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Prohibition on the Importation of Foods Containing the Residue of
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IMPORTING DEATH AS A PART OF FREE TRADE: An Argument for a Prohibition on the Importation of Foods Containing the Residue of Banned Pesticides

Derek Redmond*

I. INTRODUCTION

The United States is one of the largest exporters of pesticides in the world. Many of the pesticides are so dangerous that they are banned for use in the United States. There is no doubt that the use of these pesticides in the third world countries where they are exported is devastating. “But we are victims too. Pesticide exports create a circle of poison”1 by returning to the United States in the food we import. Concern over the dangers of pesticides became a major national concern after Rachel Carson published Silent Spring in 1962.2 Between 1962 and 1980, the United States Congress took major steps to regulate domestic production and use of pesticides.3 Then in 1980, David Weir and Mark Shapiro brought national attention to the hazards of allowing the unregulated exportation of dangerous pesticides when they published Circle of Poison.4 Pesticides banned for use in the United States were being exported to third world countries and used in the production of crops that were to be imported back into the United States covered with the lethal residue of the banned pesticides.5 Twenty years later the circle of poison still exists.

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1 David Weir & Mark Shapiro, Circle of Poison (1981).
2 Karen A. Goldberg, Comment, Efforts to Prevent Misuse of Pesticides Exported to Developing Countries: Progressing Beyond Regulation and Notification, 12 Ecology L.Q. 1025, 1031 (1985).
3 See id. at 1032.
4 See Weir & Shapiro, supra note 1.
Pesticides in general can be a valuable tool for protecting crops and preventing the spread of diseases.\(^6\) Certain pesticides, however, have been banned because they can also cause a plethora of negative affects. Banned pesticides cause environmental damage such as water pollution, soil degradation, and destruction of flora and fauna and health damage to humans such as cancer, reproductive and neurological impairments and mutation.\(^7\)

Recent congressional amendments to the Federal Food, Drug, and Cosmetics Act ("FFDCA")\(^8\) have increased the ease by which known carcinogens can reach the plates of the American public. The United States’ policy concerning the regulation of pesticides places American lives at risk by: 1) permitting the importation of agricultural products that have the residues of pesticides which are made in the United State but are banned from use in the United States; 2) using an analysis process that takes economic factors into consideration when evaluating the risk to human lives when setting regulatory standards; and 3) allowing the production and exportation of pesticides which have been proven to be so dangerous that they cannot be used at all in the United States. This Note analyzes whether current United States laws and international treaties are sufficient tools to protect the American public from the importation of dangerous pesticides and advocates for a ban on the export of pesticides which are banned for use in the United States. Part I introduces the historical context in which the debate over United States food safety is taking place. Part II will discuss current United States laws as they relate to the regulation of pesticide residues. Part III addresses the role international treaties have played in developing international import/export policy. Part IV explains how domestic and international law can be used to increase food safety which supports the conclusion in Part V that the export of banned pesticides should be prohibited.

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\(^6\) See id. at 73.

\(^7\) See id. at 73-74.

A. Historical Context of the Pesticide Debate

1. From Silent Spring to the Pesticide Boomerang

In 1962 Rachel Carson introduced the world to the dangers of pesticides through her book *Silent Spring*. "One expert on pesticides praised Carson’s work by proposing that the history of crop pest control might be divided into two periods—BC, Before Carson and AC, After Carson—and suggested that not until these latter days did man realize ‘that pesticides were not the panacea heralding the millennium.’"9 Carson warned that pesticides created an imbalance in the ecosystem that is as dangerous for humans as they are for the insects they were designed to kill.10 She argued that because insects possess the ability to develop resistance to pesticides, farmers would be required to continually increase the amount of pesticides applied.11 This would cause a build up of large amounts of pesticides, which would eventually make it up the food chain and become deposited in the fatty cells of humans.12 Carson believed that pesticides deposited in human fatty cells cause mutations in genetic material much like radioactive material.13 Carson also warned that the cumulative affects of multiple exposures to a variety of seemingly harmless pesticides could become lethal.14 *Silent Spring* brought the debate over the use of pesticides like DDT and kindred organic insecticides to the forefront of the public debate.15

Congress responded to the growing public concern by ratifying the Delaney Clause in 1958.16 The Delaney Clause defined any cancer-causing agent as presenting an unreasonable risk.17 Congressman Delaney, in advocating for a zero tolerance standard stated:

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9 JAMES WHORTON, BEFORE SILENT SPRING viii (1974).
10 See RICHARD PROCTOR, CANCER WARS 48 (1995).
11 Id. at 49.
12 Id.
13 See id. at 50.
14 See RACHEL CARSON, SILENT SPRING 31-32 (1962).
15 See WHORTON, supra note 9, at viii.
17 See Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified as amended at 21 U.S.C. § 348 (c)(3) (2000) [hereinafter Delaney Clause] ("[N]o additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found after test which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animals . . . ").
The part that chemical additives play in the cancer picture may not yet be completely understood, but enough is known to put us on our guard. The safety of the public health demands that chemical additives should be specifically protested for carcinogenicity. . . . That door should be slammed shut and locked. That is the purpose of my anticarcinogen provision.18

Experts in food law stated that the clause acted as an "unequivocal judgment that consumers should not be exposed to food ingredients shown to cause cancer, regardless of the benefits the ingredients might provide or the magnitude of the risk that they might present."19 The Delaney Clause prohibited the use of any food additive found in any amount to induce cancer in animals or humans.20 At the time that the Delaney Clause was enacted, scientists did not believe that significant numbers of food additives would prove to be carcinogenic. For example, in 1957 W.C. Hueper of the National Cancer Institute predicted that only four direct food additives, eight food colors and three classes of chemical contaminants would be carcinogenic.21

Hueper stated: It is unlikely . . . that many of the presently used additives and contaminants of foodstuffs, especially most of those of purely inorganic nature, unless they are radioactive or belong to the group of carcinogenic metals . . . introduce any carcinogenic hazard into the general food supply. . . ."22 Hueper's contention was proven wrong when in 1985 the National Cancer Institute identified 148 possible carcinogenic chemicals.23

