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United States Export of Banned Products: Legal and Moral Implications

Patrick B. Seferovich

I. THE PROBLEM

The extent of human suffering and environmental harm resulting from trade in banned or restricted pesticides cannot be fully documented.¹

In 1975, the Texas-based Velsicol Chemical Corporation exported the nerve-attacking pesticide Leptophos (Phosvel) to thirty countries. Over half of its total export was shipped to Egypt, a country with no procedures for pesticide regulation or tolerance setting. The use of Leptophos in Egypt resulted in the deaths of several Egyptian farmers and severe convulsions and speech impairments in others. American workers also became partially paralyzed from similar amounts of exposure, and traces of the pesticide were found on tomatoes in the United States which were imported from Mexico.² Despite the harm that was done, the Velsicol Corporation continued to export the product while proclaiming its

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¹. U.S. Export of Banned Products: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 95th Cong., 2d Sess. 35 (1978) (statement of S. Jacob Scherr, Attorney for the Natural Resources Defense Council) [hereinafter cited as Hearings]. Neither the Food and Drug Administration (FDA) nor the Consumer Product Safety Commission (CPSC) is able to collect data regarding export volume. Trade statistics on the export of particular products are either nonexistent or incomplete and difficult to obtain. Monitoring problems stem in part from the present inadequacy in export laws: products manufactured for export only are generally exempt from reporting requirements of U.S. laws. Furthermore, many of the records which are maintained are often considered as trade secrets and thus are never disclosed to the public nor to the appropriate regulatory body. While the Department of Commerce does compile records of all exports, the department's method of compilation makes it virtually impossible to ascertain which products were banned or restricted in the United States.

Leptophos was never registered with the Environmental Protection Agency (EPA).

In Guatemala, a country with widespread poverty, mothers’ milk has been contaminated with DDT. Most of it has come from the United States. The export of grain coated with mercury fungicides, a chemical banned in the United States, resulted in the deaths of at least 400 Iraqis and the hospitalization of 5,000 more. Herbicide 2,4,5-T, a pesticide similar in makeup to Agent Orange, was exported to South America even after the EPA canceled its registration for most domestic uses. In Columbia, tests have shown a link between the consumption of food products coated with this herbicide and a number of miscarriages and deformed babies. Approximately 500,000 persons worldwide are poisoned each year and as many as 5,000 die from herbicide 2,4,5-T. The World Health Organization (WHO) adds that this figure does not include thousands of people who are affected by the chemical in some other way, such as those who develop cancers ten to fifteen years later.

The problem is not confined to the exportation of banned drugs or pesticides. In June 30, 1977, a ban on U.S.-manufactured baby pacifiers which caused choking deaths in infants was proposed by the Consumer Products Safety Commission. Following this proposal, notice of which was given to appropriate U.S. manufacturers, over 500,000 of these pacifiers were exported. Even after the proposal became effective on February 26, 1978, at least one manufacturer continued to export the banned pacifier.

Should U.S. manufacturers be allowed to export, without restriction, products which are either banned or strictly controlled domestically? Although this question has received considerable debate in government and business circles in recent years, an answer remains elusive. Despite a growing export trade with Third World countries, often involving exports of domestically banned substances, the United States has yet to adopt an export policy which comprehensively addresses this question. The focus

3. Hearings, supra note 1, at 35.
5. Id.
7. Hearings, supra note 1, at 49.
9. Id.
11. Id.
12. Id.
13. And yet a number of factors indicate that this problem will continue to grow over the next few years: Significant increases in world population will generate increased worldwide needs for food, drugs, pesticides, and other products; demand for these products has already begun to accelerate due to an increase in the number of consumer-oriented societies; economic pressures for U.S. firms to increase exports in order to increase U.S. production and offset a growing trade imbalance will also exacerbate the problem.
of this paper will be to identify and discuss the more narrow issues this question poses, with a view to proposing the establishment of a uniform export policy.

II. BRIEF HISTORY

Historically, Third World countries provided only limited markets for U.S. products, but as domestic regulation increased, sales in these developing countries increased accordingly. The banning of products manufactured in the United States for domestic consumption frequently creates large inventories, making Third World markets prime targets for the sale and distribution of these "banned" substances. While products designed for use by U.S. citizens often are subject to a barrage of legislative and administrative restrictions, the policy of the United States toward the export of products prohibited from domestic sale can be described as caveat emptor.\(^\text{14}\) Often this "buyer beware" attitude has involved a benign refusal to disclose information as to what an export shipment actually contains. Sometimes the problem lies with improper labeling, incomplete instructions, or inaccurate ingredient lists. Often the accompanying advertising is false or misleading.

Awareness of this problem came rather suddenly after an incident involving the export of Tris-treated sleepwear in October, 1977.\(^\text{15}\) Banned in the United States, large surplus inventories of sleepwear treated with this substance were quickly exported to developing countries in Africa, Asia, and South America.\(^\text{16}\) This incident brought to light one fact: The United States has no export policy to prevent the indiscriminate dumping of questionable products. The irony of the situation is obvious: Why would legislators pass laws preventing the use of dangerous products at home, but allow a loose export policy of the same commodities? The most common explanation is that conditions in some importing countries—rampant unemployment, overpopulation, and epidemics of insect-caused diseases—often make U.S. standards of health and safety inappropriate. These conditions necessitate standards that weigh risks against results, thus allowing the use of proven products despite possible side effects.

Unfortunately this weighing of risks versus benefits has not been done and today there are a growing number of developing countries which are beginning to question this unfettered worldwide marketing. Some


\(^{16}\) Wash. Post, May 6, 1978, at D10, col. 1. See also Schulberg, supra note 14, at 334. Although the CPSC eventually prohibited Tris exports, several million dollars worth of materials treated with Tris had already been exported. Furthermore, the decision to prohibit overseas sales of Tris-treated materials applied only to products manufactured for U.S. consumption and not to products originally intended for export. Id. See also 43 Fed. Reg. 25,711 (1978).
complain about being the "dumping grounds" of U.S. companies. In a congressional report by the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations, it was stated that "approximately 68 percent of foreign countries surveyed indicated interest in receiving notification of U.S. regulatory action."

