the implementation and monitoring procedure as provided for in Part IV. Others do not take this argument for granted and try to solve the problem of the binding nature by drawing a distinction between those rights which are specific enough to constitute legal rights for individuals, and those which provide a mandate for the signatory States only. Even the latter approach, however, would not help upgrade Article 11, as it clearly constitutes a state objective only, and not a right for individuals.

Theoretically, a parallel could be drawn with the Spanish Constitution. Both International Conventions, however, have in common that they more or less set aside the question of how the different state objectives might be implemented and monitored. The Conventions escape far-reaching perspectives right from the beginning, by limiting the implementation and monitoring duties merely to the obligation of the signatory States to report on further progress[30]. They do not engage themselves in taking action to implement the mandates adopted under the Convention. Rather, they neatly restrict their duty to reporting on events occuring in their countries within the context of the Convention[31].

III. Guidelines and recommendations on the harmonization of product safety regulation

Two international activities should be mentioned in the context of regulating product safety : the efforts of the OECD to shape a consistent consumer policy and the UN Guidelines on Consumer Protection. Both efforts are not directly linked to a right to safety within a constitutional perspective. They must be located at the level of consumer law, in order to formulate concrete actions to be taken for protection of the consumer against health hazards. The OECD and UN are dealing with consumer safety policy rather than with consumer law. The link with the constitutional level is evident insofar as both international organisations

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29 Cf. M. ZULEEG, Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta, *ZaöRV*, 1975, 341 seq., 344 seq.

30 Cf. D. RAUSCHNING, *op. cit.*, (note 152).

31 Cf. in a broader context, J. SCHWARZE, Rechtsschutz Privater bei völkerrechtswidrigem Handeln fremder Staaten, ArchVR 24, 1986, 408 seq. who underlines the necessity to develop remedies for individuals under the international public law.

recognize the existence of consumer safety as a statutory responsibility within the regulatory mechanisms.

1. The OECD's approach on product safety

The OECD has played a key role in the formulation of a consumer safety policy. In 1972, a Working Party on the safety of consumer products was set up to deal with questions concerning all consumer products with the exception of food and drugs. In the same year, the US Congress adopted the Consumer Product Safety Act (CPSA) which has served as a model for safety legislation up to the present time. The United States used the OECD as a forum to push international regulation on product safety. The working programme of the OECD Committee relied on harmonization of international regulation on product safety and information exchange on emerging national legislation as an appropriate means for protecting consumers[32].

Our primary concern in this context is the development of diverging national standards. In a series of reports[33] on Data Collection Systems concerning product-related accidents, Severity Weighting of such Data, the Description of Principles and the Application of Product Safety Policy, Legislation in Member State Countries and of Development of Recall Procedures, the Committee tried to formulate a comprehensive concept of profuct safety regulation. These reports largely reflect the United States approach to safety regulation[34]. They still influence the actual shaping of the safety policy of the Community.

The OECD, however, has lost influence in the eighties due to the partial setback experienced by US policy in product safety. Recent activities of the OECD indicate a change in policy, namely a shift towards the Community approach on product safety, more specifically to the regulatory mechanisms developed by the so-called « New Approach ». The OECD tried to extend the New Approach to all industrialized countries and to lay down the basis for an international safety policy[35]. It is however not backed by policy considerations on how such an extended New Approach could foster the elaboration of a genuine product safety

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32 Cf. N. RINGSTEDT, OECD, Safety and the Consumer, *JCP*, Vol. 9, 57 seq.

33 OECD, 1978, *Data Collection Systems related to Injuries involving Consumer Products* ; OECD, 1979, *Severity Weighting of Data on Accidents involving Consumer Products* ; OECD, 1980, *Safety of Consumer Products* ; OECD, 1981 ; *Recall Procedures for unsafe Products sold to the public.*

34 Cf. Ch. JOERGES et al., *Sicherheit von Konsumgütern*, op. cit. (note 10), 201 seq. (Report on the US Product Safety Law).

35 OECD, Committee on Consumer Policy, *CCP* (89) 2, 31/3/1989, International Trade and the Consumer Interest, Possibilities for Harmonization of Product Safety Standards.

policy on the international level. European experience seems to demonstrate that the New Approach as such cannot guarantee the bringing into circulation of safe products. It would thus be necessary on the international level to consider ways and means which could fulfill the function of the statutory impact resulting from the Product safety Directive or from national product safety legislation.