In 1981 David Weir and Mark Schapiro showed the American public that, despite the Delaney Clause, their food was still not safe from contamination. The Circle of Poison explained that the United States does not escape hazardous chemicals simply by banning them at home because the

21 See Merrill, supra note 19, at 15-16.
23 See generally PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERVS., FOURTH ANNUAL REPORT ON CARCINOGENS (1985), quoted in Merrill, supra note 19, at 18.
pesticides return to us in a phenomenon called the "pesticide boomerang." The pesticide boomerang is the return of banned pesticides to the United States as residue on foods that we import. The book explained that in 1979 approximately ten percent of our imported food contained illegal levels of pesticides. At that time, nearly forty percent of the 1.6 billion pounds of pesticides produced in the United States were sold for export. This showed that United States pesticide exports were a major contributor to the food safety problem.

2. Debate Over the Delaney Clause

During the 38 years in which the Delaney Clause was law, Congress, environmentalists, scientists and industry advocates have been involved in a heated debate. The lines seem to be clearly drawn between those in support of the zero tolerance standard of the Delaney Clause and those in support of the negligible risk standard enacted in the Food Quality Protection Act ("FQPA").

The arguments used today in support of the negligible risk standard are no different than those used in 1958 to prevent the adoption of the Delaney Clause's zero risk standard. For example, during the debate over the Delaney Clause, The Commerce Committee favorably reported on a bill introduced by Chairman John B. Williams which lacked the anti-cancer language of the Delaney Clause. The Committee reasoned that "since the scientific investigation and the other relevant data to be taken into consideration by the Secretary include information with respect to possible cancer causing characteristics of a proposed additive, the public will be protected from possible harm on this count." The report advocated a safety standard which required the Food and Drug Administration ("FDA") to obtain "proof of reasonable certainty that no harm will result from the

24 See Weir & Schapiro, supra note 1, at 28.
25 See id. at 28.
26 Id.
30 Id.
proposed use of an additive." Congress applied the zero tolerance policy of the Delaney Clause because the science of 1958 was not equipped to handle such a responsibility. Our ability to see the error in the science of 1958 and the benefit of applying a zero risk standard to compensate for scientific uncertainty is an insight that is only gained in hindsight. Likewise, Congress's modern day assumption that science will provide a degree of certainty in determining safety is as unfounded as it was in 1958.

Proponents for the FQPA claimed that advances in science and technology justify abandoning the Delaney Clause. One advocate, Dr. Fred Shank, testified before the Subcommittee on Health and the Environment of the United States House of Representatives that:

At the time the Food Additive Amendments were enacted (1958), the Delaney clause, literally interpreted, was consistent with the scientific knowledge and technology of the day: the number of known or postulated carcinogens was fairly small, and the then state of the art capability to detect a substance at a level of a few parts per million was considered ultra-sensitive. As testing methods have become more sophisticated, however, it has become abundantly clear that a new approach for addressing risk is needed.

Dr. Shank failed to realize that the increased ability to detect a carcinogen simply means that we are more aware of the magnitude of the danger to which we are subjecting ourselves. Unfortunately, without having the knowledge of how the harm from exposure can be prevented, our current scientific knowledge is not sufficient to support a sound regulatory policy. Judge Tamm summarized the problem with scientific knowledge best when he said "what scientists know about the causes of cancer is how limited is their knowledge."

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31 Id.


3. Statistical Data Supports a Zero Tolerance Standard

Congress seems to have ignored the fact that when the safety net of the zero tolerance standard was in effect, thousands of lives were still being lost to pesticide poisoning each year. In the mid 1990s it was estimated that in America pesticides killed about 10,400 people. These pesticides included banned pesticides such as Aldrin, Dieldrin, and DDT. Banning these pesticides and increasing import regulation has failed to prevent these dangerous pesticides from invading our shores. In 1986 the FDA revoked the tolerances for residues of DDT, chlordane, and dieldrin. The revocation of the tolerances meant that any imported food containing trace amounts of the pesticides should be denied entry into the country. Yet ten years later, in 1996, all three pesticides were detected in foods being imported. In 1996, 11.5 percent of the sampled imported foods contained either violative levels of pesticide residues or illegal types of pesticides. In 1999, DDT, chlordane, dieldrin and aldrin (all banned in the United States) were four of the ninety pesticides detected in its annual regulatory monitoring survey. "Over seven percent of agricultural imports to the United States originate in Central American countries where pesticides banned or restricted in this country often contaminate food, feed, water and wildlife." These statistics are overwhelming proof that even today a significant amount of the foods that are imported into the United States contain the residue of illegal and banned pesticides. Using a science based regulatory standard will simply legalize the danger that already exists.

Supporters of a negligible risk standard claim that environmental activists are simply alarmists who use scare tactics rather than scientific evidence. Robert Lichter and Stanley Rothman have published several opinion surveys contrasting the views of scientists and activists on several

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35 Id.
38 See id.
39 Goldberg, supra note 2, at 1028-29.
environmental issues. They claim that these studies prove that environmental activists do not have the scientific support to justify a zero tolerance approach to regulating pesticides. While these studies have been affective in showing that there are significant differences between the opinions of scientists and activist, the authors failed to offer any scientific data as justification for the scientists’ opinions. The Lichter and Rothman studies illustrate that scientists who reject a zero tolerance approach to pesticides are merely operating under the risky presumption that pesticides should be considered safe until proven to be a significant danger. For example, in one study scientists and activists agreed that smoking and asbestos are major causes of cancer, yet only twenty-one percent of the scientists versus forty-seven percent of the activists considered DDT to be a major cause. The cancer causing effects of smoking and asbestos have been thoroughly studied and widely accepted as major causes of cancer. It is entirely likely that scientists are less likely to consider DDT as a major cause of cancer, despite the massive deaths that resulted from its application in the early 1960s, because the impact of DDT has not been fully researched and understood.