The dichotomy between those countries that may need domestically restricted products and those who are working to prevent this dumping only serves to illustrate the pressing need we have in this country for a comprehensive export policy. The repercussions of exporting banned products are not confined to the effects felt by foreign consumers. Products banned for sale in the United States are manufactured here, transported here, and are often used abroad in the production of products which eventually are reimported into the United States. Thus, many concerned citizens and legislators here at home are beginning to ask for a stricter export policy.

Clearly the U.S. government is faced with the task of formulating an export policy which will not only reflect the capability of the importing countries to assess the risks and benefits of the product, but will also be attentive to the needs of those developing countries where the benefits of some products may outweigh the risks involved. This policy must also reflect domestic considerations: What dangers are posed by manufacturing and transporting such products within the United States and what dangers are there with the reimportation of products containing a banned substance?

No single control policy restricting the export of all domestically banned products will legitimately cover the entire range of exports that include such items as pesticides, drugs, toxic chemicals, and effective but risky medicines. In each case the nature and the certainty of the risk will be different and, given the opportunity, the conditions within the importing country will have to be weighed against the risk.

III. CONSTRUCTING AN EXPORT POLICY: ISSUES TO CONSIDER

The task of developing a uniform export policy involves a number of separate but interrelated questions.

A. Does the United States Government Have a Moral or Legal Responsibility to Prevent the Export of a Substance or Product it
Knows or has Reason to Believe is Dangerous?

B. Is There an International Legal Basis for Imposing a Restrictive Export Policy?

C. Assuming a New Export Policy is Needed, What is the Present Capability of the United States Regulatory System to Monitor and Enforce Such a Policy?

D. How Would a Restrictive Export Policy Affect Developing Countries?

E. What Reforms in the Export System Should be Instituted?

A. Does the United States Government Have a Moral or Legal Responsibility to Prevent the Export of a Substance or Product it Knows or Has Reason to Believe is Dangerous?

Unquestionably the moral obligation of the United States to institute a uniform export policy should stem from general principles of fairness and human decency. Surely there is little or no justification for allowing an uninformed, poverty-stricken country to use a substance that we created but will not use ourselves because we know it is harmful. United States adherence to the principles of the Helsinki Accords,20 and recent attempts by former President Carter to incorporate a sensitivity for human rights into our foreign policy is an indication of a long-term American commitment to the protection of human rights and the global environment.

As a member of the Organization for Economic Cooperation and Development (OECD),21 the United States has subscribed to internal policies which seek to protect the earth's environment by restricting the manufacture of certain chemical substances.22 As a member of the United Nations, the United States has supported the United Nations Environment Programme (UNEP),23 the purpose of which has been "to provide early warning of significant environmental risks and opportunities, and to ensure that governments have access to the best available environmental data."


21. The OECD was established in 1960 as an intergovernmental organization consisting of developed nations. The governing body of the OECD is the Council, which can make decisions that are binding on member states.


both specialized agencies of the United Nations — whose Environmental Health Criteria Programme (EHCP) attempts to collect data on every aspect of potentially dangerous chemicals. It seems clear from its participation in these agreements and organizations that the United States has in fact "promised" to concern itself with those very things which the present export system has failed to do: protect human health and the world environment.

The long-time role of the United States as a dominant worldwide exporter adds another dimension to this obligation. If only from a political or foreign policy standpoint, the United States does not stand to gain international respect if it continues to pollute and harm others through the dumping of dangerous substances abroad.

A comprehensive U.S. export policy, which would operate to prevent the unwarranted export of dangerous products would be consistent with U.S. principles of products liability law, which have virtually eliminated the principle of caveat emptor. A reformed export policy would also remove one of the most blatant inconsistencies in U.S. national legislation: While the National Environmental Policy Act of 1969 (NEPA) advocates strict guidelines for the possible environmental effects of the activities of all federal agencies, the laws that govern exports cannot prevent (except in a few narrow instances) the indiscriminate unloading of dangerous U.S. products on foreign consumers.

The National Environmental Policy Act (NEPA) was designed to establish environmental values as an “important element” in all planning done by U.S. Government agencies. NEPA has been interpreted as applying to the export of products to foreign countries — products which were banned or strictly regulated in the United States and the harmful consequences of direct or indirect federal agency activity in foreign countries. This interpretation of NEPA could form the basis of a new, more

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25. The EHCP has published a number of materials relating to the composition and effects of several chemical substances. Some of these include lead, mercury, polychlorinated biphenyls (PCB's), and nitrates. The EHCP has also established a number of "national" data collecting centers, which gather information relating to the use and effects of chemicals in that environment. Id. at 412-13.


29. Id. at 456-57. See also Applebaum, Controlling the Environmental Hazards of International Development, 5 ECOLOGY L.Q. 321, 344 (1976). NEPA requires that U.S. government agencies consider the possible environmental "effects" of their proposed activities. Ostensibly, this requirement could extend to federal agencies which conduct activities abroad affecting the environment. The extraterritorial reach of NEPA has been a topic of some concern recently. To date no clear answer as to the extent of its application has been established. A number of interpretations in the form of amendments or proposals have been made. In 1978 the Council on Environmental Quality (CEQ) issued preliminary regulations
clearly delineated U.S. export policy.

Realizing that the standards of some countries might not be the same as those of the United States, one method of balancing ethical responsibility, practical economic considerations and respect for the decisions of other countries is to require that the importing country be made fully aware of the potential risks of the product.

Critics of a notification policy argue that this approach would require full publication of the thousands of regulatory actions—bans, suspensions, registrations, judicial injunctions—occurring each year. They argue that requiring a document from the government of the importing country indicating that it had received and considered the information would create masses of paperwork, and would require thousands of additional man-hours for processing. Some concede that while this might be feasible in the United States, it would be prohibitively expensive in the host country, especially in the developing countries who do not have the personnel to handle enormous amounts of paperwork. For example, two years ago the Ministry for Environment in Nigeria, one of the larger and richer developing countries, consisted of the Minister, one assistant and one secretary. A high level of scientific and technical expertise would also be necessary to evaluate the risk-benefit trade-offs posed by a possible import. And even if this step could be accomplished, many governments lack the procedures and the degree of central control necessary to set and implement standards for safe use.

These arguments are legitimate concerns, but should not act to bar the establishment of a more restrictive export system. One solution would be to incorporate into the export policy mechanisms by which the importing country could establish or upgrade its own regulatory system for assessing the risks and benefits of products intended for export.

