NOTE

EXPORTATION OF HAZARDOUS PRODUCTS

I. INTRODUCTION

In the early 1970's, use of the pesticide Leptophos caused numerous illnesses and deaths in rural communities of Egypt.[1] Leptophos was produced by an American corporation and exported from the United States although its use was prohibited domestically.[2] Allowing the exportation of hazardous products, even though they cannot be sold in the United States, creates a double standard.[3] The exportation of domestically banned or restricted products also presents serious risks for American consumers.[4] Once a product is banned, there is no guarantee that it will not subsequently reenter the United States under the guise of an acceptable label.[5] This Comment discusses why and how the double standard should be eliminated.

Current statutes provide federal agencies, such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the Consumer Product Safety Commission (CPSC), with the authority to make decisions concerning the exportation of banned or restricted products,[6] but such authority

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1. Leptophos, marketed as Phosvel, attacked human nervous systems. Victims suffered from speech impairments, convulsions, and mental defects. Over 1,000 buffalo also died from Leptophos poisoning. Shea, *Profile of a Deadly Pesticide*, ENVIRONMENT, Jan. 1977, at 6; Washington Post, Dec. 10, 1976, at 1, col. 6.

2. Leptophos was never registered by the EPA for domestic use, but was manufactured by Velsicol, a Texas corporation. In 1975, Velsicol exported over 3,000,000 pounds of Leptophos. Egypt stopped purchasing the pesticide in 1976, but Velsicol continued exporting Leptophos while proclaiming its safety. *U.S. Export of Banned Products: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 47-48 (1978) (statement of S. Jacob Scherr) [hereinafter cited as *1978 Hearings*].

3. *Id.* at 56.

4. See notes 31-32 *infra*.

5. [1978] EXPORT WEEKLY (BNA) No. 215, M-2: "If we allow the export of sleepwear treated with TRIS, can we guarantee that those products will not be sent back to the United States with a new label?" (From testimony of Esther Peterson, White House Consumer Advisor, on the Exportation of Hazardous Products.)

6. The scope of this Comment includes the following six statutes: Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a-136y (1976 & Supp. 1979); Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1976 & Supp. 1979); Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-74 (1976 & Supp. 1979); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1976 & Supp. 1979); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. 1979); and Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1976 & Supp. 1979).

perpetuates the double standard.[7] In 1978 amendments to the statutes were enacted to alleviate the problem.[8] However, the amendments do not go far enough in remedying the situation.[9] Alternative remedies, such as civil actions brought by injured plaintiffs, do not provide realistic protections.[10] United Nations delegates, warning that Third World nations would no longer tolerate being used as "dumping grounds" for chemicals and drugs exported from technologically developed countries,[11] have decried the U.S. exportation policy, and have called for reforms that would more effectively protect the health and safety of mankind.[12]

Eliminating the double standard problem through legislation necessitates a consideration of various policy factors. These factors include: the U.S. responsibility for the well-being of American citizens and foreign consumers of American products, a recognition of the importing nation's right to make decisions affecting its citizens, the need to cooperate with international organizations, the economic effect of export regulations, and the feasibility of administering legislative provisions.[13] A balancing of these factors suggests the enactment of legislation providing for greater agency control over the exportation of hazardous products manufactured domestically or abroad by American-owned companies. This Comment determines the content of legislation that best comports with the balance of factors. It begins with an examination of the scope of the problem.

II. SCOPE OF THE PROBLEM

In recent years, U.S. regulatory agencies have banned the domestic sale of unsafe pesticides, drugs, and consumer products.[14]

7. See notes 88-96 and accompanying text *infra*.

8. 7 U.S.C. § 1360 (1976), *as amended by* Act of Sept. 30, 1978, Pub. L. No. 95-396, § 18(a), 92 Stat. 833; 15 U.S.C. § 1202 (1976), *as amended by* Act of Nov. 10, 1978, Pub. L. No. 95-631, § 8(a), 92 Stat. 3746; 15 U.S.C. § 1264 (1976), *as amended by* Act of Nov. 10, 1978, Pub. L. No. 95-631, § 7(b), 92 Stat. 3745; and 15 U.S.C. § 2067 (1976), *as amended by* Act of Nov. 10, 1978, Pub. L. No. 95-631, § 6(a), 92 Stat. 3745.

9. H.R. REP. NO. 1686, 95th Cong., 2d Sess. 4 (1978) [hereinafter cited as 1978 REP.].

10. See notes 114-118 and accompanying text *infra*.

11. At a 1977 United Nations Environment Programme (UNEP) meeting, Dr. J. C. Kiano, a Kenyan minister, urged that "[u]nless a product has been fully tested and certified, and widely used in the countries of origin, it should not be used for export." *1978 Hearings*, *supra* note 2, at 44. (statement of S. Jacob Scherr).

12. See notes 22-29 and accompanying text *infra*.

13. *1978 Hearings*, *supra* note 2, at 5-6 (statement of Esther Peterson).

14. 1978 REP., *supra* note 9, at 13-14.

The Environmental Protection Agency, the Consumer Product Safety Commission, and the Food and Drug Administration have removed over 500 pesticides,

Yet, each year, millions of dollars worth of banned products are exported in compliance with the law.[15] A problem of national and international concern has resulted from reports of deaths, injuries, illnesses, and environmental harm attributed to the consumption and use of these products.[16] The scope of this problem can best be understood through an examination of the potential for harm and the jurisdictional aspects of the problem.

A. Potential for Harm

The types of products that possess patent or inherent dangers include: drugs, food, chemicals, and consumer goods.[17] The exportation of these products harms foreign citizens, U.S. citizens,

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drugs, consumer products, food additives, chemicals, medical devices, and goods from the domestic market . . . . [I]n general, a ban or cancellation or withdrawal of approval was instituted because of a hazard to health, safety, or the environment created by the product.

15. *Id.* at 1. *See, 1978 Hearings, supra* note 2, at 160-161. For example, although DDT and BHC are banned in the United States, both pesticides have been accepted for use by the United States Agency for International Development in its pest management program. UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ENVIRONMENTAL IMPACT STATEMENT ON THE AID PEST MANAGEMENT PROGRAM 23 (Vol. II, 1977) [hereinafter cited as IMPACT STATEMENT].

16. *See*, 1978 REP., *supra* note 9, at 9. A letter from the EPA to the subcommittee stated: "We are, of course, aware of the international environmental impact of the spread of certain pesticides through the world's ecosystem."; United Nations Environment Programme Governing Council Decision, UNEP/GC.6/L.8/ADD.3 (1978) [hereinafter cited as 1978 UNEP Decisions] acknowledged" the repeated occurrence of harmful effects to the health of the people and the environment caused by lack of awareness of the risks associated with potentially harmful chemicals . . . ."

17. Drugs include pharmaceutical products; foods include grains and food additives; chemicals include pesticides, herbicides, fungicides, and chemically toxic substances; and consumer goods include Tris-treated fabrics, toys, and recreational items. The dangers these products pose may be delineated into four categories. First, there are those products that are known to be dangerous, such as carcinogenic drugs or chemicals that cause physiological abnormalities. Second, are products containing inherent dangers or side effects of which the consumer should be made aware. For example, the drug Winstrol causes several known side effects such as baldness and stunting of growth. While the drug's use is severely limited in the United States, Winstrol is readily available in Brazil although the dangers of its use are not publicized. Weir, *For Export Only: Poisons and Dangerous Drugs*, ROLLING STONE, Feb. 10, 1977, at 30 [hereinafter cited as *For Export Only*]. Third, are those goods that contain unknown potential dangers such as drugs that have not been fully tested. Finally, there are those products that have been adultered. At a subcommittee hearing in June, 1978, FDA representatives provided examples of adulterated food which had been intended for export. Although the agency does not usually inspect outgoing food, inspectors inadvertently found over 6,000 boxes of insect-contaminated rice bound for Chile and 200,000 pounds of rodent-contaminated cornmeal destined for Aruba, Netherland Antilles. 1978 REP., *supra* note 9, at 11.

and the United States as a country.[18] Most notable are the tragedies that have occurred in foreign nations, particularly Third World nations.