Robert Proctor makes it quite clear in his book, Cancer Wars, that the debate over the carcinogenic character of pesticides has been more of an issue of political position than scientific knowledge. Proctor explains that the current assumption in the research community is that cancer is caused by high-level exposures to carcinogens. However, that assumption has not always proven true. Each year 7,000 to 30,000 deaths occur in the United States from exposure to radon gas in homes, the majority of which occur at levels below the Environmental Protection Agency’s (“EPA’s”) safety threshold. Dangerous philosophical assumptions and political orientations undermine the reliability of scientific research as a tool for determining a standard of safety in pesticide regulation. Good regulatory policy should take account of this reliability problem and err on the side of safety. The only way to obtain safety is by adopting a zero tolerance standard and prohibiting the export and production of banned pesticides.

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41 See generally id. at 99-130.
42 See id. at 183.
43 See id. at 120.
44 See id. at 154.
45 Id.
46 See id.
47 See id.
4. The EPA and FDA Have Traditionally Advocated for Lower Standards

Over time the EPA and FDA have gradually acquiesced to the pressures of the chemical industry to ease chemical regulation. In 1973, the FDA, in contravention of the Delaney Clause, had a policy that a carcinogen had to have a cancer risk of less than one in one hundred million in order to be considered to have "no significant human risk." Then in 1977, the FDA lowered the standard and declared that a carcinogen food additive is safe if the risk is lower than one in one million. Yet, even after the repeal of the Delaney Clause environmentalists claim that the EPA is failing to adhere to the one in one million cancer standard which was established in the FDA's regulatory history and the legislative history of the 1996 FQPA.

Environmental groups have been fighting for years to push the EPA to enforce and advocate laws that would protect the American public. In *Les v. Reilly*, the EPA refused to ban certain pesticide that they knew caused cancer. The United States Court of Appeals held that the Delaney clause should be enforced strictly against all carcinogens in processed foods. The court reasoned that the Delaney Clause "intended to ensure that no carcinogens, no matter how small the amount, would be introduced into food." Despite the court ruling in *Les v. Reilly* the EPA refused to consistently enforce the clause if the cancer risk was not higher than one in one million.

Congress, like the EPA, has traditionally provided little to no support for a zero tolerance standard even when it was clearly necessary. In 1998, the Center for Public Integrity published a report entitled "Unreasonable Risk: The Politics of Pesticides." The study shows that "Congress has . . . put the

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49 See id.
51 See *Les v. Reilly*, 968 F.2d 985, 986 (9th Cir.1992).
52 See id.
53 See id. at 990.
54 Id. at 989.
55 See Merrill, supra note 19, at 9 ("On only four occasions did FDA rely on the Clause as the basis for refusing to allow a substance in food.").
56 See id.
economic interests of the pesticide industry ahead of the safety of the American public."\textsuperscript{57} The study showed that "from 1988 to 1995, more than 65 bills were introduced in Congress to tighten pesticide regulations. Not one of them passed."\textsuperscript{58}

B. Congress Repeals the Delaney Clause

1. Congress Adopts a Negligible Risk Standard

Despite increased technology and regulatory power the pesticide boomerang still exists today and it may get worse. In 1999 the FDA reported that imported foods were three times more likely to contain illegal pesticides than domestic food products.\textsuperscript{59} Yet, in 1996 Congress repealed the absolute protection of the Delaney Clause and replaced it with a lower and less reliable one. The Delaney Clause was replaced by a "negligible risk" standard, which is to be determined by the EPA.\textsuperscript{60} The new Act, entitled the FQPA, states:

As used in this section the term "safe," with respect to a tolerance for a pesticide chemical residue, means that the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.\textsuperscript{61}

This new standard relies on scientific knowledge to assess the risks and removes the safety net of an absolute bar on cancer causing pesticides. A science-based standard places the public at risk on two levels. First, the scientific data identifying the cancer causing properties of pesticides are

\textsuperscript{58} Id. at 4.
\textsuperscript{59} See Food and Drug Admin., Pesticide Program Residue Monitoring 1999, at http://www.fluoridealert.org/ pesticides/ FDA.Residu.Monitor.1999.htm (last visited Nov. 20, 2002) (reporting that 0.8 percent of domestic samples contained violative residues vs. 3.1 percent violative residues found in imported samples).
often incomplete, subject to error and skewed by industry advocates. Second, the translation of data into scientific conclusions may be grounded in unproven assumptions and deep-seated political views. The negligible risk standard subjects the American public to several layers of risk which are unnecessary and possibly fatal.

2. A Scientific Risk Assessment Leaves Room for Too Much Error

The scientific risk assessment required by FQPA is grounded in the misconception that the EPA can achieve scientific certainty in assessing the cancer causing affects of pesticides. However, scientists, environmentalists and industry advocates agree that the scientific data is not sufficient to assess the cancer causing potential of a carcinogen. The possibility for error in assessing causation, epidemiology and threshold exposure levels is so great that current methods of risk assessment are not sufficient to support a reliable government regulatory scheme.

Ray McAllister, director of regulatory affairs of the American Crop Protection Association, a pesticide industry group, stated that the “data are too sparse to draw definitive conclusions about the role that the minor constituents of food—like trace amounts of pesticides . . . play in causing or preventing cancer in humans.” The National Academy of Science determined that of the 8,627 chemicals regulated or classified by the FDA complete risk evaluations were available for only five percent.

A recent scientific debate over the carcinogenic character of a widely used group of insecticides called “pyrethrins” illustrates that modern day

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62 Industry advocates and chemical producers claim that current scientific studies are an inaccurate measure of the cancer causing potential of pesticides because they overestimate the risks to humans by using high-level exposures in animal testing. See PROCTOR, supra note 10, at 167-70. Likewise, environmental advocates claim that the studies are a poor predictor because it fails to take into consideration the cumulative affects of low-level exposures. See id. at 154 & 170.

63 See CROSS, supra note 33, at 64 (“Extensive reliance on quantitative risk assessment may be deemed unscientific and unreliable for use in government regulation of carcinogens.”).