An alternative solution, one which is used to some extent today, involves the role of international organizations, including the OECD, WHO requiring full-scale environmental impact statements (EIS) for actions affecting the United States, the global commons, and Antarctica. The proposal also called for a detailed “Foreign Environmental Statement” for actions affecting only the environment of one or more foreign nations. Since the focus of these proposed amendments was international activities actually conducted by federal agencies, it is unclear whether the export action or inactions of the FDA, EPA, and the CPSC would come under NEPA’s EIS requirements, even if the CEQ amendments were enacted. Nonetheless, a logical connection does exist between these three federal agencies and the “effects” of their action relative to the exportation of banned pesticides, drugs, etc. in foreign countries. CEQ preliminary draft regulations are reprinted in 124 Cong. Rec. S6513-14 (daily ed. Apr. 27, 1978).

The CEQ proposal met with disfavor in many circles. In response, President Carter and Senator Adlai Stevenson proposed alternatives, both of which provide for sharp limitations on the extraterritorial reach of NEPA. For a more indepth discussion of this topic, see Exports and Environmental Injury, note 27 supra.

31. Id.
and FAO. Many of these international agencies presently provide data banks on substances which are potentially dangerous to health and environment. Thus, the understaffed countries could turn to these organizations in order to make the important risk-benefit analysis. To those countries with a small regulatory agency, or none at all, the international body might be used as their “own” regulatory agency away from home. This would also give these countries the necessary training and expertise to eventually establish their own systems. 

The developing countries which have in the past imported many of these banned substances are becoming increasingly aware of the potential hazards posed by certain chemicals and consumer products. The president of Sierra Leone recently turned down an offer of $25 million from a Colorado firm wanting to export toxic wastes from U.S. factories. Mexico recently shut down several pesticide (DBCP) factories. A physician in Bangladesh stated that he was “especially outraged at the number of useless drugs being sold at high prices, and at the fact that infant formula is being promoted by Western companies as a substitute for more nourishing breast milk.”

The result of this seems to be that developing countries, in spite of their understaffed ministries, will increasingly search for products that have some indicia of reliability and safety. As a matter of fact, many of these countries have actually come forward and asked that the United States should not allow the export of products that are dangerous to man or the environment. In 1977, Dr. Kiano, Kenya’s Minister for Water Development, called for “international action to stop countries being used as experimental dumping grounds for drugs and chemical products.”

33. See text accompanying note 25 supra. Other international organizations which could play a role in resolving this important problem are: Global Environmental Monitoring System (GEMS), the International Referral Service (IRS), the International Register of Potentially Toxic Chemicals (IRPTC), the Codex Alimentarius Commission (the CAC was established in 1962 to implement the Joint Food and Agriculture Organization-World Health Organization (FAO/WHO) Food Standards Programme), and the International Agency for Research on Cancer (IARC). This list is not exhaustive but only representative of some of the more significant international bodies which have the capability of effecting changes with present exportation problems.

34. This author does not advocate “passing” to international organizations U.S. responsibility for enacting and implementing protective export measures. The goal should be one of cooperation between exporter, importer, and international bodies able to offer assistance. Others have expressed more extreme positions:

I am very concerned about the suggestion that we [the United States] should solve this problem by giving some international organization the responsibility.

I think it is kind of an elegant way of saying we are going to pass the buck . . .

. I would prefer to see it being done directly by the exporting countries.

Hearings, supra note 1, at 41 (statement of S. Jacob Scherr).


36. Id.

37. Id.

38. Dr. Kiano urged that “unless a product has been fully tested and certified and widely used in the countries of origin, it should not be used for export.” Hearings, supra
American industry, nevertheless, argues that "[what the United States won't export, West Germany and other countries will." Since many of these countries will remain without export controls, American industry, under a strict export policy, would face a competitive disadvantage in world markets and might be forced to relocate in areas without such regulation or countries with more hospitable regulatory surroundings, such as the less-developed countries (LDC's).

This argument—that with increased export regulation U.S. industry would be at a competitive disadvantage in world markets—assumes that all importers make decisions based on price alone, and is therefore misplaced. The imposition of regulations may very well enhance the desire by developing countries for U.S. exporters vis-à-vis other unregulated exporting countries. The argument also ignores the "boomerang effect" of many of these exported chemicals and pesticides. Nerve-damaging kepone, for example, was manufactured in Virginia for export only and was sprayed on Guatemalan bananas destined for U.S. markets. Other chemicals, such as aldrin, dieldrin, eptachlor, and chlordane—banned here but made available for export—often come back to haunt this country in the form of cacao from Ecuador, coffee from Costa Rica, and sugar and tea from India.

The argument that U.S. manufacturers might be forced to relocate in foreign countries (especially in LDC's) if export regulations are increased is also not persuasive. Many of the products banned here were never originally intended for Third World markets and it is unlikely that these industries would seek to relocate on this basis alone.

Unless those exporting companies derive a substantial percentage of sales from exports, it is unlikely they will seek to relocate. However, even assuming there are a sufficient number of relocated industries to cause concern, there are a number of measures that could be taken to reverse or reduce relocation. Positive measures might include subsidies or low interest rate loans to pay the costs of meeting new standards. Negative measures might include the "withdrawal of government business or fiscal incentives from the offending firm, the blocking of foreign exchange transfers to finance new development, or the threat of harsher import standards." Further obstacles to relocation would be the political and economic instability of many underdeveloped countries and the fact that

note 1, at 34 (quoted statement of S. Jacob Scherr).

The fifty-eight nation UNEP Governing Council incorporated Dr. Kiano's views into its decision that "there have been unethical practices concerning the distribution of chemicals, drugs, cosmetics, and food unfit for human consumption and that there is a need for harmonious cooperation between exporting and importing countries." Id.

40. Alston, supra note 22, at 401. See also Schulberg, supra note 14, at 362.
42. Id.
43. Alston, supra note 22, at 450.
44. Id.
demanding standards may be enacted *after* the company has arrived—thus nullifying any real savings.

B. *Is There An International Legal Basis for Imposing a Restrictive Export Policy?*

There are no international agreements or treaties which focus directly on the liability of an exporter of domestically banned substances. In recent years, however, several multilateral arrangements and organizations have arisen which indicate a trend toward stricter international cooperation in world trade and technological development.