2. The UN-Guidelines on consumer protection

The UN-Guidelines on Consumer Protection were adopted in 1985 after a ten-year long debate. Health and safety is mentioned in the list of « general principles »[36]. These contain essentially a restatement of basic consumer rights as set out in the well-known message from President Kennedy. Under « general principles » it says : « Governments should develop, strengthen or maintain a strong consumer protection policy ». The legitimate needs to meet are : « the protection of consumers from hazards to their health and safety ». The International Organization of Consumer Unions has tried to give « health and safety » priority over all the other principles enumerated and has proposed the following rewording of « general principles »[37] :

> *The right to physical safety of consumers in their protection from potential dangers, which all countries should recognize as a basic and fundamental human right.*

The International Organization of Consumer Unions failed and « health and safety » was put on an equal footing with « promotion and protection of the economic interests of consumers ... ». The general principles are then broken down into « guidelines » defining basic minimum standards for health, safety and environmental protection under two separate headings, « physical safety » and « measures relating to specific areas ». The scope of « physical safety » can be defined against the more detailed section on « measures relating to specific areas » which deals mainly with food, water and pharmaceuticals. It is designed particularly for assisting developing countries by giving « priority » to areas of essential concern for the health of the consumer, such as food, water and pharmaceuticals. The section on « physical safety » should be understood as laying down basic safety principles valid for every type of health and safety regulation, whereas the section of « specific areas » formulates additional requirements for particular products.

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36 Cf. for a general analysis, P. MERCIAI, Consumer Protection and the United Nations, *Journal of World Trade Law*, 1986, 206 seq. ; D. HARLAND, The United Nations Guidelines for Consumer Protection, *JCP*, Vol. 10, 1987, 245 seq.

37 IOCU, Comments by the International Organisation of Consumers Unions, *United Nations Draft Guidelines on Consumer Protection*, 1985.

According to the Guidelines

> *« ...governments should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use ...*
>
> *Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities, and where appropriate, the public without delay. Governments should also consider ways of ensuring that consumers are properly informed of such hazards.*
>
> *Governments should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial or severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it. If it is not possible to do this within a reasonable period of time the consumer should be adequately compensated ».*

Post market control covers the establishment of accident surveillance systems, the existence of compensation rules and mechanisms to guarantee that unsafe products are withdrawn from the market. Measured against the Guidelines, quite a number of the major trading nations should revise and tighten their safety regulations[38]. The reading and philosophy behind the Guidelines relating to product safety is strongly influenced by the regulatory philosophy of the OECD as formulated in the seventies under the influence of the United States.

The Guidelines and the OECD reports suffer from a major deficiency : they do not deal with problems of procedure. They more or less set aside questions of implementation and monitoring. Enforcement measures are only taken at an informal level, without a real mandate. The OECD initiates review investigations on the state of the legislative machinery within its member countries, the UN is undertaking consultations for Latin America and the Caribbean to promote the application of the Guidelines[39].

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38 In the same sense, cf. P. MERCIAI, *op. cit.*, (note 162), 214-216 ; D. HARLAND, *op. cit.*, (note 162), 352-252.

39 *IOCU-Newsletter*, 1987, n° 163, may 1.

IV. International guidelines and recommendations on the export of banned and severely restricted products[40]

International organisations realized relatively early that it would be fairly unrealistic to develop a comprehensive approach on the harmonization of differing product safety regulations. On the other hand they could not set aside the existence of differences in the regulatory status of products. Non-governmental organisations undertook intensive lobbying to push international organisations into action. But consumer goods were not ranking very high in public attention. The awareness focused on the export of banned and severely restricted drugs and perhaps even more on « double standards » in the regulation of pesticides and chemicals. This is not the place to tell the history of the development in export regulation as such throughout the different international organisations. It might be useful, however, to draw attention to the most prominent efforts in order to characterize the mechanisms developed and to highlight the role of the international organisation.