65 See Merrill, supra note 19, at 16-17.
science is still ill equipped to provide definitive answers. The EPA Office of Pesticide Programs Cancer Assessment Review Committee issued a final rule designating pyrethrins as likely to cause cancer. The designation was based on studies conducted in both 1995 and 1999 in which tumors were detected in rats exposed to the pesticide. Yet industry representatives have been purported to be providing data to the EPA which if accepted would change the seemingly “final rule” and remove the pesticide from the list of reported carcinogens.

When the EPA determines that a carcinogenic pesticide poses a negligible risk it has the functional affect of establishing a threshold below which exposure to the pesticide should be safe. Yet, the most hotly debated scientific issue concerning carcinogens is whether there actually are “thresholds” below which exposure to a carcinogen can be safe. In 1983 Dr. Bernard Weinstein of the Columbia University School of Public Health testified before Congress:

Although the response to various types of carcinogens is likely to be dose dependent, I know of no evidence that clearly establishes a threshold level for any carcinogen. Furthermore, even if this were established in a given experimental system, it would be difficult to predict with confidence the threshold level in a heterogeneous human population.

This statement is as true today as it was in 1983. Scientists such as Bruce Ames and industry advocates claim that exposure to low levels of certain

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67 See id.
68 See id.
69 See id.
70 See id.
73 Bruce Ames, leader in cancer research and author of several works, is often referred to as the twenty-third most often cited scientist in the English speaking world. PROCTOR, supra note 10, at 11.
carcinogens pose no cancer risk because up to a certain point the body has an
ability to detoxify foreign substances.\textsuperscript{74} These scientists argue that high dose
animal studies overstate the cancer risk to humans.\textsuperscript{75} Yet John Bailar, III,
former editor of the Journal of the National Cancer Institute conducted a
study of more than a thousand separate bioassays to show that high dose
studies underestimate risks almost as much as they overestimate risks.\textsuperscript{76}
Furthermore, David Hoel\textsuperscript{77} discovered through one of the largest United
States rodent carcinogen testing programs that there was no correlation
between toxicity and tumor formation.\textsuperscript{78} The study showed that a carcinogen
need not reach toxic or near toxic levels in order to cause cancer.\textsuperscript{79} Modern
science has progressed from being able to detect pesticides at a level of parts
per million in the early 1960s to parts per billion in the 1990s. Yet, despite
an increase in detection capabilities we are still not able to objectively
determine the threshold level below which exposure to a pesticide will not
cause cancer.\textsuperscript{80} Without an understanding of what constitutes a safe threshold
level, knowing how much pesticides are consumed is irrelevant. The only
way to have certainty in the safety of food is to have an absolute ban on those
few chemicals we know have long lasting negative affects.

The current scientific consensus seems to be that an imbalanced diet
is a greater cause of cancer than pesticides and food additives.\textsuperscript{81} Congress, by
enacting the FQPA, empowered the EPA to consider the effects of pesticide
restrictions on the prices of fruits and vegetables. Because of Congressional
action and scientific consensus, the focus has shifted from preventing
exposure to pesticides to ensuring a balanced diet. Studies by Bruce Ames and other prominent scientists suggest that environmental regulation of carcinogenic pesticides "can actually harm health by increasing the price of fruits and vegetables." These scientists fail to consider, however, the power of market forces. It is possible that if pesticide manufacturers were forced to sell safer non-carcinogenic pesticides, they would have to lower the prices of those pesticides to stay competitive instead of passing the price on to the consumer. This policy would also make American farm products competitive with their foreign competitors by applying the same safety standards to foreign importers as are applied domestically. A recent study commented on by Philip Landrigan\(^3\) shows that despite Congress' efforts the rate of cancer in children continues to rise.\(^4\) Lowering regulatory standards in order to manage import prices is a misguided and dangerous method for protecting the public health.

3. The United States Should Prohibit the Export of Banned Pesticides

Pesticide poisoning occurs in several ways; the toxic chemical may be ingested, inhaled or absorbed through the skin.\(^5\) Some pesticides are necessary to prevent insects, nematodes, fungi, weeds and rodents from destroying the world's food supply.\(^6\) In fact, in certain cases some pesticides

\(^{82}\) PROCTOR, supra note 10, at 144.
\(^{83}\) PBS reported:

Philip Landrigan is chairman of the Department of Community and Preventative Medicine at the Mount Sinai School of Medicine in New York and director of Mount Sinai's Center for Children's Health and the Environmental. He is a professor of pediatrics and preventative medicine... and a former senior advisor to the Environmental Protection Agency (EPA) for Children's Health and the Environment.... From 1988 to 1993, Dr. Landrigan served as chair of the Committee on Pesticides in the Diets of Infants and Children at the National Academy of Sciences, National Research Council (NRC).


\(^{84}\) See Pat Phibbs, Study Says Environmental Factors Stronger Than Heredity as Potential Cause of Cancer, 31 Env't Rep. (BNA) 1635 (Aug. 4, 2000) (The study shows that "the rate of contracting non-Hodgkin's lymphoma is increasing... [due] to exposure to pesticides.").

\(^{85}\) See Goldberg, supra note 2, at 1026, citing D. BULL, A GROWING: PESTICIDES AND THE THIRD WORLD POOR 28 (1982).

\(^{86}\) See Goldberg, supra note 2, at 1029.
have been used to prevent the spread of diseases such as malaria. However, there are several pesticides that the United States government has identified as containing cancer-causing agents. These carcinogenic pesticides were banned for use in the United States and should be banned from export to third world countries. American lives can be exposed to dangerous pesticides in more ways than just through imported foods. There was one case in which pesticides which were applied in West Africa were blown back into the United States by the Atlantic trade winds. The FDA believes that its resources for import surveillance are not keeping pace with increased entries and the fiscal reality makes it improbable that regulatory resources will ever match this increase. The only way to ensure that American lives are safe from exposure to banned pesticides is to prohibit their export.