As an outgrowth of the 1972 Stockholm Conference on the Human Environment, the United Nations Environment Programme (UNEP) was established to promote international environmental cooperation and to act as a coordinator of other related agencies and programs. One of UNEP's objectives is to establish a warning system to provide notice to countries whose environment and human health may be affected by the export of hazardous substances. To this end UNEP has established the International Register of Potentially Toxic Chemicals (IRPTC), the purpose of which is to reduce the health and environmental hazards presented by chemicals by facilitating universal access to existing scientific and regulatory data. The United States was a participant in the 1972 Stockholm Conference and is a member of UNEP.

As a member of such international organizations as FAO, WHO, and OECD the United States has supported an international policy which seeks "to protect the health of consumers and to ensure fair practice in the trade, [and] to promote coordination of all food standards . . . ."
The OECD, probably the most effective international group to date, has advocated the "polluter pays" principle and, in cooperation with the United Nations and the European Economic Community, has been able to restrict the manufacture and use of certain chemicals in all twenty-four of the OECD member nations.

In 1975 the United States along with thirty-four other nations signed the Final Act of the Helsinki Conference on Security and Cooperation in Europe (CSCE). Among the general provisions of the Act it is stated that:

The participating States...

[1] consider that their trade in various products should be conducted in such a way as not to cause or threaten to cause serious injury...

[2] will take measures further to improve conditions for the expansion of contacts between representatives of official bodies, of the different organizations, enterprises, firms and banks concerned with foreign trade, in particular, where useful between sellers and users of products and services...

[3] reaffirm their interest to achieve the widest possible international harmonization of standards and technical regulations...

The act also puts forth the following objectives on international environmental cooperation:

The participating States...[agree]

[1] to study, with a view to their solution, those environmental problems which, by their nature, are of a multilateral, bilateral, regional or subregional dimension...

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52. Id. at 422.

53. Id. at 423. Alston's thesis is that currently there are several institutional barriers to effective international regulation of toxic chemicals. Some of these are: nonexistent or inefficient testing programs; reluctance of manufacturers and national governments to provide their own data to international bodies; and the lack of referable international testing standards which are critical in overcoming the fear and inertia of nations who would rather rely on their own information. Alston suggests that four existing international initiatives or programs could significantly improve the results of international regulatory efforts, which in the past have been piecemeal in their problem-solving approach. Alston seems to believe that this "piecemeal or categorical" approach has now been abandoned in favor of a comprehensive and cohesive program involving four international organizations: (1) The International Agency for Research on Cancer (IARC); (2) The International Register of Potentially Toxic Chemicals (IRPTC); (3) The Organization for Economic Cooperation and Development (OECD); and (4) The European Economic Community (EEC). Id.

Unfortunately, it is doubtful even this innovative approach will quickly overcome the fear of inertia that characterizes most nations when asked to rely on an international body for vital information and support. With the establishment of a consortium of international bodies one obstacle toward greater international reliance may have been overcome. But the credibility of international bodies vis à vis national-state reliance will probably not become functional until there is greater participation in the international consortium by respected and highly qualified representatives from a majority of the most influential nations.

54. The Helsinki Accords, supra note 20, at 1300, 1301, 1304. [Emphasis added.]
to increase the effectiveness of national and international measures for the protection of the environment, by the comparison and, if appropriate, the harmonization of methods of gathering and analyzing facts, by improving the knowledge of pollution phenomena and rational utilization of natural resources, by the exchange of information . . . in the field of the environment;

[3] to take the necessary measures to bring environmental policies closer together and, where appropriate and possible, to harmonize them;

[4] to encourage, where possible and appropriate, national and international efforts by their interested organizations, enterprises and firms in the development, production and improvement of equipment designed for monitoring, protecting, and enhancing the environment.

The most logical step the United States could take to bring itself in line with these international commitments (especially with those sections italicized above) would be to enact a new export policy — a policy which would generally monitor U.S. foreign trade through comprehensive notification and certification procedures.

In spite of the implied commitment in these multilateral arrangements, it is not clear whether an international tribunal would hold an exporting country liable for causing harm to the importing nation (assuming the parties to the suit were also parties to the agreement). Since many of these arrangements are couched in general terms serving primarily to promote world peace and “future” cooperation through diplomacy, it is doubtful that a defendant-exporter would be held liable based on these arrangements.

From an international law standpoint, these international statements become increasingly significant in light of several earlier international decisions where two countries were held liable by an international tribunal for causing harm to another country. In the Trail Smelter Arbitration, emission of sulphur dioxide fumes from a private smelting operation in British Columbia caused harm to timber and crops in Washington State. An international tribunal held Canada liable under international law for the acts of its nationals.

In The Corfu Channel Case, Albania was held liable for the damage to two British vessels which hit sea mines in Albania’s territorial waters,
despite the fact that Albania had not placed them there. In this case the International Court of Justice stated that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Thus, in both cases liability was imputed to the state because it knew that its nationals (or others) were engaged in potentially harmful acts.

In *The Lac Lanoux Arbitration* between France and Spain, a distinction was made between activities that have purely domestic implications for the exporting national and those that have regional or even global consequences.

These three cases stand for the proposition of international law that a nation may not use its resources or property or permit the use of its territory in such a manner as to injure another state. One commentator has suggested that the logical extension of this norm would be to include potentially dangerous exports into the class of such activity that can cause injuries abroad. Ostensibly, if liability were to attach to the exporter of hazardous products which cause harm in the importing country, then some form of self-imposed restraint (e.g., better export regulations) would be forthcoming, enforcement mechanisms aside. At a minimum, there is a basis in international law for establishing a duty to prevent one country from harming another through "dumping" dangerous substances on an uninformed or misinformed underdeveloped country.