In 1975, thirteen Brazilian children died after coming into contact with aldrin, a toxic pesticide sold in stores throughout much of Brazil.[19] The EPA had severely restricted domestic distribution of aldrin in 1974. At that time, the sole producer of aldrin in the United States, Shell Chemical Company, ceased manufacturing the chemical and transferred production to a plant in Holland. From there, the pesticide was exported to nations where pesticides were not regulated.

A similar incident occurred in Colombia in the early 1970's.[20] During that time, an unusually large number of miscarriages and birth defects were reported. According to later tests, the cause of the miscarriages and deformities was 2,4,5-T, a herbicide that was exported by Dow Chemical and several other American companies even though the herbicide's EPA registration was cancelled in 1970.[21]

Concern over the inadequacy of U.S. laws in protecting people and the environment from the effects of dangerous exported goods has become international in scope. A Third World leader's demand for "international action to stop developing countries from being used as experimental dumping grounds for drugs and chemical products"[22] resulted in a decision passed by the United Nations Environment Programme (UNEP) Governing Council in May, 1977.[23] Recognizing that drugs, foods, and chemicals that are unfit for human consumption are readily sold abroad, the decision called for greater cooperation between exporting and importing nations.[24] Specifically, it recommended that exporting countries

18. See notes 19-35 and accompanying text *infra*.

19. *For Export Only*, *supra* note 17, at 31.

20. *Id.*

21. Another reported incident involved a mercury fungicide. In 1972, 400 Iraqis died and 5,000 others were hospitalized after consuming grain that was treated with the fungicide, the use of which had been banned in the United States. *1978 Hearings*, *supra* note 2, at 49. The extent of human injury and environmental harm resulting from trade in banned products cannot be fully documented because most incidents do not receive international attention. *Id.* at 47.

22. 1978 REP., *supra* note 9, at 11.

23. United Nations Environmental Programme Governing Council Decision, UNEP/GC/90 and Corr. 1, paras. 198-229 (1977) [hereinafter cited as 1977 UNEP Decision].

24. *Id.*

should not be permitted to sell dangerous products which are prohibited for domestic use unless the importing nations are informed of the dangers and the proper authorities consent.[25]

The issue of the exportation of banned or restricted products was discussed again by the UNEP Governing Council the following year, and more representatives from developing nations joined in voicing a grave concern over the problem.[26] Representatives from developed countries, including the United States, agreed that information concerning dangerous products was not being adequately disseminated to importing nations.[27] The decision made by the delegates that year emphasized the "need for strong and effective measures in all countries to ensure against . . . risk (associated with potentially harmful chemicals),"[28] and suggested actions that could be taken to prevent future harm.[29]

Americans, concerned about the exportation problem, realize that the dangers in the products can affect U.S. citizens. Any American visiting a foreign country could be exposed to the dangers of products found within that nation. Similarly, American

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25. *Id.*

26. *1978 Hearings* , *supra* note 2, at 67.

27. In July, 1975, U.S. diplomatic officials were requested by the State Department to inquire as to whether their host countries wanted to receive notification of regulatory actions taken by U.S. agencies. Twenty-seven of the forty-one responding nations expressed a desire to receive such notification. Letter from Douglas J. Bennet, Jr. to Benjamin S. Rosenthal (July 13, 1978) (State Department Letter concerning notification), *reprinted in* 1978 REP. *supra* note 9, at 37. A Government Accounting Office Director also reported that representatives from fourteen nations specifically requested timely notification concerning all pesticide regulatory actions. Underdeveloped countries were especially interested in receiving this information because they are unable to engage in the necessary evaluations routinely performed by the EPA. 1978 REP. *supra* note 9, at 13.

28. 1978 UNEP Decision, *supra* note 16.

29. The 1978 UNEP Decision:

> 1. Appeals to the countries exporting . . . to prevent the export of items which are restricted . . . in the countries of origin until the exporting countries have ascertained that the results of tests . . . on the effects of these chemicals on the health of people and the environment (as well as detailed instructions in mutually agreed languages for the safe use of these products) have been provided to the designated authorities in the recipient countries, so as to make it possible for those authorities to make fully informed decisions on the import and utilization of the products . . . ;
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> 2. Calls upon the Governments of both exporting and recipient countries to institute adequate monitoring, evaluative and protective measures . . . ;
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> 3. Requests the Executive Director to explore ways and means of assisting recipient countries in instituting the measures . . . and in finding solutions to problems involving potentially harmful chemicals including the provision of information on alternatives to their use. *Id.*

workers employed by companies that manufacture hazardous products are directly exposed to their deleterious effects.[30] Even American consumers cannot escape the threat of harm when banned products are exported and subsequently reenter under a different guise illegally.[31] Reentry into the United States occurs when the United States imports food products that are treated with banned or restricted pesticides.[32]

The exportation of hazardous products also has the potential for hurting U.S. commercial interests and diplomatic relations.[33] Tragedies resulting from the consumption of American products adversely affect the reputation of domestic manufacturers and increase foreign resentment against the United States.[34] As importing nations, particularly developing countries, become more aware of

30. In the mid-1970's, 99 percent of the Kepone manufactured was produced in the United States. A Kepone-producing plant in Virginia was forced to stop manufacturing the chemical after 70 persons connected with the production became seriously ill from Kepone exposure. *1978 Hearings, supra* note 2, at 68. *See also* Sterrett & Boss, *Careless Kepone: A Persistent Nightmare*, ENVIRONMENT, Mar. 1977, at 31. In 1976, employees exposed to Kepone at Velsicol Chemical Corporation suffered from nerve disorders including: partial paralysis, muscular coordination failure, and dizziness. Three employees were afflicted with encephalitis while two others suffered from multiple sclerosis. Washington Post, Dec. 1, 1976, at 1, col. 1.

31. See note 5 *supra*.

32. A study conducted in 1977 found that 45 percent of the imported green coffee beans tested by the FDA contained illegal residues of banned or restricted pesticides. *1978 Hearings, supra* note 2, at 70. *But see*, Letter from the Department of Health, Education, and Welfare to Benjamin Rosenthal (Aug. 31, 1978), *reprinted in 1978 Hearings, supra* note 2, at 200, in which Robert C. Wetherell said, "We concluded that these levels of pesticide residues do not pose a hazard to the consumer." Highly toxic chemical residues have also been found on tomatoes, beans, peas, and squash imported from Mexico. *1978 Hearings, supra* note 2, at 48. Reentry can also occur when Atlantic trade winds blow pesticides from West Africa back to the United States. Risebrough, *Pesticides: Translantic Movements in the Northeast Trades*, 159 SCIENCE 1233 (1968).