II. CURRENT UNITED STATES LAWS ON PESTICIDES

A. Application of the FQPA

“Pesticides are substances used to prevent, destroy, repel or mitigate any pest ranging from insects, animals and weeds to microorganisms such as fungi, molds, bacteria and viruses.” The Federal Insecticide Fungicide, Rodenticide Act (“FIFRA”) empowers the EPA to register pesticides and set tolerance levels. “A ‘tolerance’ is the level of a specific pesticide allowed on a specific agricultural commodity.” The FDA and United States Department of Agriculture (“USDA”) enforce these tolerance levels by inspecting foods being imported. The Federal Food Drug and Cosmetic Act (“FFDCA”) prohibits the sale of “adulterated” food. The FFDCA

87 See id. (DDT has been one of these pesticides).
88 See id.
96 See Robert M. Millimet, The Impact of the Uruguay Round and the New Agreement on
defines an adulterated food as one that "bears or contains any poisonous or deleterious substance which may render it injurious to health."97 The EPA conducts studies to determine the levels at which each pesticide presented for registration may be safely used.98 A pesticide can receive a registration if it presents "no unreasonable effects to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide."99 The Delaney Clause legally defined any cancer-causing agent as presenting an unreasonable risk.100 Therefore, pesticides such as DDT, dieldrin and chlordane were banned from use in the United States.

If DDT, dieldrin, and chlordane were evaluated on today's standard there would be no certainty that these dangerous pesticides would have been banned. Under today's standards advocates for the use of banned pesticides such as DDT may argue that the pesticides can be valuable tools in preventing the spread of vector-borne diseases. This argument should fail because the use of DDT in India shows that these carcinogens are not affective tools for disease prevention. In India the initial use of DDT reduced the spread of malaria from 7.5 million cases to 50,000; however the insects developed a resistance to DDT and the number of cases increased back to 6.5 million.101 In that instance DDT failed to stop the spread of malaria, it increased the resistance of the pests, and it increased the cancer risk to the entire population. Unfortunately, today's standard makes the disease prevention argument a viable reason for allowing the use of other carcinogenic pesticides. Thus, the negligible risk standard may result in exposing the American public to lethal pesticides due to poor policy decisions as well as errors in scientific analysis.

The negligible risk standard is supposed to be more effective than the Delaney Clause because it provides special protection for infants and children and it requires the assessment of cumulative risks. "In establishing tolerances, EPA must assess risks to infants and children on the basis of 'available information' concerning (1) consumption patterns among infants and children, (2) special susceptibility of infants and children and (3)

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97 Horton, supra note 89, at 142 (citing 21 U.S.C. § 331(a)).
99 Id. at 6.
100 See supra note 17 and accompanying text.
101 See Reynolds, supra note 5, at 75.
cumulative effects of exposures to infants and children." The EPA is required to assess the cumulative risk of exposure to multiple pesticides which have similar modes of toxicity. Currently the EPA plans to evaluate three classes of pesticides—organophosphates, carbamates, and chloracetanilide herbicides. There is no doubt that a cumulative risk assessment would be a valuable tool in identifying the true carcinogenic character of pesticides. The problem with setting policy based on the cumulative risk assessment method is that it is a new and undeveloped system, which can lead to decisions being based on guesses instead of empirical analyses. Unfortunately, the assessment is based on the scarce scientific evidence that exists today. In 1998 Fenner Crisp, special assistant to the EPA assistant administrator, said, “the EPA has had ‘little experience’ with evaluating classes of similar pesticides.” Congress, recognizing that the information is not perfect, requires the EPA to apply a “tenfold margin of safety” to take into account “potential pre- and post-natal toxicity.” While this precaution may seem reasonable it still may fail to capture the true error.

B. Tolerances Under the FQPA

A banned pesticide may not be sold or distributed within the United States. “However, as long as the pesticide’s tolerances remain in effect, foods containing residues of the pesticides may be sold in the United States.” Federal law does not require that the tolerances of banned pesticides be canceled. Since the enactment of the child protection standard in 1996 the EPA has struggled with limited resources and very little congressional guidance on some critical issues. This means that Congress has allowed the EPA to spend the last five years importing known carcinogens without knowing the levels at which they can be imported safely. The EPA

103 See 21 U.S.C. § 346a(b)(2)(D)(v) (2000) (“[T]he administrator shall consider... available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity.”).
105 See id.
106 Id.
107 McGarity, supra note 70, at 118.
108 GEN. ACCOUNTING OFFICE, supra note 36, at 12.
109 See id.
110 See McGarity, supra note 70, at 134.
recognizes that the tolerances for pesticides that have been banned should be revoked. The EPA’s 1982 policy states, “[w]hen a pesticide’s registration for a food or feed use is canceled because of a concern about the safety of the pesticide, the associated tolerance . . . is no longer justified and logically should be revoked.” The EPA went on to state, “the [FDA and USDA] are concerned that having formal tolerances remaining in effect for canceled pesticides may serve to condone use of these pesticides in this country and/or in or on commodities imported from foreign countries.” The 1996 amendment of the FFDCA established that the tolerances of banned pesticides must be revoked within 180 days of the suspension of the pesticide registration.

Banning a pesticide for use in the United States, however, does not necessarily mean that the tolerance will be revoked. The FFDCA allows the EPA to maintain tolerances for certain banned pesticides which the administrator determines are unavoidable. The FDA, EPA and USDA have created action levels that function as tolerances for certain pesticides such as DDT, chlordane, and dieldrin. These pesticides are Persistent Organic Pollutants (“POP”s) because they do not break down readily in the environment. The EPA allows certain levels of these pesticides to exist in foods on the grounds that exposure is unavoidable as a result of the widespread use during the 1950s and 1960s. However, the continual production and exportation of banned pesticides perpetuates the cycle of pollution and prevents the environment from ever becoming cleansed of the illegal pesticides. The FDA, EPA and USDA are tasked with setting action levels that are low enough to make the health risks negligible. However, in 1994 a study by the EPA on the residues of DDT, chlordane, and dieldrin in fish reported that the action levels were still too high to protect the health of consumers who eat fish.