While the holding in *Trail Smelter* has been the most frequently cited basis in customary international law for a state's obligation to prevent extraterritorial injury, it does not totally proscribe injury to a neighbor's property, but requires a balancing of interests. Some argue

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62. Schulberg, *supra* note 14, at 371. Schulberg argues that a state's responsibility should extend "to assisting importing nations to ensure that known dangerous pesticides being produced in [the exporting country's] factory do not injure the foreign farm worker or the consumers of the agricultural products grown in that neighboring country." *Id.*

Schulberg's rationale appears to be that if a state can be held responsible for "emissions" from its factories which cause harm to another state, then a state which *allows* "exports" from factories which also cause harm to another state should also be held liable. Schulberg suggests that the result of such a holding could be the establishment of a standard imposing a responsibility on producer nations to provide recipient nations with warnings that it is foreseeable that the products they are about to export could cause serious human and environmental harm. *Id.*

Under this analysis, products banned or restricted for domestic use in the United States would automatically require warnings to importing countries, since the foreseeability of harm would clearly be established by the U.S. determination that such products should be banned or restricted.

64. *Id.* at 363.
that a state violates the principle of *Trail Smelter* when "it avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage." 65

It is arguable, therefore, that when a state arbitrarily (without giving proper disclosure or receiving informed consent from the importing country) dumps dangerous products on another and causes injury therein, liability would attach, unless full disclosure was made, since to hold otherwise would impose too great a burden on international trade. A more precise test would require a balancing of the interests and responsibilities of the countries involved (as suggested by *Trail Smelter*), and would involve a consideration of the principle of foreseeability of harm, which applies in a negligence cause of action under U.S. law. Under this theory, although full disclosure would not necessarily be a complete defense to liability, it would create a presumption in favor of the exporting country. Increased export regulation could guarantee full disclosure by exporters and a freer exchange of information between exporter and importer.

C. Assuming a New Export Policy is Needed, What is the Present Capability of the United States Regulatory System to Monitor and Enforce Such a Policy?

The regulation of domestic commerce is administered by three agencies: The Food and Drug Administration (FDA), the Consumer Products Safety Commission (CPSC), and the Environmental Protection Agency (EPA). 66 While these agencies have reasonably clear statutory authority

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65. *Id.* For a recent analysis of the legal steps a state might take in preventing environmental injury to itself, see Bilder, *The Role of Unilateral State Action In Preventing International Environmental Injury*, 14 *VAND. J. TRANSNAT'L L.* 51 (1981).


Reagan's approach has been to reduce both government expenditures and government regulations. In early May 1981 funding for the CPSC floundered before the Senate Commerce Committee. On May 12, 1981, against the express wishes of the Reagan Administration, the Committee finally decided to fund the CPSC for another two years. Nevertheless, the CPSC's budget was reduced by 30 percent. Wash. Post, May 31, 1981, at D8, col. 1.

An inadequate budget will severely limit the work an agency can undertake. Domestic considerations will likely be given priority over export concerns. In September 1981 it was reported that the Reagan administration was drafting a White House Policy statement which would ease the way for U.S. companies to export hazardous goods that have been banned or restricted in this country. The types of products that may be affected range from highly toxic chemicals such as PCB's and chlorofluorocarbons to the banned pesticides DDT, lindane, and eldrin. Consumer products such as Tris-treated sleepwear may also be-
to regulate products and substances designed for domestic consumption, there is substantial ambiguity in their authority over exports. The Department of Commerce has the statutory authority to restrict the exportation of any U.S.-made product if it finds that its exportation would create a domestic shortage, or affect national security or foreign policy. However, when U.S. foreign policy is involved, the State Department will usually make the final decision.

The inadequacies of our present ill-defined export policy were brought to light in October 1977 when the CPSC decided it did not have the statutory authority to prevent the export of domestically banned Tris-treated sleepwear. Prompted by several U.S. Congressmen, an Interagency Working Group on the Exportation of Hazardous Materials (Group) was formed in May 1978 to review our present export policy. The Group consisted of representatives of all regulatory agencies as well as the Departments of State, Agriculture, Commerce, Energy, Justice and the Treasury. In July 1978, the Group presented its findings at hearings conducted by the Commerce, Consumer and Monetary Affairs Subcommittee of the Committee of Government Operations. The Subcommittee determined that the lack of export controls was not confined to the CPSC, but extended to the FDA, the EPA, and the Department of Commerce.

Under the Food, Drug and Cosmetic Act (FDCA), the FDA can regulate certain products in the domestic market. A product removed from the domestic market can be exported without prior notice to the FDA if it meets four criteria:

1. The product is in line with specifications of the foreign purchaser.

According to the White House statement, the change in export policy is needed because current pre-export notification requirements place U.S. exporting companies at a competitive disadvantage relative to foreign exporters. The draft policy would replace the present system with a broader and more general information and education campaign. Instead of notifying governments when a banned or restricted product is to be exported, the Reagan administration would provide “brief summary information” to either foreign governments or international organizations. Under this proposed policy, notification to foreign governments could theoretically occur years before the product is actually exported. Such a system would seriously impede the ability of foreign governments to make an “informed choice.” Thus, the outlook for the enactment of appropriate export legislation under the Reagan Administration is not favorable. Consequently, Congress must not be easily dissuaded from the views expressed in the 1978 Subcommittee Report, note 15, supra. Foreign policy objectives alone offer important reasons for pursuing comprehensive export legislation which is responsible to the needs of the importing country and the United States. Wash. Post, Sept. 9, 1981, at A1, col. 1-3.


69. Id. In practice the Department of Commerce cannot impose export controls without a State Department determination that national security or foreign policy considerations require them.

2. The product is not in conflict with the laws of the importing country.
3. The product is labeled as intended for export.
4. The product is not sold or offered for sale in domestic commerce.\(^7\)

The effect of these requirements has been at most superficial. Presently the FDA cannot compel exporters to inform the FDA of an intent to export banned products. As a result, information as to what exactly has been exported by the United States is extremely scarce.\(^7\) Notwithstanding statutory requirements, the FDA’s policy with respect to some drugs varies with conditions. The FDA can prevent the export of new drugs which are unlicensed for domestic use, but it cannot prevent the export of domestically licensed drugs “even if they are adulterated, misbranded, out-of-date, or otherwise unfit for human consumption in the United States.”\(^7\)

The FDCA also does not require the FDA to notify a foreign government of an FDA ban on drugs, food additives, or medical devices.\(^7\) Ironically, the FDA has a policy of notifying foreign officials of health hazard problems after shipment of adulterated products to that country. FDA Commissioner Donald Kennedy testified at the Subcommittee Hearings that the current state of the FDA export policy was “so internally inconsistent that it is very hard to know what the policy is.”\(^7\)