1. OECD, UN and GATT

In its reports on « Recall procedures for unsafe products sold to the public », the OECD reiterated the then valid US doctrine developed under the Consumer Product Safety Act that forbids the export of consumer goods subject to a domestic market restriction[41]. But the report does not really discuss the issue. The policy is just a short statement within the report without any indepth analysis. Efforts within the Committee to bring up the issue again and to prepare a report on the export of banned and restricted consumer goods did not get the necessary support from the OECD Member States. Although the OECD lacks a consistent policy statement it is only organisation world-wide which is operating an information exchange system on regulatory actions. The so called informal notification procedure was established in 1973. It was first meant as an attempt by the OECD's Committee to obtain an overview on the overall initiatives of Member Countries for regulating product safety, without taking into account the implications on global trade. The procedure was then extended from the mere exchange of product safety legislation to regulatory actions. Insiders refer to the

40 Cf. references in footnote 2.

41 Cf. footnote 33, for more details and for the amendments within the US export policy, H.-W. MICKLITZ, loc. cit., footnote 2, Export regulation on Pesticides and Chemicals.

informal character of the notification procedure which has made such an extension possible. A formal recommendation by the Governing Council is said to never have been adopted. The system has been in operation for a number of years now and some form of administrative routine has been established[42]. The OECD receives notification from its Member States which are copied and distributed. The most considerable input comes from the US-Consumer Product Safety Commission which notifies also voluntary recalls. The OECD tried to set up some form of a review committee in which the notifications should be discussed, but the attempt failed. That is why the OECD is today in no way involded in the processing of the notifications beyond the mere distribution of the information.

The second major effort dealing with the export of banned and severely restricted goods can be reported from the GATT. Generally, Member States of GATT are free to adopt safety regulations aimed at the protection of their citizens from health hazards[43]. The GATT Standard Code requires Member States adhering to the Code to notify such measures as they have taken in product safety matters[44]. The duty to notify is somewhat similar to the Community's policy to be kept abreast of any regulation effecting the free trade of goods within the Community[45]. But in 1982, following the initiatives of OECD, UNEP, FAO in the field of chemicals and pesticides, the GATT set up a notification procedure. The initiative covers not only consumer goods, but medicines, pesticides and chemicals as well, could not play any role due to the much better settled and better established mechanisms within FAO, UNEP, and last but not least, withtin OECD. But the ever increasing impact on FAO and UNEP to engage in the regulation of the export of pesticides and chemicals has led to a new initiative in GATT in that field. The background, this time, seems to be somewhat different. GATT is concerned because the existing export control mechanism in the field of chemicals and pesticides, though not formally binding on the states, might endanger the free trade of goods and foster protectionism. The debate is still going on and it remains to be seen if and how GATT is willing to reconcile

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42 E. LINKE, Report on the Informal Notification Procedure, presented on the colloque *Sécurité et Défense des Intérêts Economiques des Consommateurs*, 17 et 18 avril 1986, Dijon, France.

43 Within the restrictions of article XX : subject to the requirement that such measures are not applied in a manner which would consitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on the international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures : (b) necessary to protect human, animal or plant life or health ;...

44 Cf. R. W. MIDDELTON, The GATT standard Code, *Journal of World Trade Law* 14, 1980, 201 et seq. ; cf. Ch. JOERGES et al., loc. cit., footnote 3, 280 et seq.

45 *O. J.*, n° L 109, 26/4/1983, 8 et seq., thereto Ch. JOERGES et al., loc. cit., footnote 3, 432 et seq.

the existing double standards with the GATT Agreement and the GATT Standards Code.

2. Existing mechanisms of export regulation

For the better understanding and for the ongoing debate on export regulation it might be useful to give a short overview on the existing mechanisms in the field of chemicals and pesticides, as they determine the international debate and set the tone for possible solutions.

It has become quite common to distinguish between three different types of export regulations : (1) information exchange on legislation and on regulatory actions — it is here where the OECD's informal notification system and the 1982 GATT initiative might be ranked ; (2) export notification — under this scheme exporters are required to notify each and every export on banned and severely restricted products to the designated authorities in the importing countries and/or to the importer ; (3) prior informed consent — here the export occurs only if the designated authorities in the importing country have given their explicit consent that they agree to the export. There are many variations of the shaping of the concrete mechanism under discussion, the debate focusing mainly on the role of the exporting country : whether and to what extent exporting authorities might and should be involved in the notification process. Three important developments, however, all happening in 1989 might have contributed to the most recent GATT engagement : the development of the Basle Convention on the Transboundary Movement of Hazardous Wastes prescribing the prior informed consent procedure and the adoption of the amended London Guidelines[46], the amendment of the FAO Code on the distribution and Use of Pesticides, respectively[47], both pointing into the direction of prior informed consent. The FAO Code and the amended London Guidelines require exporting countries « to implement appropriate procedures within their territory, designed to ensure that exports do not occur contrary to the PIC (Prior Informed Consent) decisions of participating importing countries »[48].