111 GEN. ACCOUNTING OFFICE, supra note 36, at 12.
112 Id.
113 Id.
116 See GEN. ACCOUNTING OFFICE, supra note 36, at 12.
117 See id.
118 See id.
119 See GEN. ACCOUNTING OFFICE, supra note 36, at 12-13.
120 See id.
C. United States Regulation of Pesticide Exports

The only major efforts by the United States to regulate the export of pesticides have been to require informed consent from the country to which the pesticide is being exported. In January 1981, President Carter responded to the concern over the hazards raised by exporting pesticides by enacting Executive Order Number 12,264, which established a United States Hazardous Substances Export Policy.\(^2\) "The order strengthened export notice requirements already required by statute and established formal export licensing controls for "extremely hazardous substances."\(^2\) However, the Prior Informed Consent system is flawed. Opponents argue that the process duplicates information exchange systems already in existence. The system is also impractical, because it burdens a high speed industry that requires rapid movement of agricultural products to prevent spoilage, food shortage, and famine."\(^2\) Ultimately, the informed consent program is an ineffective tool for preventing the circle of poison. In 1990 the United States Customs Service reported that seventy-three percent of the 465,338,865 pounds of pesticides shipped from the United States contained incomplete and inaccurate labeling making it impossible to accurately assess the hazard level of the pesticides.\(^2\) Of the pesticides that were identifiable the Customs Service records indicate that 52,022,337 pounds were banned, unregistered or restricted-use pesticides.\(^2\)

III. INTERNATIONAL PESTICIDE POLICIES

The international trade of agricultural products is regulated by three major methods: 1) international quality standards; 2) international trade agreements; and 3) national regulatory laws.

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\(^{121}\) See Goldberg, supra note 2, at 1035, citing Exec. Order No. 12,290, 3 C.F.R. § 127 (1982).

\(^{122}\) Goldberg, supra note 2, at 1035.

\(^{123}\) Reynolds, supra note 4, at 78.

\(^{124}\) See id. at 93.

\(^{125}\) See id. at 94.
A. Pesticide Regulation and Codex

International organizations have traditionally focused on regulating pesticides by creating a better information network. In 1962 the Codex Alimentarius Commission ("Codex") was created to establish an international standard for science-based food safety and quality. Codex operates under the joint umbrella of the Food and Agriculture Organization, a branch of the United Nations ("UN"), and the World Health Organization. Codex is recognized as the international authority on food safety and quality. Because Codex standards are used by many countries as the basis for their food regulations, the United States has a vested interest in ensuring that Codex standards are scientifically and technically sound. The United States has representatives in two thirds of the Codex Committees and task forces. Unfortunately, despite the United States’ extensive involvement many of the Codex standards for pesticides, food additives and nutritional labeling are substantially weaker than United States standards. When a country ships adulterated food it violates the Codex Code of Ethics for International Trade in Food. However, Codex regulation is nonbinding. When adulterated food products are detected the importing country should inform the authorities in the exporting country. Codex relies on the laws and governmental agencies within the exporting country to enforce the code of ethics. Ultimately, this places the safety of American lives in the hands of foreign governments, many of which do not have the level of sophistication necessary to enforce their own laws.

127 See Joseph A. Levitt & Michael Wehr, The Importance of International Activities to the Work of the Food and Drug Administration’s Center for Food Safety and Applied Nutrition, 56 FOOD AND DRUG L.J. 1, 6 (2001).
129 See Goldman, The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation, J. ENVTL. L. & LITIG. 11, 18-19 (1992). See also Levitt & Wehr, supra note 122, at 6; Hyman, supra note 123, at 1723 (explaining that Codex Alimentarius Commission has 165 member countries).
130 See Levitt & Wehr, supra note 127, at 6.
131 See Goldman, supra note 129, at 18-19.
132 See Horton, supra note 89, at 149.
133 See id.
134 See id. at 151.
135 See Horton, supra note 89, at 151.
As an international regulatory agency Codex sets international tolerances for carcinogenic pesticides.\textsuperscript{136} The FQPA requires that the EPA consider the Codex standard when setting tolerances.\textsuperscript{137} If the EPA adopts a standard that is different from the Codex standard the FQPA places an additional reporting burden on the EPA.\textsuperscript{138} In such a case, 21 U.S.C. § 346a(b)(4) requires that the EPA issue a public comment explaining why they are not adopting the international standard.\textsuperscript{139} Thus the FQPA has the effect of transforming the non-binding Codex standards into an international standard to which the EPA is accountable. The added reporting burden acts as a disincentive for the EPA to diverge from the Codex standard.

B. Pesticide Regulation and GATT

1. Development of the GATT

Trade agreements play a central role in regulating the use of pesticides in the international food trade.

The purpose of forming a trade agreement between countries is to eliminate barriers to free trade that are created by a lack of uniformity in national policies. In order to facilitate their ability to compete in global trade, individual nations have formed regional agreements to remove domestic regulations that discriminate against trade between countries who are parties to a particular agreement.\textsuperscript{140}

The General Agreement on Tariffs and Trade ("GATT"), the UN's

\textsuperscript{136} See Hyman, supra note 128, at 1723 (In 2000 The Codex Alimentarius contained more than 200 food safety standards, guidelines and codes of practice.).

\textsuperscript{137} See 21 U.S.C. § 346a(b)(4) (2000) (In establishing a tolerance for a pesticide chemical residue in or on a food, the Administrator shall determine whether a maximum residue level for the pesticide chemical has been established by the Codex Alimentarius Commission.).


\textsuperscript{139} See 21 U.S.C. § 346a(b)(4) (2000) (If a Codex maximum residue level has been established for the pesticide chemical and the Administrator does not propose to adopt the Codex level, the Administrator shall publish for public comment a notice explaining the reasons for departing from the Codex level.).