In 1978 legislation was proposed to bring the FDA out of the export maze. Under the Drug Regulation Reform Act of 1978\(^7\) two new standards would apply to all drugs:

1. Approved drugs in compliance with domestic requirements could be freely exported.
2. Unapproved drugs or approved drugs not in compliance with domestic requirements could be exported only after an export permit had been approved by the Secretary.\(^7\)

An export permit would be granted only if the exporter demonstrates that the foreign buyer had assented to its importation after being informed of its legal status here and the basis for that status.\(^7\) Scientific

\(^{71}\) 1978 Subcommittee Report, supra note 15, at 18.
\(^{72}\) For a discussion of what is presently known about the extent of exports regulated by the FDA, see id. at 11.
\(^{73}\) Id. at 18. A product regulated by the FDA is not considered adulterated or misbranded under the FDC Act, Section 801(d), if it (1) meets the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled that it is intended for export, and (4) is not sold or offered for sale in domestic commerce. A product which meets these criteria can be legally exported. Id.
\(^{75}\) Hearings, supra note 1, at 150.
\(^{76}\) H.R. 11611. Discussed in 1978 Subcommittee Report, supra note 15, at 19. See also Hearings, supra note 1, at 92 (statements of Dr. Donald Kennedy, FDA Commissioner).
\(^{78}\) Id.
and other technical data would also be made available to the importing
government. Finally, "where such export would be contrary to public
health," the Secretary of the FDA could unilaterally deny the permit.

Under this proposed legislation the peculiar nature of one country's
needs could be assessed against the risk of the product. A drug that could
pose dangers in one country might provide "overriding benefits in another
country." Commissioner Donald Kennedy also testified at the Subcom-
mittee Hearings that this permit procedure would give added protection
against the export of adulterated and misbranded old drugs and would
make needed drug products more available to foreign countries.

The problem with this proposed legislation is that it would result in
an increase in the export of nonapproved drugs to developing countries
which do not have the technical and scientific sophistication to make
judgments regarding drug safety. Since a complete ban on unapproved
drugs would not take into consideration the peculiar needs of the import-
ing country, the Subcommittee suggested an alternative: "Instead of al-
lowing the export of all drugs if certain conditions are met, [the draft
legislation] could be changed to prohibit all nonapproved drug exports
except those meeting certain reasonably strict criteria." One commenta-
tor has stated that this change would in effect shift the presumption from
allowing a permit before meeting the criteria to prohibiting a permit un-
til meeting the criteria. In this way only a limited but vitally necessary
amount of nonapproved drugs will enter foreign markets.

The CPSC administers the Federal Hazardous Substances Act
(FHSA), the Flammable Fabrics Act (FFA), and the Consumer Prod-
ucts Safety Act (CPSA). The purpose of these acts is to allow the CPSC
to promulgate safety standards and to ban unreasonably dangerous prod-
ucts from the domestic market. Prior to the Tris-sleepwear incident,

79. Id.
80. Schulberg, supra note 14, at 341.
82. Id. at 20.
83. Schulberg, supra note 14, at 341.
84. 15 U.S.C. §§ 1261-74 (1976). Section 1273 was amended in 1978 to require U.S.
exporters to file a notification statement with the CPSC. This section is almost identical to
the notice requirement under section 1202(c) of Flammable Fabrics Act (FFA) discussed
infra note 85.
export are exempt from the provisions of this statute, unless the CPSC determines that
exportation would present an unreasonable risk to persons residing in the United States. 15
conform to an applicable flammability standard or regulation must file a statement with the
CPSC not less than 30 days before exporting the product to the foreign country. The state-
ment must include date of shipment, destination, type of product, and quantity to be
shipped. Notification to the importing country is not required under this new amendment.
Moreover, the CPSC may, for good cause shown, exempt the U.S. exporter from this re-
products that had not been introduced into domestic commerce could be exported without restriction, regardless of the degree of hazard they presented. Consequently, the Commission has asked Congress to amend the present statutory authority so that it could prohibit exports of hazardous products. Under these proposed amendments, U.S. exporters would be required to notify the CPSC of an intended export of a hazardous product not in conformity with the CPSA, and the Commission would in turn be required to notify foreign governments of the product's status (within the United States). As long as the exported product was labeled in accordance with the laws of the importing country, the product would be exempt from export restrictions.

The Subcommittee also recommended that CPSC authorization should contain (1) a certification requirement by the importing country, (2) a labeling requirement by U.S. exporters, and (3) a grant of Commission discretion to ban outright the export of hazardous products. It is not clear from these proposed changes that the foreign purchaser will be given adequate notice upon which to make a sound judgment about the product's acceptability (i.e. risks versus benefits). Because developing countries either have no labeling standards or inadequate standards, these amendments do not ensure that labeling or quality control of products intended for export will be carried out properly.

The EPA, which implements the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), can temporarily suspend, ban outright, or limit the use of certain chemicals and pesticides from the U.S. market. Under section 12 of TSCA any chemical substance intended for export and so labeled is exempt from TSCA's regulatory provisions. The only other requirements relating to export are that the U.S. exporter notify the EPA of an intent to export and that the EPA notify the importing government of the availability of the data about the chemical.

At present regulatory action under TSCA has been limited to two chemicals and neither has been completely banned from exportation. Thus, without specific rules for implementing section 12 of the Act, the notification requirement remains ineffective.

While TSCA's export provisions have not received the attention they should have, the investigation of FIFRA—due mainly to the potential worldwide danger pesticide use now poses—has been different. Originally enacted in 1947, FIFRA was amended in 1972 to require the EPA to notify foreign governments and international organizations through state department channels of pesticides which were cancelled or suspended

90. 1978 SUBCOMMITTEE REPORT, supra note 15, at 14; Schulberg, supra note 14, at 345 n.78.
U.S. EXPORT OF BANNED PRODUCTS

from use in the United States.91 The amendment also exempted from further U.S. regulation pesticides which conformed to the specifications of foreign purchasers and were intended solely for export.92

Like the notification provisions of TSCA; the notification provision of FIFRA (section 17) has rarely been invoked by the EPA. In the past, the EPA limited its notification to foreign governments to only those situations where the EPA had taken final action on a substance, where all pesticide use had been cancelled, or where the cancellation was initiated by the EPA.93

The drawbacks of this practice were several. First, the EPA rarely considered its actions as final and gave no definition of a final action; second, if a pesticide was cancelled for a particular use or several uses, notification would still not be required as long as at least a single domestic use remained; third, U.S. exporters would initiate their own cancellation of a pesticide from domestic use—usually when cancellation by EPA was imminent—and thereby avoid the notification requirement. Ironically, many regulatory actions were taken by the EPA, having both national and international significance.94 In short, the ability or desire of the EPA to control adverse impacts of exported pesticides was a nullity.