International organisations are far from being involved in the implementation of export regulation. This holds true even for the most developed mechanism in the Basle Convention and the UNEP amended Guidelines and the amendment of the FAO Code. Certainly, the respective secretariats are involved to a greater extent than the OECD in the informal procedure. But one cannot say that the secretariats

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46 *London Guidelines for the Exchange of Information on Chemicals in International Trade*, amended 1989.

47 *FAO Code on the distribution and Use of Pesticides*, 1985, as amended in 1989.

48 The meaning of which is under review in the UNEP which tries to develop a model legislation to implement the London Guidelines.

are administering or even governing the management of the system. International organisations pursue a threefold long term objective to strengthen their position : (1) they try to compile information in a specific data bank on the regulatory status of the notified products and regulatory actions — (this has been largely achieved), (2) they try to initiate information exchange between the regulatory agencies on the notifications they get, this mechanism is best developed in the WHO whereas difficulties seem to persist even in the Community, (3) they make efforts to « smuggle » themselves into the process of information dissemination in order to obtain a key position backed by some kind of information monopoly. In short, the overall efforts in the regulation of exports are directed toward enhanced information exchange and intensified cooperation world-wide.

V. Community response to the international challenge

Ch. Joerges has given an overview of the actual stage of development of Community Law and Community Policy in product safety regulation. J. H. H. Weiler and P. Ver Loren van Themaat are quite critical about the Community's competence to regulate product safety. At this juncture, it seems to be fairly unrealistic to raise the question of possible extraterritorial effects of a still non-existent right to safety, although only such an extended right to safety could provide some form of Community responsibility to respond to the international challenge.

1. Some preliminary remarks to possible extraterritorial effects of a european right to safety

Responsibility in external relations necessarily involves the applicability of Article 113. Timmermanns has proposed to bring the shaping of the common commercial policy into line with Articles 30 and 36[49]. Health and Safety matters would remain outside the scope of the common commercial policy as long as the competence lies in the hands of the Member States. The overall parallelism[50] between the internal and the external competences would lead to the conclusion

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49 C. W. A. TIMMERMANNS, *La libre circulation des marchandises et la politique commerciale commune*, 1988.

50 Cf. E. STEIN in collaboration with L. HENKIN, Towards a European Foreign Policy ? The European Foreign Affairs System from the Perspective of the United States Constitution, in M. CAPPELLETTI, M. SECCOMBE, J. WEILER, *Integration through Law*, volume 1 Methods, Tools and Institutions, book 3, Forces and Potential for a European Identity, 1986, 43 et seq.

that Member States delegate their competence in product safety matters to the Community, once the Council adopts the directive as it stands. If the transfer of competence entails a genuine engagement of the Community in product safety matters, (an engagement which would then result in a Community commitment to protect Community citizens against unsafe products[51]), raises the question whether the internal/external parallelism developed with the due regard to international trade might be so radically transferred to the field of health and safety. It would yield a Community commitment to protect non-EEC citizens against health hazards ! Legal doctrine on the possible extraterritorial effects of German fundamental rights might be helpful to approach carefully the issue[52].

And even if such a Community responsibility is assumed to exist, it needs to be clarified whether such a responsibility creates enforceable individual rights. The European Court of Justice limits the basic freedoms of the Treaty to EEC nationals. In neither International Fruit[53], Polydor[54] nor in Kupferberg[55] were the rights of non EEC nationals at stake. EEC nationals had invoked the direct applicability of the EFTA agreement or the GATT against existing law.

2. Export regulation in the Draft Directive on Product Safety ?

The still existing and long lasting uncertainties on a European right to safety make it feasible to look for a solution to the international challenge on the level of secondary Community law. The Directive does not provide for any kind of export regulation although the issue has been raised in the working group which participated in the preparation of the various drafts. Reference could be made to the respective provisions in the EEC directive on medicines[56] and in the

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51 Cf. thereto H.-W. MICKLITZ, *Consumer Rights*, loc. cit, footnote 13.