\textsuperscript{140} Marc Victor, Precaution or Protectionism? The Precautionary Principle, Genetically Modified Organisms, and Allowing Unfounded fear to Undermine Free Trade, 14 TRANSNAT'L LAW 295, 298 (2001).
International Code of Conduct on the Distribution and Use of Pesticides and the North American Free Trade Agreement ("NAFTA") are all international trade agreements that have played a major role in the regulation of pesticides. "Trade agreements allow restrictions on the importation of goods under certain circumstances." Unfortunately, all of these agreements have fallen far short of providing the necessary protection to American citizens.

The agreement that formed the [World Trade Organization] is a truly global trade agreement consisting of 134 member countries and thirty observers, of which both the EU and the United States are members. The goal of the [World Trade Organization] agreement is the same as the goal of regional trade agreements: the elimination of discriminatory barriers to trade.142

The GATT was established in 1947 in response to the World War II economic summit held in Bretton Woods, New Hampshire.143 The agreement is designed to have several rounds in which binding international rules are adopted in an effort to reduce trade barriers.144 Before the Tokyo Round the international community did not recognize the relationship between trade and environmental regulation.145 The Tokyo Round146 was criticized for lacking a green component.147 The environmentalist criticism sparked the focus on environmental harmonization in the Uruguay Round.

The major provisions of the Uruguay Round of the GATT,148 which regulate pesticides, are the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")149 and the Agreement on

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141 Id.
142 Id.
143 See Miller, supra note 126, at 210.
144 See id. at 211.
145 See id.
147 See Miller, supra note 126, at 211.
149 See Horton, supra note 89, at 152 (citing Agreement on the Application of Sanitary or Phytosanitary Measures, Apr. 15, 1994, pmbl., arts. 2.1, 3.3 in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1381 [hereinafter SPS Agreement]); see also Miller, supra note 121, at 211.
Technical Barriers to Trade ("TBT Agreement").\(^\text{150}\) The SPS Agreement created exceptions to the GATT rule against trade barriers if the measure is necessary to protect human, animal or plant life or health.\(^\text{151}\) The SPS Agreement requires measures to be based on scientific principles. The SPS Agreement works with the TBT Agreement to prevent violative trade barriers.\(^\text{152}\) The TBT Agreement guides the development, adoption and application of product standards and procedures applied to determine whether a certain product meets the international standards.\(^\text{153}\) Both agreements recognize the sovereign right of countries to establish their chosen levels of consumer protection.\(^\text{154}\) This means that the third world countries that are using banned pesticides are free to set lower export/import standards than those of the United States. Therefore, a third world country knowing that the United States is only able to inspect one percent of imported food products\(^\text{155}\) may choose to send adulterated foods if the chances of economic gain are higher than the chances of getting caught. The success of many of the international regulatory efforts depends on whether the exporting country has incorruptible officials who rigorously enforce rational legislation and regulation.\(^\text{156}\) A country with lower standards than ours may also utilize the international forum to force the United States to lower its standards.\(^\text{157}\)

In 1985 the UN Food and Agriculture Organization ("FAO") adopted the International Code of Conduct on the Distribution and Use of Pesticides ("Code of Conduct") which was adopted as part of the Uruguay Round of the GATT.\(^\text{158}\) The Code of Conduct established standards for the manufacture, packaging, labeling and disposal of pesticides.\(^\text{159}\)

\(^{150}\) See Horton, supra note 89, at 152 (citing Agreement on Technical Barriers to Trade, Apr. 15, 1994, pmbl., in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1427 [hereinafter WTO Agreement].

\(^{151}\) See Hyman, supra note 128, at 1724.

\(^{152}\) See id.

\(^{153}\) See id. at 1724.

\(^{154}\) See Horton, supra note 89, at 152.

\(^{155}\) See Stephanie Dreckman, Negotiating Environmental Standards for an Agricultural Free Trade Agreement Between Chile and the United States, 4 Sw. J. L. & TRADE AM. 227, 233 (1997).

\(^{156}\) See Horton, supra note 89, at 154 & 158.

\(^{157}\) See Miller, supra note 126, at 217.

\(^{158}\) See id. at 210.

\(^{159}\) See id.
A pesticide is placed in the PIC [Prior Informed Consent] process noted above if the pesticide meets one of three criteria: (1) the chemical has been banned for health or environmental reasons in five or more countries; (2) the chemical has been banned or severely restricted for health or environmental reasons in a single country after January 1, 1992; or (3) the chemical causes health or environmental problems under the condition of use in developing countries.~160

The Code of Conduct is not very effective because it is not binding and it lacks enforcement provisions.161

The Codex standards provide the internationally accepted maximum restrictions on import laws.162 A country may impose stronger safety restrictions on the importation of foods but the country if challenged must provide "scientific justification" for the higher standard.163 "This requirement is intended to prevent agricultural protectionism by a WTO member who may be seeking to evade its free trade commitments to other member countries."164 Unfortunately, this places the burden of proof on the importing country to show that its efforts at protecting the health and safety of its citizens is legitimate. In order to scientifically justify safety measures in excess of international standards, the SPS Agreement requires a "risk assessment" to evaluate the likelihood of adverse biological and economic consequences.165 "The risk assessment must be based on an examination and evaluation of available scientific information."166 In an era in which hundreds of new pesticides are developed each year, acquiring comprehensive scientific data on each new pesticide can be a daunting task. The burden is further exacerbated by the long latency periods and cumulative effects of most pesticides.

~160 Reynolds, supra note 5, at 82.
161 See Miller, supra note 126, at 211.
162 See Victor, supra note 140, at 307-308.
163 See id. note 140, at 307.
164 See id.
165 See id.
166 See id.
2. The GATT and International Harmonization

The United States challenge to the European Union’s ("EU") ban on the use of hormones in beef is an example of how an international treaty can be used to defeat national efforts to protect its citizens. In 1980, the illegal use of hormones in veal production caused hormonal irregularities in some European children. Consumer concern over the use of hormones motivated the EU to ban the importation of food products with genetically engineered hormone stimulants. The enforcement of the directive resulted in a ban on most of the United States beef products. The WTO commissioned several studies that found that the use of hormones produced little health risk. The EU tried to argue that the ban was justified because it removed all the possibility of risk. The Appellate body of the WTO held that the EU could not ban the use of the hormones on a "zero risk" policy. The EU also tried to invoke Article 5.7, which is a precautionary clause that allows provisional application of a safety measure "in cases where relevant scientific evidence is insufficient." The appellate body held that a precautionary measure could not be implemented without sufficient scientific evidence to support its necessity. This decision had the effect of preventing a national government from responding to public concern and increasing safety measures without first having extensive scientific data to justify the precaution. While the United States’ efforts to remove the ban may have been a huge success for the United States beef export industry, commentators have noted that the rejection of the "precautionary principle" may backfire on the United States environmental efforts in the future.