In an attempt to correct these shortcomings, Congress amended FIFRA in 1978 by enacting the Federal Pesticide Act of 1978.95 Among the major changes were:

1. statutory labeling and misbranding requirements on exported pesticide products;
2. registration of establishments producing pesticides solely for export (previously exempted from this requirement);
3. a requirement that all pesticides that are not registered, including those whose approval have previously been denied or revoked by EPA, be marked accordingly;

91. The State Department acts primarily as a conduit between the federal regulatory agency and the importing country. The agency notifies the State Department of actions it has taken with respect to specific substances or products. The State Department then relays this information to the U.S. embassy in the importing country who in turn relays the information to the appropriate ministry or official. Unfortunately, this process has not worked. Either the federal agency fails to notify the State Department or the U.S. embassy fails to relay the information to the proper official. Often State Department notices are delayed and rarely—if ever—are they considered for their content. See Hearings, supra note 1, at 239-55 (statements of Sharon E. Ahmad and Rauer H. Meyer).
93. Id. at 21.
94. Schulberg, supra note 14, at 352. Schulberg states that after the Kepone incident in 1976, "the Senate Subcommittee on Agricultural Research and General Legislation concluded that manufacturing plants producing pesticides and related chemicals exclusively for export did not have to comply with the Insecticide Act's requirement of registration of pesticide manufacturing establishments." Id. Thus, prior to the 1978 amendment, it was legal to export any pesticide without notifying the EPA. Hearings, supra note 1, at 69-70 (statement of S. Jacob Scherr).
4. requirements that the foreign purchaser of an unregistered pesticide sign, prior to export, a statement acknowledging that the pesticide cannot be sold in the United States;
5. a copy of the acknowledgment statement (in No. 4 above) would be transmitted to the appropriate official of the importing country; and finally,
6. a requirement that the EPA provide upon request of a foreign government all information related to the cancellation or suspension of a pesticide registration.

Certainly these amendments have improved the ability of the EPA to control pesticide exports. However, they stop short of requiring certification by an appropriate foreign official that the information about the status of a particular product has been conveyed. Without this certification element, there is no guarantee that proper notification will be carried out.

In this same vein, none of the amendments require U.S. pesticide manufacturers who export both cancelled and unregistered pesticides to inform EPA of the country of destination of the proposed export. Such information would expedite notification to those countries.

Although these regulatory agencies lack the necessary authority to properly restrict the export of banned products, under the Export Administration Act of 1969 the Department of Commerce has the authority and general responsibility of controlling U.S. exports when they significantly affect U.S. foreign policy. Despite this statutory authority the Department of Commerce has been virtually powerless whenever the issue of foreign policy has arisen, deferring instead to the State Department. Unfortunately the State Department has advocated a "hands off" policy with respect to the export of banned products, arguing that foreign governments are in the best position to establish their own standards of public health and safety and that our only role is to provide them with certain information when U.S. regulatory bodies require it. This position ignores three important considerations. First, most developing countries do not have the means or know-how to establish health and safety standards which will adequately protect their citizens. Second, although the State Department has acted as a conduit for passing information to foreign governments in limited situations, even this limited procedure has proved ineffective because the notices sent by the regulatory agencies through the State Department often are not received by the importing country. Third, present regulations calling for notification to foreign governments only require notification in limited situations. A wide range of hazardous substances still remain untouched by any controls.

Evidently the only avenue for change with respect to our export system must come in the form of congressional legislation and it must focus on our present regulatory agencies—the EPA, the CPSC, and the FDA.

96. Id.
98. 1978 SUBCOMMITTEE REPORT, supra note 1, at 24.
This legislation should address itself to current regulatory provisions which should:

1. provide the agencies with adequate authority to develop information on the nature, extent, and value of exports of banned products and the country of destination;
2. provide for adequate notification to foreign governments;
3. give regulatory agencies adequate flexibility and discretion in dealing with the export of banned products;
4. provide adequate protection to U.S. citizens from reimportation of banned products; and
5. provide adequate labeling of banned products which are exported.

D. How Would a Restrictive Export Policy Affect Developing Countries?

Essential to a comprehensive export policy are the requirements of notification of product hazards by the exporter and certification (or acknowledgement) of notification by the importing government. But some critics argue that stricter U.S. standards of notification and certification would be an unacceptable intrusion on the sovereignty of foreign nations, and might be interpreted as absolving American exporters of liability for their products.99

From the standpoint of international law, foreign nations have no sovereign right to purchase goods (in the absence of a contract or treaty) produced in the United States. As one commentator has stated, "Every country is ultimately entitled to determine within the limits of international morality, what it will provide and to whom. The use of this prerogative is entirely legitimate . . ."100

The Subcommittee's position on this point was that an acknowledgement of notification by the foreign government regarding products about to enter its country is not an approval of exportation, but merely a "return receipt requested" for information delivered.101 In response to the State Department's position that "no country . . . should establish itself as the arbiter of other's health and safety standards," the Subcommittee believed that the United States was not trying to impose its health and safety judgments on other nations, but simply trying to assume some of the responsibility for the products it introduces into the world's market.102 The notification and certification requirements do not dictate what

99. Id. See also Hearings, supra note 1, at 240. (Statement of Sharon E. Ahmad, Director, Office of International Trade, Bureau of Economic and Business Affairs, Department of State).
100. Alston, supra note 22, at 455 n.272.
102. Id. Ironically, a representative of the State Department admitted there might even be instances where some drugs, produced in the United States, should be banned from export consideration altogether. Hearings, supra note 1, at 250-51 (Statements of Rep. Benjamin S. Rosenthal, Chairman, Commerce, Consumer, and Monetary Affairs Subcommittee
is or is not safe for the foreign country's own citizens. On the contrary, these procedures would be imposed out of deference to the importing country so that foreign governments can be aware of what products we have determined to be deleterious or dangerous.