Although it is beyond the scope of the legislation discussed in this Comment, it should be noted that the nuclear export program has created comparable reentry problems. In Sierra Club v. AEC, Civil No. 1867-73, Memorandum Opinion at 6 ERC 1980 (D.D.C. 1974), an allegation was made that large quantities of radioactive wastes were being returned to the United States for recycling as part of the nuclear export program. *See* Note, *The United States Nuclear Power Export Program: An Assessment of Its National and International Impacts on the Environment*, 7 GA. J. INT'L. & COMP. L. 148, 149 (1977). "[F]uel which is not consumed during the operation of foreign reactors is returned to the United States for reprocessing and storage. Thus, the AEC could be assuming responsibility for the maintenance of radioactive wastes from both domestic and foreign nuclear reactors."

33. *1978 Hearings, supra* note 2, at 37.

34. "Incidents, such as those involving Leptophos, do damage to the reputation of U.S.-produced goods and increase resentment toward our nation." *Id.* (For a discussion of the Leptophos tragedy, see note 1 *supra*.)

the dangers of products manufactured in the U.S., animosity towards the United States and its manufacturers could provide a competitive advantage to other exporting countries.[35]

The problem is exacerbated when American companies export products that are known to be unsafe.[36] When the shelf life of a product has expired and the product is no longer safe, or when an agency bans domestic sale of a dangerous commodity, manufacturers often "dump" their inventories abroad.[37] Many companies circumvent agency restrictions or prohibitions by manufacturing unsafe products for export only.[38] Other companies open new plants in foreign countries where products are less strictly regulated.[39]

Experts suggest that the problem will become worse in the future as a result of increased world population,[40] a greater demand for consumer goods in developing nations,[41] economic incentives for manufacturers to increase exports,[42] the increase in the quantity of pharmaceutical products that are being developed for human consumption throughout the world,[43] and the likelihood that a greater number of products will be determined as car-

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35. *Id.*; "However, as the potential dangers of unregulated toxic chemical use become more apparent, a growing mutuality of interest between developed and developing countries could emerge. Favorable trading relations might be placed in jeopardy through the discovery of hazardous effects for which a warning was not provided." Alston, *International Regulation of Toxic Chemicals*, 7 ECOLOGY L.Q. 397, 401 (1978) [hereinafter cited as *Toxic Chemicals*].

36. 1978 REP. *supra* note 9, at 7. "[I]n some instances the companies have gone beyond exploiting the situation and have employed manipulation and deception . . . . Multinational drug companies often encourage sales by plying foreign doctors and pharmacists with gifts." *For Export Only, supra* note 17, at 32.

37. *Drug Regulation Reform Act of 1978: Hearings on H.R. 11611 Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 994 (1978). The CPSC banned the domestic sale of Tris products in April 1977. On May 1, 1978 it was reported that over 100,000 Tris-treated products had been sold abroad. 1978 REP., *supra* note 9, at 10.

38. See note 19 *supra* and accompanying text.

39. *See Toxic Chemicals, supra* note 35, at 439; *For Export Only, supra* note 17, at 32. "Some countries, in fact, have solicted the U.S. corporate polluters."

40. *See* P. BARKLEY & D. SECKLER, ECONOMIC GROWTH AND ENVIRONMENTAL DECAY 27 (1972); *Toxic Chemicals, supra* note 35, at 435.

41. *1978 Hearings, supra* note 2, at 3 (statement of Esther Peterson).

42. *See Toxic Chemicals, supra* note 35, at 434. "[T]he chemical industry is a major factor in the economies of most developed nations, and the extent of a country's chemical exporting activity is often a key determinant of its balance of payments situation."

43. *Id.* at 435.

cinogenic.[44] Lower mortality rates and higher population growth rates have increased the Third World countries' reliance on imported chemicals.[45] These countries now demand larger food supplies and their agricultural systems necessitate a more extensive use of pesticides.[46] With an increase in population and a rising standard of living, Third World nations seek more consumer goods.[47] The unwillingness of manufacturers to conduct exacting tests and to release information that might threaten their competitive position,[48] coupled with traditional economic considerations motivating manufacturers to export products regardless of their hazardous effects,[49] further aggravates the problem. The question is, how can the harm resulting from the exportation of hazardous American products be alleviated? Before this question can be answered, the jurisdictional aspects of the problem must be considered.

B. Jurisdictional Aspects

The problem discussed in this Comment concerns the manufacture of hazardous goods by American companies within the United States or abroad, and the distribution of these goods to foreign nations. Goods produced in the United States may be controlled by appropriate laws and regulations: U.S. jurisdiction over the distribution of these products is not questioned.[50] Instead, the major concern is the application of appropriate jurisdiction through legislation.[51] As the Government deals with the direct effect of these products on foreign citizens, rather than with their effect on the well-being of American citizens, policy issues of international magnitude emerge.[52] The issue becomes not how far can

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44. *1978 Hearings*, *supra* note 2, at 3 (statement of Esther Peterson).

45. *Toxic Chemicals*, *supra* note 35, at 435.

46. The "Green Revolution," the introduction of new grain varieties, has spread American agricultural technology to many Third World countries. Such technology necessitates the use of more pesticides, and the agricultural systems of developing countries have become hooked on "pesticide addiction." Comment, *Controlling the Environmental Hazards of International Development*, 5 ECOLOGY L.Q. 321, 328-329 (1976) [hereinafter cited as *Environmental Hazards*].

47. See note 41 *supra*.

48. *Toxic Chemicals*, *supra* note 35, at 401.

49. See note 42 *supra*.

50. See note 6 *supra*.

51. See notes 59-74 and accompanying text *infra*.

52. See note 120 and accompanying text *infra*.

the Government go in exercising its jurisdiction, but rather, how far *should* it go in exercising that jurisdiction.

More complicated jurisdictional issues arise when a corporation, owned or controlled by U.S. citizens in a foreign nation, manufactures products for distribution outside the United States. In that situation, questions of international conflict of laws arise, and U.S. jurisdiction may be limited, as was illustrated in the French case of *Fruehauf v. Massardy*.[53]

In *Fruehauf*, a Paris court compelled a French corporation, owend by U.S. citizens, to honor a contract even though the contract violated the United States' Trading with the Enemy Act.[54] Both the United States and France claimed the nationality of the corporation, subjecting Fruehauf to the concurrent jurisdiction of each sovereign.[55] Yet, the United States chose to acquiesce in the French court's decision despite the conflict with U.S. law. As one commentator explained, the legitimacy of the host country's objections and the possibility of retaliation often influence the United States to relinquish its jurisdictional claims over American-owned, foreign-based corporations. While no principle of international law requires the United States to moderate its regulation of foreign

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53. [1968] D.S. Jur. 147, [1965] J.C.P. II 14, 274*bis* (Cour d'appel, Paris), *reprinted in* 5 INT'L LEGAL MAT'LS 476 (1966). The essential international law question is whether the United States has jurisdiction over acts occurring outside the United States. The concept of territoriality usually prohibits such jurisdiction. "In determining the intended scope of United States legislation, United States courts appear to have accepted the interpretational notion that international law limits their jurisdiction to acts committed within the territory or having an effect therein." Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579, 587 (1969) [hereinafter cited as *Reflections on Fruehauf*]. For a discussion of international conflict of laws theories, see A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (Vols. I & II 1974).

54. In *Fruehauf*, an American corporation held a majority of shares and controlled the board of directors of Fruehauf France, a French corporation. One of Fruehauf's French directors contracted to sell equipment to another French corporation. Such equipment was to be resold to Communist China. The United States, acting under the Trading with the Enemy Act, ordered the American corporation to suspend execution of the contract, and accordingly, the American corporation ordered Fruehauf to cancel. Fruehauf's French directors brought suit to execute the contract, and the French court granted such relief. *Reflections on Fruehauf, supra* note 53, at 580.