52 M. HEINTZEN, Das Grundrechtliche Eingriffskriterium bei Sachverhalten mit Auslandsberührung, DVBL, 1988, 621 ff ; Th. OPPERMANN, Transnationale Austrahlungen deutscher Grundrechte, in *Festschrift W. G. GREWE*, 1981, 521 ; The issue is likewise discussed in the context of transboundary pollutions, cf. references in footnote 59.

53 1972, *ECR*, 1219.

54 1982, *ECR*, 329.

55 1982, *ECR*, 3641.

56 88/C36/02, n° C 36, *O. J.*, 8/2/1988, 22 et seq. ; thereto H.-W. MICKLITZ, *loc. cit*, footnote 2.

regulation on the export of pesticides[57]. Here provisions on information exchange and export notification have been introduced. The EEC responds here to « soft-law » solutions which have been found in the competent international solutions, WHO and UNEP/FAO. Why does the draft stay away from the international efforts taken mostly within the OECD as supported by GATT, and why doesn't it refer to the recent efforts within France, Australia and Sweden, who have introduced export regulation in consumer goods most recently ?

VI. Solutions to « double standards » under international (economic) law ?

Regulating consumer safety matter involves national or Community authorities. Administrative actions are taken to restrict or abandon the marketing of unsafe products. Two cases have to be distinguished in which « extraterritorial effects » might emerge :

— the export of banned and severely restricted products to countries in which the very same products are not restricted in the same way,

— the re-import of banned and severely restricted products to the export country (for example, tea where residues of the forbidden pesticides DDT might be discovered).

To put it simply, the first case concerns the protection of foreign citizens, the second concerns the protection of EEC citizens. How can the question be solved under international administrative and international public law ? And what kind of lessons can be drawn from fields where the same or a similar issue has been and still is discussed ? It is P. Mayer[58] who demonstrates so deliberately the still dominating principle of the national sovereignty which excludes the extraterritorial application of product safety legislation. A couple of short remarks might nevertheless be permitted.

The protection of foreign citizens is extensively debated in the field of transboundary environmental pollution[59]. There is some indication to assume that the emission country is under an obligation to take into consideration the

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57 N° 1734/88, n° L 155, *O. J.*, 22/6/1988, 2 et seq. ; E. REHBINDER, Export von Schädlingsbekämpfungsmitteln : Gemeinsame Verantwortung von Export-und Importstaat ? *Jahrbuch des Umwelt und Technikrechts* UTR Bd. 5, 337 et seq.

58 Portée internationale des décisions nationales selon le droit commun.

59 Ph. KUNIG, Grenzüberschreitender Umweltschutz — Der Einzelne im Schnittpunkt von Verwaltungrecht, Staatsrecht und Völkerrecht, in W. THIEME (Hrsg), *Umweltschutz im Recht* 1988, 212 et seq. and E. REHBINDER, note on Th. OPPERMANN/Th. KILIAN, *Gleichstellung ausländischer Grenznachbarn im deutschen Umweltverfahren*, 1981, and M. KLOEPFER/Ch. KOHLER, *Kernkraftwerk und Staatsgrenze*, 1981, RabelsZ 47, 1983, 564.

repercussions on the environment in the emission country. Reasoning is based either on the scope of application of the national statute in question and/or on international public law. The protection of the national's citizens against the reimport of unsafe products invokes the overall discussion on the extraterritorial effects of anti-trust law[60]. Modern doctrine tries to limit the application of the national anti-trust law and by invoking rules of reason which restrict the scope of application of the national law, allows the taking into account of the legislation in which the effects have been transported, or by refering to rules under international public law which restrict the exporting countries capacities to apply national law beyond its territory[61].

Would there not be an opportunity to consider the extraterritorial effects of product safety regulation in the light of these experiences ?

60 Cf. most recently J. KAFFANKE, *Nationales Wirtschaftsrecht und Internationale Wirtschaftsordnung*, 1990.

61 A. PUTTLER, *Völkerrechtliche Grenzen von Export-und Reexportverboten. Eine Darstellung am Beispiel des Rechts der Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland.*