There is a separate justification for these requirements: When pertinent information on a product is exchanged between the exporting and importing country, as it would be under the notification-certification procedures, guidelines to prevent indiscriminate product-use could be established, thereby providing a measure of safety for U.S. citizens who might otherwise be affected through reimportation.

In addition, the interpretation that these requirements would absolve the exporter of liability has no foundation in international law. However, the "consent" nature of the certification requirement makes this concern—liability of the exporter—legitimate. This could be resolved by enacting legislation so that the certification requirements would not absolve the contract liability between buyer and seller.  

Probably the most critical question a new export policy must answer is whether it could accommodate those underdeveloped countries who are financially and technologically unable on their own to make a risk-benefit analysis of a potential import. Should our export policy prevent exportation when the importing country cannot make its own assessment? The answer should be "no," for the following reason. When the product is such that the risk of non-use in the importing country is greater than the risk of use, the United States should permit its exportation. Scientific assessment of the risks and benefits could be conducted by the appropriate U.S. regulatory agency in conjunction with officials of the importing country to ensure that a well-informed choice is made.

One of the most publicized cases which illustrates why this approach could work (without any "backlash" from foreign officials) involved the drug Depo-Provera. Depo-Provera, a long-term injectable contraceptive, had been banned for domestic use in the United States. Several Third World leaders claimed that the drug would help reduce their over population problems and their associated illnesses and mortality rates. They argued that not only was this drug vitally needed in their countries, but that, unlike the United States, they had no effective alternatives. Hence,

and Sharon E. Ahmad, Director, Office of International Trade, Bureau of Economics and Business Affairs, Department of State).

103. Id. The Subcommittee further stated that the total number of export transactions which would come under these proposed procedural requirements would be small. The Subcommittee believed that if losses did occur as a result of such controls, the impact on our balance of payments would be minimal. Id. at 25.

104. See note 105, infra and accompanying text.

105. Id. at 25. Another important example involved the antibiotic chloromycetin. Chloromycetin was severely restricted in the United States to a few serious diseases. The FDA had determined that its risks greatly outweighed its benefits. However, in some less developed countries the drug is widely used to combat a variety of serious diseases or infections which are uncommon in the United States. Hearings, supra note 1, at 5.
the United States was faced with a dilemma: Should it permit the drug to be exported, risking the harm it might cause to foreign consumers, or should it deny exportation and risk diplomatic tension with the Third World. The present regulatory system was without the tools to deal with the highly volatile nature of this situation. Thus, the affair became primarily a matter of foreign policy with the export regulatory system taking a back seat.

This case presents a clear illustration of the inadequacies of U.S. export policy. A more finely tuned and comprehensive policy would make sound decisions possible on matters similar to the Depo-Provera case, without the United States being forced into a diplomatic corner.

E. What Reforms in the Export System Should be Instituted?

To ensure the greatest protection to foreign and U.S. consumers alike without unfairly infringing upon the rights of U.S. exporters and of each nation to establish its own national health and environmental standards, the Subcommittee made the following proposals for a uniform export policy. New legislation should:

1. provide all regulatory agencies with the necessary statutory authority to (a) determine whether a product banned from the domestic market should be allowed to be exported; (b) collect data regarding items banned or not in compliance with agency standards; (c) require that exports be conspicuously and correctly labeled; and (d) totally prohibit the export of a product that it has reason to believe would be dangerous to any consumer;

2. require the regulatory agencies to notify foreign governments of all actions taken and all proposed actions which may affect the importing country;

3. provide a means for giving technical assistance and training to officials of developing countries to enable them to make sound regulatory decisions;

4. require that foreign governments certify that they have received notification and fully understand the status of the export product.106

To guarantee that these proposed changes are carried out, the following measures should also be taken. First, there should be a permit system in which prior to the export of a domestically banned product the exporter must obtain a permit from the appropriate federal agency.107 This permit application should require the exporter to provide the agency with necessary product data upon which the agency could make a unilateral decision as to whether or not the product should be exported. This information would also be forwarded to the foreign government for their use in determining whether to import such a product. The granting of a permit would be contingent on the agency receiving certification from the appropriate foreign office, indicating that it received the necessary information.

and approved of the importation. Second, the agency should be required to notify the foreign government of "every action taken to revoke, amend, or limit a permit, or registration to sell or use a product on the United States market."108 Third, all exporters should be required to meet domestic quality control and labeling standards. This measure would attempt to eliminate deceptive practices.109 Fourth, Congress should commit the United States to comply with internationally accepted standards, as long as they do not conflict with U.S. standards.110 Finally, the State Department should assist the three regulatory agencies in developing a working relationship with their foreign counterparts.111

Alternatively, U.S. exports of domestically restricted or banned products to countries without the technical know-how to ascertain the health and safety uses involved (the cost-benefit analysis) could be regulated separately. Before exports would be permitted, the U.S. manufacturer would be required to perform a cost-benefit analysis in the importing country. The financial costs could be borne either by the U.S. company alone, or by the U.S. company and the importing country. U.S. regulatory bodies could provide the structure within which these negotiations and analyses could take place—thereby ensuring the vitality of U.S. foreign policy objectives with respect to the particular country and region.

IV. CONCLUSION

Advanced industrial nations may be able to recognize and exclude dangerous substances from importation, but less sophisticated governments lack the necessary knowledge and administrative capability to protect their citizens and environments. A tenuous equilibrium exists between the minimal concern presently shown by the United States and the possibility of becoming the world’s environmental policeman. Finding the right balance will not be an easy task. An increasing number of developing countries object to becoming the dumping grounds for the industrialized world. Others object almost as loudly to having the developed world’s standards imposed upon them.

It is not clear whether the solution lies in the development of international standards. But it will be many years, if ever, before effective world standards emerge. In the interim the United States must accept some responsibility for its exports by establishing standards which are compatible with its own and yet comport with the needs of developing countries. Legislation on this issue must begin now. Lethal pesticides, toxic chemicals, and dangerous drugs all have a way of returning to haunt their makers. Mixed in the volatile brew of international relations, they can become explosive.

108. Id. at 381.
109. Id. at 382.
110. Id.
111. Id. at 379.