55. The United States may decide that the nationality of a corporation is the place from which it is controlled, and, under French law, a corporation that has its main office in France is considered a French national. "The individual with dual nationality may frequently be subjected to the concurrent jurisdiction of each sovereign to which he owes allegiance." *Id.* at 590-91.

corporations owned by U.S. citizens, the United States may refrain from exercising its jurisdiction in such instances.[56]

Similarly, the United States could relinquish its jurisdiction over American owned foreign corporations when such corporations choose to export dangerous products to other nations. The United States, however, is less likely to waive jurisdiction over violations of its laws when the legislation is clearly intended to have an extraterritorial effect.[57] Furthermore, the international legal principle of territoriality, which generally prohibits a state from exercising jurisdiction over acts occurring outside its boundaries, does not apply when a basis for jurisdiction is established through the consent of the nations involved.[58] The United States could, therefore, secure its right to exercise jurisdiction by enacting laws with provisions applying to the exportation of hazardous products by foreign-based subsidiaries, and by agreeing with the host country that the United States will have jurisdiction over such laws. In determining what provisions these laws should contain, the remainder of this Comment will discuss the current applicable law, the need for statutory change, and the policy considerations that must be examined before the enactment of such legislation.

III. CURRENT SOLUTIONS TO THE PROBLEM

A. Existing Legislation

Under the authority of the FDA, the CPSC, and the EPA are six product control acts containing provisions that affect the production and distribution of dangerous products, including: hazardous substances,[59] consumer products,[60] flammable fabrics,[61] pesticides,[62] toxic substances,[63] foods,[64] drugs,[65] and medical devices.[66]

56. *Id.* at 598.
57. *Id.* at 587.
58. *Id.* at 586.
59. 15 U.S.C. §§ 1261-1275 (1976 & Supp. 1979).
60. 15 U.S.C. §§ 2051-2081 (1976 & Supp. 1979).
61. 15 U.S.C. §§ 1191-1204 (1976 & Supp. 1979).
62. 7 U.S.C. §§ 136a-136y (1976 & Supp. 1979).
63. 15 U.S.C. §§ 2601-2629 (1976 & Supp. 1979).
64. 21 U.S.C. §§ 301-392 (1976 & Supp. 1979).
65. *Id.*
66. *Id.*

The provisions empower the agencies to set product standards;[67] require labeling;[68] require testing,[69] registration,[70] or agency approval[71] before the product can be marketed; recall products from the market;[72] seize noncomforming goods;[73] and ban the sale and distribution of certain goods.[74] The overall purpose of these acts is to protect the public and the environment against unreasonable risks of injury resulting from the use, consumption, and handling of hazardous products.[75] Yet, in general, exported products are exempt from the acts' domestic provisions if there is compliance with the exportation provisions.[76] Such provisions include the following requirements: 1) that the product is packaged for export,[77] 2) that the product meets the specifications of the foreign buyer,[78] 3) that the product is in accordance with the laws of the importing nation,[79] 4) that the product has not been offered for sale in domestic commerce,[80] 5) that exportation does not present an

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67. Flammable fabrics, 15 U.S.C. § 1193 (1976); consumer products, 15 U.S.C. § 2056 (1976); foods, 21 U.S.C. §§ 341-342 (1976); medical devices, 21 U.S.C. § 360(d) (1976).

68. Hazardous substances, 15 U.S.C. § 1262 (1976); consumer products, 15 U.S.C. § 2063 (1976); toxic substances 15 U.S.C. § 2603 (1976).

69. Toxic substances, 15 U.S.C. § 2603 (1976).

70. Pesticides, 7 U.S.C. § 136a (1976 & Supp. 1979).

71. New drugs, 21 U.S.C. § 355(a) (1976); medical devices, 21 U.S.C. § 360(e) (1976).

72. Consumer products 15 U.S.C. § 2064 (1976); medical devices 21 U.S.C. § 360(h) (1976).

73. Pesticides, 7 U.S.C. § 136k (1976 & Supp.); flammable fabrics, 15 U.S.C. § 1195 (1976); hazardous substances 15 U.S.C. § 1265 (1976); consumer products, 15 U.S.C. § 2061 (1976); toxic substances, 15 U.S.C. § 2606 (1976).

74. Hazardous substances, 15 U.S.C. § 1262 (1976); consumer products, 15 U.S.C. § 2057 (1976); toxic substances, 15 U.S.C. § 2604 (1976); medical devices, 21 U.S.C. § 360(f) (1976).

75. *See* United States v. Nutrition Service, Inc., 227 F. Supp. 375 (W.D. Pa. 1964); 15 U.S.C. § 1193 (1976); 15 U.S.C. § 2051 (1976); 15 U.S.C. § 2601 (1976); [1972] U.S. CODE CONG. & AD NEWS 3995; [1960] U.S. CODE CONG. & AD NEWS 2834.

76. *See* 7 U.S.C. § 136o (1976 & Supp.); 21 U.S.C. § 381(d)(2).

77. 15 U.S.C. § 1202 (1976 & Supp. 1979); 15 U.S.C. § 1264 (1976 & Supp. 1979); 15 U.S.C. § 2067 (1976 & Supp. 1979); 15 U.S.C. § 2611 (1976 & Supp. 1979); 21 U.S.C. § 381(d)(1) (1976 & Supp. 1979). These statutes provide that the package bear a label that it is intended for export.

78. 15 U.S.C. § 1264 (1976 & Supp. 1979); 21 U.S.C. § 381(d)(1)(A) (1976 & Supp. 1979).

79. *Id.*

80. 15 U.S.C. § 1264 (1976 & Supp. 1979); 15 U.S.C. § 2067 (1976 & Supp. 1979); 15 U.S.C. § 2611 (1976 & Supp. 1979); 21 U.S.C. § 381(d)(1)(D) (1976 & Supp. 1979). In United States v. Articles of Hazardous Substance, 588 F.2d 39, 44 (4th Cir. 1978) the court stated: "there is no indication that articles which have been offered for sale in domestic commerce can avoid the consequences of seizure and forfeiture by resorting to export after condemnation has occurred." 15 U.S.C. § 1264(b)(3) (1976 & Supp. 1979) codifies this judicial interpretation.

unreasonable risk to U.S. citizens,[81] 6) that a statement of exportation is sent to the importing nation,[82] 7) that the importing nation acknowledges receipt of information,[83] 8) that all foreign governments and international organizations receive notification of actions taken by U.S. agencies,[84] and 9) that the agencies cooperate with international organizations.[85] These exportation provisions are not consistent throughout the statutes,[86] nor do they go far enough in affording protection against the possible dangers of the products.[87]

Thus, current statutes regulating the sale and distribution of dangerous products invoke a double standard.[88] The acts are primarily concerned with protecting American citizens against the hazards of dangerous products when such products are distributed in the United States.[89] They are not aimed at protecting foreign citizens against ill effects caused by the products, nor

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81. 15 U.S.C. § 1202 (1976 & Supp. 1979); 15 U.S.C. § 1264 (1976 & Supp. 1979); 15 U.S.C. § 2067 (1976 & Supp. 1979); 15 U.S.C. § 2611 (1976 & Supp. 1979); 21 U.S.C. § 381 (1976 & Supp. 1979).

82. 7 U.S.C. § 136o (1976 & Supp. 1979); 15 U.S.C. § 1202 (1976 & Supp. 1979); 15 U.S.C. § 2067 (1976 & Supp. 1979); 15 U.S.C. § 2611 (1976 & Supp. 1979). These provisions require the manufacturer to notify the appropriate agency of intent to export a product that does not meet agency standards, or is otherwise regulated by the agency. The agency, in turn, notifies the foreign government of the exportation and of the basis for the standard or regulation.

83. 7 U.S.C. § 136o (1976 & Supp. 1979).

84. *Id.*

85. *Id.*

86. EXPORTATION PROVISIONS CONTAINED IN THE ACTS

Packaged for Export	Meets Foreign Specifications	In Accordance with Laws
HSA	HSA	HSA
CPSA	FDCA	FDCA
FFA		
TSCA		
FDCA		
Not in Domestic Commerce	**No unreasonable risk to U.S.**	**Exportation Statement**
HSA	HSA	CPSA
CPSA	CPSA	FFA
TSCA	FFA	TSCA
FDCA	TSCA	FIFRA
	FDCA	
Acknowledgement of Data	**Notification of Actions**	**Cooperation with International Organizations**
FIFRA	FIFRA	FIFRA

87. See notes 97-112 and accompanying text *infra*.

88. *1978 Hearings*, *supra* note 2, at 56 (statement of S. Jacob Scherr).

89. See note 75 *supra* and accompanying text.

do they provide adequate protection against subsequent importation back into the United States.[90] While domestic sales of hazardous products are strictly regulated, the attitude concerning the exportation of many of the same products is one of *caveat emptor.*[91] To beware, the buyer must have information concerning the hazardous imported product but, in most cases, the foreign purchaser has little or no information.[92]

Amendments were recently enacted in response to this attitude.[93] Yet, even with the amendments, the *caveat emptor* attitude prevails. In general, the exportation provisions do not provide for sufficient notification of the product's status in the United States.[94] They also do not mandate appropriate exportation labeling.[95] Nor do they authorize the agencies to gather information in order to make appropriate exportation decisions.[96] The statutes, therefore, provide inadequate protection for the foreign purchaser.

The exportation of hazardous substances, food, and approved drugs is permitted without notification to the importing country of the product's status in the United States.[97] Under the Consumer Product Safety Act (CPSA), the Flammable Fabrics Act (FFA), and the Toxic Substances Control Act (TSCA), notification of the product's status must be sent to the importing nation prior to exportation.[98] These statutes, however, do not require notification to

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90. See notes 19-35 and accompanying text *supra*.

91. *1978 Hearings*, *supra* note 2, at 66 (statement of S. Jacob Scherr).

92. *See* D. KAY, THE INTERNATIONAL REGULATION OF PHARMACEUTICAL DRUGS 37 (1976) [hereinafter cited as PHARMACEUTICAL DRUGS]. "The states (importing nations) had few, if any, trained inspectors to monitor the quality of imported pharmaceuticals and lacked the infrastructure necessary to support a reliable control system." *Toxic Chemicals*, *supra* note 35, at 401. Many developing countries have neither the facilities nor the resources to fully evaluate imported chemical substances.

93. See note 8 *supra*.

> [T]he committee has been concerned about the export of consumer products, fabrics and related materials, and hazardous substances which have been deemed unsafe for American citizens .... It is the belief of the committee that the U.S. government has an obligation to share the results of its safety research with countries which purchase U.S. exports. [1978] U.S. CODE CONG. & AD. NEWS 9434, 9437.

94. 1978 REP., *supra* note 9, at 4. See notes 82-84 *supra*.

95. 1978 REP., *supra* note 9, at 4. See notes 76-86 and accompanying text *supra*. Most of the domestic labeling provisions are not exempt for exported products under FIFRA. 7 U.S.C. § 136o(a)(1) (1976 & Supp. 1979).

96. 1978 REP., *supra* note 9, at 4. See notes 76-86 and accompanying text *supra*.

97. See note 82 *supra*.

98. *Id.*

foreign countries or international organizations whenever the agencies take an action concerning a hazardous product.[99] The notification provisions also do not require the dissemination of information regarding alternative products.[100] The absence of a certification provision, which would require the importing government to acknowledge receipt of information, creates the additional problem that the appropriate official may never receive notification.[101] Thus, in instances in which information was sent to foreign countries, the responsibility for assuring that the announcements were properly relayed remained with embassy personnel who often neglected to forward these notifications.[102]

Another way to notify the foreign purchaser of the product's status in the United States is through appropriate labeling. Most of the acts, however, afford no protection through labeling because the exportation provisions require only that the package be marked for export.[103] Additional warnings that the contents are not registered, approved for use, or allowed to be sold in the United States, do not have to be included under such provisions.[104] Furthermore, the statutes do not mandate an accompanying statement of adverse effects of product consumption and directions for use.

Even if complete product status notification were encompassed in the provisions, the importing countries would still have to interpret the information. Most of these countries lack the scientific and technical knowledge necessary to make regulatory decisions based on an analysis of need versus danger of use,[105] and none of the acts provide for technical training and assistance to the officials of the developing countries.[106]

U.S. agencies also lack adequate knowledge regarding hazar-

99. The exception is 7 U.S.C. § 136o(b) (1976 & Supp. 1979).

100. *Id.*

101. *Id.* at § 136o(a)(1) (1976 & Supp. 1979). It should be noted, however, that since the provision became effective, the EPA has banned, suspended or restricted use of fourteen pesticides, but notification was given on only five of the actions that were taken. 1978 REP., *supra* note 9, at 21.

102. *1978 Hearings, supra* note 2, at 81. "For example, an official at one embassy told us that he did not routinely forward notifications on chemicals not registered in the host country because it may adversely affect U.S. exporting."

103. See notes 77 and 95 *supra*.

104. *Id.*

105. See note 133 and accompanying text *infra*.

106. See notes 76-86 and accompanying text *supra*.

dous product exportation because they do not have enough authority to gather the information concerning the nature and value of the prohibited products and the country of destination which is necessary to make a cost/benefit analysis.[107] Part of such an analysis necessitates a determination of whether or not the product comports with the purchaser's specifications, but only two of the statutes provide for such a determination.[108] Another part of the analysis would include a finding that the product is not in violation of the laws of the importing nation; few of the statutes require this finding.[109] Therefore, an appropriate cost/benefit analysis is not feasible, and in some instances products are exported even though risks of use outweigh benefits while, in other instances, a product is not exported even though potential benefits clearly outweigh the risks.[110]

Even if a cost/benefit analysis could be made, the agencies are not authorized to act according to such information; they cannot ban the exportation of a product unless such exportation would endanger the people of the United States.[111] No provisions permit the banning of a product intended for export on the basis of a finding that the product is inappropriate for use in the importing nation or anywhere else in the world.[112]

This inadequacy, along with the other factors discussed, highlights the double standard nature of current legislation. Still, the exportation provisions afford some protection for the importing nation, and the enactment of new statutory amendments, as will be discussed *infra*, would provide even greater protection.

B. Alternatives to Statutory Control

The potential for protection through alternative solutions is not as promising. Such solutions include bilateral and multilateral agreements as well as civil actions brought by injured plaintiffs. Bilateral agreements concerning hazardous products are often used to promote the adoption of uniform standards,[113] to provide

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107. *Id.*
108. See note 78 *supra*.
109. See note 79 *supra*.
110. See notes 124-131 *infra*.
111. See note 81 *supra*.
112. See notes 76-86 and accompanying text *supra*.
113. *Toxic Chemicals*, note 35 *supra*, at 409. *See* D. KAY, THE INTERNATIONAL REGULATION OF PESTICIDE RESIDUES IN FOOD 36-38 (1976) [hereinafter cited as PESTICIDE RESIDUES].

for information exchange,[114] or to advance combined research.[115] These types of agreements, however, do not provide a viable solution because of their limited nature. While the exportation problem affects many countries, bilateral agreements have little impact beyond those states which are signatories.[116] Multilateral agreements, which often evolve as a result of existing international organizations, have a more widespread impact.[117] In the past, however, such agreements have taken a piecemeal approach to the control of hazardous products, and the result is "a confusing multiplicity of organizations, each with a narrow perspective on what is essentially a unified threat to human health and the environment."[118]

Civil actions against American manufacturers are rarely brought by injured plaintiffs for two reasons: first, such actions are expensive to bring and second, they often involve conflict of laws issues which impede a plaintiff's chance to recover.[119] Even if civil actions were feasible, they would not provide a solution to the problem because they cannot eliminate the harm. A civil action only provides a remedy for injuries *after* they occur; appropriate legislation could arrest the danger *before* injuries occurred.

Statutes must be amended to provide better protection for American citizens and consumers of American-made products. Foreign nations must be made fully aware of imports that are patently and inherently dangerous. Through cooperation with the United States, these nations must be able to use data to develop a cost/benefit analysis for such imports. American agencies must likewise determine that exportation will not endanger the well-

114. *Toxic Chemicals*, *supra* note 35, at 410. *See* Memorandum of Understanding Concerning Exchange of Information on, and Control of, Products Involved in Commerce between the United States and Mexico which are Regulated on Behalf of the United States by the Food and Drug Administration, *signed* Aug. 13, 1974, T.I.A.S. No. 8522 (*effective* Aug. 13, 1974); PESTICIDE RESIDUES, *supra* note 113.

115. *Toxic Chemicals*, *supra* note 35, at 410.

116. *Id.*

117. *Id. See, e.g.*, PESTICIDE RESIDUES, *supra* note 113; PHARMACEUTICAL DRUGS, *supra* note 92.

118. *Id.*

119. One of these rare civil actions for injuries was commenced on behalf of a minor, a resident of Canada, who was born with birth defects after his mother ingested thalidomide manufactured by a Delaware corporation. Henry v. Richardson-Merrell, Inc., 508 F.2d 28 (3rd Cir. 1975). The plaintiff was unable to recover because the court applied the Canadian statute of limitations rather than that of Delaware, where the action was brought.

being of the American people and environment. The problem remains as to how this should be done. The solution necessitates taking into account several factors. The remainder of this Comment will discuss these factors in determining a legislative solution.

IV. POLICY FACTORS

The U.S. position concerning the exportation of hazardous products ultimately affects the well-being of American citizens, foreign consumers of American-made products, and the environment. In determining this position, Congress should engage in a balancing process which takes into account a variety of policy factors: 1) a responsibility for the well-being of users of American products, 2) a recognition of the sovereignty of the importing nation and its differing cultural, social, and economic conditions, 3) responsibility for the safety of the American people, 4) the impact of the legislation on the U.S. economy, 5) the need to cooperate with international organizations, and 6) the feasibility and practicality of administering the legislative directives.[120] The statutes enacted as a result of such balancing would eliminate the double standard contained in current legislation. More specifically, new legislation would reduce the harm resulting from the consumption of hazardous products exported from the United States, harm which occurs because of the current U.S. attitude towards human health and safety.

A. Responsibility for Human Well-Being

"If we want to say that all the nations of the Earth are our friends, we can hardly go around selling poison to them."[121] This means that the United States must accept responsibility for the goods that it introduces into the world market. Thus far, American exporters have not accepted this responsibility, and, in fact, many manufacturers of banned products feel no compunction about shipping these same goods abroad if there is no proof of harm to American workers or consumers.[122] Thus, when the CPSC

120. *1978 Hearings, supra* note 2, at 5 (statement of Esther Peterson).

121. *Id.* at 9.

122. *Banned at Home But Exported*, BUS. WEEK, June 12, 1978 at 152 [hereinafter cited as *Banned at Home*]. A representative from Abott Laboratories recently said that the company disagrees with the FDA's ban on cyclamates and would continue selling them throughout Europe.

banned domestic distribution of clothing treated with Tris, businesses sold the goods abroad.[123] Industry, naturally, has an economic interest in exporting goods once they cannot be sold at home, and current legislation provides them with no incentive to stop this practice.

Of course, responsibility for human well-being must be viewed subjectively, and such a responsibility must be weighed against the effect of not using the product in a particular nation. This balancing approach takes into account the sovereignty of the importing nation in determining what is best for its people in view of its cultural, social, and economic conditions.[124]

B. Sovereignty of the Importing Nation

There are instances when a product that is banned in the United States is appropriate, and perhaps even essential, for use in other nations that have different problems and priorities.[125] Factors such as necessity of product use, standard of living, and the availability of alternative products will often determine whether the benefits of product consumption outweigh its costs.[125.1]

The exportation of the contraceptive Depo Provera illustrates the importance of making a cost/benefit analysis. A finding by the FDA that Depo Provera could cause cancer and birth defects resulted in the banning of the drug for use everywhere.[126] Despite the FDA finding, many underdeveloped nations wished to continue importing the drug because it is inexpensive and easy to administer in countries with high illiteracy rates and a shortage of

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123. *Id.*

124. 1978 REP., *supra* note 9, at 3. *See Toxic Chemicals, supra* note 35, at 453.

125. "[E]very sovereign nation has the right to determine what should or should not be imported into it for the use of its citizens . . . . U.S. determinations of what is safe or appropriate for use by its own citizens are based on factors which may or may not have universal applicability." 1978 REP., *supra* note 9, at 25.

Even if nations have similar conditions, their assessments of products may differ. Although Canada and the United States exchange information on health issues, the two countries reached opposite conclusions concerning the dangers of Red Dye No. 2. The FDA banned use of the dye; the Department of Health in Canada did not. *Toxic Chemicals, supra* note 35, at 408, n.48.

125.1 "The Committee has, however, found that in many instances articles subject to the FDCA which may not meet domestic standards for one reason or another might properly and significantly benefit foreign nations." [1978] U.S. CODE CONG. & AD. NEWS 1031.

126. Washington Post, July 1, 1978, at 10, col. 3. *1978 Hearings, supra* note 2, at 4 (statement of Esther Peterson).

medical personnel to distribute other forms of birth control.[127] Officials of the importing nations resented the ban on the exportation of Depo Provera, viewing it as a lack of confidence in their ability to determine what is best for their people.[128]

The banning of the insecticide DDT by the EPA presents a similar example.[129] Historically, DDT has been used to control pests and thereby increase agricultural output.[130] In developed nations, where technological advances in agriculture result in high levels of productivity, the banning of DDT may be acceptable, but in developing nations, with billions of starving people, the banning of DDT is inappropriate.[131]

Recognition of the importing nation's sovereign right to make judgments concerning the welfare of its people necessitates permitting that nation to make decisions based upon a cost/benefit analysis. Often, however, that nation is unable to weigh favorable and adverse effects of product use because it lacks the technical and scientific expertise necessary for evaluation.[132] Such a country may also be unaware of alternative products.[133] The lack of expertise and knowledge which necessarily impairs wise decision-making must, therefore, be taken into account in the legislation.

C. *Reimportation Considerations*

Before permitting the exportation of a hazardous product bas-

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127. *Id.*

128. *Id.* Another example is the antibiotic chloromycetin. Its use is restricted in the United States to a few serious diseases. In other countries, the drug is used to combat diseases which are uncommon in the United States. *1978 Hearings, supra* note 2, at 4 (statement of Esther Peterson).

129. DDT was banned for sale in the United States in 1972. "The countries that continue to import DDT use it to kill disease-carrying mosquitoes, and see the alternative—widespread outbreaks of malaria—as far worse." *Banned at Home, supra* note 122.

130. *See* IMPACT STATEMENT, *supra* note 15 (Vols. I & II).

131. Comment, *Agricultural Pesticides: The Urgent Need for Harmonization of International Regulation*, 9 CAL. W. INT'L L. J. 111, 116 (1979).

The FDA has also prohibited the use of manually collumated X-ray machines, preferring automatic devices instead. The agency found that manual operation of the machines often resulted in unnecessary over-exposures. However, manually operated machines are used in some nations without causing unnecessary exposure to patients. These machines are especially needed in South America where there is a lack of equipment and skilled technicians to work the automatic devices. For these countries the benefits of having usable x-ray equipment outweigh the risks of unnecessary exposure from manual operation. *1978 Hearings, supra* note 2, at 108.

132. See note 92 *supra*.

133. *Id.*

ed upon a cost/benefit analysis, government agencies should consider the problem of subsequent reimportation into the U.S. While the EPA may permit the exportation of pesticides such as DDT and heptachlor, there is a threat that products that have been sprayed with these chemicals in other countries will be imported into the United States. Similarly, if the CPSC permits exportation of Tris-treated fabrics there is no guarantee that the same goods will not be subsequently reimported under the guise of an acceptable label. Recognizing this possibility, a study by the Government Accounting Office indicated that subsequent reimportation must be considered a serious problem which should be taken into account in agency decisions concerning exportation policies.[134]

D. Economic Considerations

Any decision prohibiting the exportation of goods based upon the fear that the goods would subsequently reenter the U.S., a cost/benefit analysis, or U.S. responsibility to product users, may ultimately affect the U.S. economy. Indeed, government officials have cautioned that application of domestic standards to major export transactions could impair the U.S. objective of correcting a huge trade deficit and strengthening the dollar.[135]

In the early 1970's when federal agencies began imposing guidelines on the distribution of drugs, chemicals, and other hazardous commodities, American companies viewed Third World nations as marketplaces for exports.[136] As products were banned for sale in the United States, manufacturers shipped their inventory abroad, and were able to sell these products which were worthless at home.[137] Some companies found it lucrative to continue manufacturing hazardous products for export even after their inventory was depleted.[138]

While foreign sales of unsafe products can be economically beneficial, such sales might adversely affect the American

134. 1978 REP., *supra* note 9, at 29.

135. [1978] EXPORT WEEKLY (BNA) No. 196 A-3 (statement made by Frank A. Weil).

136. During 1974, the Agency for International Development gave 13 million dollars to foreign countries so that they could import U.S. pesticides. *For Export Only*, *supra* note 17, at 32.

137. When Tris was banned, a company in North Carolina shipped its inventory abroad and received $400,000 for goods which were worthless in the United States. *Banned at Home*, *supra* note 122.

138. See notes 20, 21 and 30 and accompanying text *supra*.

economy. First, as long as hazardous products are exported, there is little impetus for manufacturers to develop safer, alternative products even though the sale of such products could be equally profitable.[139] Secondly, if deaths and injuries continue to result from the consumption of American products, importing nations may lose confidence in U.S. trade agreements.[140] Finally, by selling domestically banned products, the United States could injure itself in the marketplace because foreign buyers have the competitive advantage of using banned U.S. products in the production of their own goods.[141] Statutes which reflect all these considerations must be enacted.

E. Cooperation with International Organizations

Once the economic considerations are weighed along with the other policy factors, the need to cooperate with the mandates of international organizations, such as UNEP, must be considered. Such organizations have already become involved with the problem of the exportation of hazardous products.[142] While the degree of involvement varies with each organization,[143] in general, these international organizations have called upon the exporting nations to become more responsive to the health and safety of mankind.[144] As a world leader and a member of these organizations, the United States must enact laws that recognize the concerns of the international community.

F. Feasibility of Administering Legislation

Legislation enacted in response to the concerns of international organizations, which also takes into account the responsibility for the products, the sovereignty of the importing nation, reimportation considerations, and economic considerations, could be

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139. *1978 Hearings*, *supra* note 2, at 215 (statement of Susan B. King).

140. *See* [1978] U.S. CODE CONG. & AD. NEWS 9434, 9437. "Such a policy not only affirms this nation's committment to human rights, but also strengthens U.S. diplomatic relations and long-range export prospects.'"

141. *1978 Hearings*, *supra* note 2, at 9. "Let's look at the pesticides . . . and the food additives . . . . To permit those things to be used in foreign nations and then to permit those products to be imported into this country and to compete with American agriculture just seems very unfair." (statement of Garry Brown).

142. *See* PESTICIDE RESIDUES, *supra* note 113, at 18-36; PHARMACEUTICAL DRUGS, *supra* note 92, at 34-46; 1978 UNEP Decision, *supra* note 16; 1977 UNEP Decision, *supra* note 23.

143. *Id.*

144. *Id.*

administratively burdensome. Therefore, the best policy regarding the exportation of dangerous products should consider the feasibility of implementing agency directives, and legislation must provide for the efficient use of agency resources.

V. A LEGISLATIVE SOLUTION

A balancing of policy factors suggests an exportation policy similar to the UNEP Governing Council Decisions of 1977 and 1978.[145] Legislation enacted in accordance with this policy would be similar to the current Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but would be somewhat more extensive.[146] The provisions of such legislation would eliminate the double standard by affording protection both to U.S. citizens and to foreign purchasers of American-made products. The content of legislation which most readily comports with the balanced policy factors would include provisions: 1) authorizing the collection of data concerning the product and the importing nation, 2) requiring cooperation with international organizations, 3) requiring informational labeling, 4) requiring the transmission of product information to foreign nations, 5) providing for technical assistance to officials of developing countries, and 6) authorizing the agency to ban the exportation of a product when necessary.[147] While all of the statutes regulating the exportation of hazardous products contain some of these provisions, none of the statutes contain them all.[148] Furthermore, some of the provisions are not found in any of the statutes.[149] This Comment suggests that all statutes regulating the exportation of hazardous products be amended to contain all of these provisions. With such provisions, the United States could accept responsibility for its products while recognizing the sovereignty of the importing nation and allowing the officials of that nation to make determinations concerning use of a hazardous product by its citizens. The following discussion analyzes the relation of the legislative provisions to the policy factors.

A. Authorization for Data Collection

Before permitting the exportation of a domestically banned or

145. 1978 UNEP Decision, *supra* note 16; 1977 UNEP Decision, *supra* note 23.
146. 7 U.S.C. § 136o (1976 & Supp. 1979).
147. 1978 REP., *supra* note 9, at 5.
148. See note 86 *supra*.
149. *Id.*

restricted product, the appropriate agency should collect and analyze information concerning: 1) a description of the product, 2) the location at which the product will be manufactured, 3) the country of destination, 4) evidence that the product conforms to the specifications of the foreign purchaser, and 5) evidence that the product does not violate the laws of the importing nation.[150] The cost/benefit analysis made from this information enables the agency to determine whether the product should be exported. If the analysis determines that the product should not be exported, this information should be sent to the importing country. Using this information and other data, a foreign nation would then make its own decision whether to import the product.

The authority to collect and analyze data recognizes the U.S. responsibility to foreign purchasers by ensuring that the United States will not approve the exportation of domestically regulated products unless the benefits of consumption outweigh the risks.[151] Gathering the data would not be burdensome since much of the information is already available to the agency. From its domestic regulation of a hazardous product, the agency will already have information concerning the product and the site of production.[152] The manufacturer would furnish the remaining information.[153]

B. Cooperation with International Organizations

Section 136o(d) of the FIFRA reads: "The Administrator shall, in cooperation with the Department of State and any other appropriate Federal agency, participate and cooperate in any international efforts to develop improved pesticide research and regulations."[154] Similar provisions should be enacted for the other acts.

C. Labeling Requirement

Labeling provisions should require a statement that the contents of the package are for export, and, where appropriate, that the contents are not registered, approved for use, or allowed to be

150. 1978 REP., *supra* note 9, at 6.

151. In requiring information concerning the site where the product will be made, the agency can discover whether manufacturing would present a risk to U.S. citizens.

152. See note 6 *supra*.

153. See note 82 *supra*.

154. 7 U.S.C. § 136o(d) (1976 & Supp. 1979).

sold in the United States.[155] Such provisions should also mandate an accompanying statement of directions for use and adequate warnings of adverse effects.[156] By notifying the foreign purchaser of the product's dangers, the United States assumes further responsibility for products that American manufacturers introduce into the world market.

D. Notification and Certification Requirement

Whenever an agency restricts or bans the distribution of a product in the United States, notification of such action should be sent to appropriate international organizations and to governments of foreign nations. If requested, information should also be sent concerning the reason for the action taken and regarding products that could be used as alternatives.[157] Foreign officials should also receive notification and information regarding any product their country is importing that does not conform to standards set by U.S. agencies.[158] This provision requires the manufacturer to notify the appropriate agency of its intention to export a product that does not comply with domestic regulations.[159]

Effective notification necessitates the sending of complete, concise, and timely information through the State Department to the international agencies, the U.S. embassies abroad, and to the appropriate foreign officials.[160] A certification requirement mandating that the appropriate government official acknowledge receipt of the information would assure that the announcements reached their destinations.[161]

With this information, the importing nation could make a cost/benefit analysis and determine whether the product should be used by its people. The result of the cost/benefit analysis and the data used in the analysis made by the U.S. agency could also be considered by the foreign officials in making their determinations.[162]

A problem inherent in the notification procedure is the confidential nature of some of the information that would be

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. See note 82 *supra.*
160. *See* 7 U.S.C. § 136o (1976 & Supp. 1979).
161. *Id.*
162. See notes 150-151 and accompanying text *supra.*

required.[163] Although notice of actions taken by the agencies could readily be disclosed, the reasons the actions were taken might involve confidential information about the product. While manufacturers would be reluctant to forward such information, data acquired by the agencies could be relayed to the foreign government to the extent that it is not confidential.

E. Technical Assistance to Foreign Officials

The information used by the foreign officials in their cost/benefit analysis must be interpreted, but many of the importing nations lack the necessary technical and scientific expertise. Therefore, provisions should be enacted requiring the agencies to assist or train foreign officials in making such interpretations.[164] Foreign officials could request assistance or training from the appropriate agency, and the agency could employ the resources of U.S. foreign assistance programs, as well as its own, in complying with these requests.[165] Enactment of such a provision further insures U.S. responsibility for the products which it exports.

F. Discretionary Banning Authority

A banning provision would authorize the appropriate agency to prohibit the exportation of a product if the product was so dangerous that no argument could be made for its export anywhere, or if it posed a serious risk to the health and safety of U.S. citizens.[166] Through this provision, the United States would assume responsibility for the well-being of U.S. citizens and foreign consumers of American-made products.

VI. CONCLUSION

Although the United States has enacted legislation designed to protect its citizens from the dangers posed by the consumption of unsafe chemicals, drugs, foods, and consumer products, it has not provided for the adequate regulation of these same products

163. *See* 7 U.S.C. § 136h (1970 & Supp. 1979); 15 U.S.C. § 1193 (1970 & Supp. 1979); 15 U.S.C. § 2055 (1970 & Supp.); 15 U.S.C. § 2613 (1970 & Supp. 1979).

164. *1978 Hearings, supra* note 2, at 74 (statement of S. Jacob Scherr).

165. Training could be provided through a program such as AID. It has also been suggested that the expense of the assistance be paid by the manufacturer. *Toxic Chemicals, supra* note 35, at 454-455.

166. See note 81 *supra*.

when they are exported.[167] This double standard has resulted in human and environmental harm that will continue unless laws are enacted enabling the United States to assume responsibility for products that American businesses send abroad.[168]

The effect of this legislation could be impaired by jurisdictional complications arising from the exportation of hazardous products by American subsidiary companies. However, since the United States can claim jurisdiction over subsidiaries, and thereby compel compliance with the statutes,[169] problems would not result unless the regulation was opposed by the government of the country in which the subsidiary is located.[170] Even then, the United States could exercise its jurisdiction and regulate the subsidiary accordingly, rather than acquiesce to the jurisdiction of the foreign government.[171] The application of the acts should therefore extend to both domestic and foreign-based, American-owned corporations.

In accepting responsibility, government agencies must be granted legislative authority to provide product information and scientific assistance to importing nations so that decisions can be made according to what is best for the American people, the people of the importing nation, and the environment. Current statutes do not go far enough in providing adequate regulatory authority. The solution, therefore, necessitates the enactment of laws containing the following provisions:[172]

(1) The authority for the agency to collect information concerning: the product, the country of destination, the location of production, evidence that the product comports with foreign buyer specifications, and evidence that the product is in accordance with the laws of the importing nation. This information could be supplied by the agency or by the exporter.

(2) A requirement that the product be labeled for export, and, where appropriate, indicate that the product is banned, not registered, or restricted for use in the United States, plus an ac-

167. See notes 88-96 *supra*.

168. See notes 19-49 and accompanying text *supra*.

169. See notes 50-58 and accompanying text *supra*.

170. *Id.*

171. *Id.*

172. *See* 1977 UNEP Decision, *supra* note 23; 1978 UNEP Decision, *supra* note 16; *1978 Hearings*, *supra* note 2, at 71-74 (statement of S. Jacob Scherr); 1978 REP. *supra* note 9, at 5-6.

companying statement of directions for use and warnings of adverse effects.

(3) A requirement that the agency notify foreign governments of any regulation or restriction imposed on a product. The governments should be notified through appropriate officials, U.S. embassies abroad, and international organizations, and the foreign government must certify that it has received the information.

(4) Prior to export, the manufacturer must notify the agency of its intent to export a regulated product, and the agency would notify the foreign government of such intent and, where requested, would give the reasons for the domestic regulations as well as information concerning alternative products. The foreign government would be required to certify that it has received such information.

(5) A provision providing for technical assistance and the training of officials of importing nations to aid them in making appropriate decisions.

(6) A provision mandating that the agencies cooperate with international organizations in their efforts to regulate and determine standards for hazardous products.

(7) A requirement that no product could be exported unless the product meets domestic standards; or unless the agency finds that the product is appropriate for use in the importing nation, that its use poses no risk to U.S. citizens, and the importing nation requests that export be allowed; or unless the importing nation requests exportation of the product and the agency finds that exportation would pose no risk to U.S. citizens, and the agency has not determined that exportation should be absolutely prohibited.

(8) The provisions of the legislation apply to domestic corporations and their foreign subsidiary companies.

Enactment of legislation containing these provisions would effectuate the U.S. responsibility and concern for human welfare while furthering diplomatic and trade relations with importing nations.

Janet Berk