The inability to restrict pesticides that have not been extensively tested places the American public in the position of being a victim of the same risks that existed in the 1940s when DDT was first introduced. DDT was first introduced in 1939 against the Colorado potato beetle which was

167 See Victor, supra note 140, at 309.
168 See id. at 310.
170 See Victor, supra note 140, at 311.
171 See id.
172 See id.
173 Id. at 314.
174 See id. at 307.
175 See Victor, supra note 140, at 314 n.157 (citing Steve Charnovitz, Environment and Health Under WTO Dispute Settlement, 32 INT’L LAW 901, 913 n.89 (1998)).
plaguing Europe. The first American tests were not conducted until 1942, but the product scored so impressively in the initial tests that it went into mass use immediately. Like DDT unregistered pesticides being used in foreign countries have the potential of gaining popularity and mass use before adequate studies have been conducted to assess its true danger. When DDT was introduced scientists were sensitive to the dangers of DDT to human health but a lack of regulatory and legal power prevented any action from being taken until the casualty rate rose so high that Congress could no longer ignore its fatal effects. One historian noted that in the 1940s “the failure to escape a DDT residue hazard was due less to ignorance that residues might be dangerous . . . than to the lack of legal power to prohibit the sale and use of DDT until its safety could be determined.” Likewise, under the GATT, the FDA may have some evidence that an unregistered pesticide might be dangerous but the lack of scientific data and treaty restrictions may prevent the United States from enacting the precautions to prevent American exposure to the risk.

The United States government has reassured the public that the United States will not compromise the health and safety of its citizens for international harmony. However, this policy has proven false on more than one occasion. In 1990, when EPA inspectors detected the fungicide procymidone in some French and Italian wines imported from the European Community, the EPA issued temporary tolerance levels for the fungicide in order to avoid GATT dispute procedures. The GATT does not have the authority to overturn United States federal law; however, the political pressure created by the threat of a dispute resolution and possible international sanctions can influence legislatures to compromise national safety for international harmonization. Just as the United States has used the GATT dispute resolution process to force other countries to lower their standards the United States can also be forced to lower its standards. For example, the United States challenged the United Kingdom on its health-based ban on the

176 See WHORTON, supra note 9, at 248.
177 See id. at 248.
178 See id. at 251.
179 WHORTON, supra note 9, at 251.
181 See Miller, supra note 126, at 213.
182 See id.
183 See Millimet, supra note 96, at 486.
sale of moist snuff using the dispute resolution provisions of GATT.\textsuperscript{184} The United States tobacco industry successfully overturned the ban through an action in the British courts.\textsuperscript{185} However, it was the threat of international action that prevented the British government from reinstating the ban on proper procedural grounds.\textsuperscript{186} Anytime the United States is able to force an international power such as the United Kingdom to lower its standards there is no reason why we should not believe that we too may become victims of international pressure.

C. Pesticide Regulation and NAFTA

Neither the GATT nor the NAFTA and its side agreements have been sufficient tools for establishing any reliability in the safety of internationally traded foods.\textsuperscript{187} NAFTA and its side agreements were established in 1993 between Mexico, Canada and the United States.\textsuperscript{188} The agreements are best analyzed as part of the North American Regime. The regime is comprised of NAFTA, the North American Agreement on Labor Cooperation ("NAALC") and the North American Agreement on Environmental Cooperation ("NAAEC").\textsuperscript{189} Originally President Bush only wanted NAFTA as a method of combating the trade blocs that were forming in Europe and Asia.\textsuperscript{190} Outcry from a coalition of labor, environmental, agricultural, and human rights groups postponed the signing of the agreement until President Clinton entered into office.\textsuperscript{191} President Clinton championed the cause of the environmentalists and labor unions and was able to negotiate the NAALC and NAAEC.\textsuperscript{192} NAFTA, through the NAAEC, recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.\textsuperscript{193} The NAAEC addresses many of the environmen-

\textsuperscript{184} See Goldman, \textit{supra} note 129, at 15-16.
\textsuperscript{185} See id.
\textsuperscript{186} See id.
\textsuperscript{189} See id.
\textsuperscript{190} See id. at 405.
\textsuperscript{192} See Kibel, \textit{supra} note 188, at 407.
\textsuperscript{193} See id. at 412.
talists' fears of harmonizing downward by allowing each country to create its own environmental standards while requiring strict enforcement of those standards. The NAAEC has a substantial amount of enforcement authority. The agreement allows actions to be brought by citizens against any of the three governments, and it allows actions by the governments in the agreement against each other. Since March of 2000, fifteen claims have been adjudicated before the secretariat of NAFTA. None of the claims have involved pesticides. The major difference between the North American Regime and other international treaties is that the regime encourages countries to consider prohibiting the export of banned pesticides. One commentator stated with excitement:

Most significantly, the United States has for the first time agreed to consider a total prohibition on the export of banned pesticides. Even though the phrase 'considering' allows the U.S. government significant interpretational leeway, it nevertheless represents a major shift in U.S. policy toward this issue.

If the United States were to prohibit the export of banned pesticides it would have a major economic affect on the pesticide industry. "In 1990 approximately twenty-five percent of the pesticides exported from the United States were banned, severely restricted, or unregistered." However, such a prohibition may provide the necessary push to drive developing countries toward utilizing safer pesticides and better technology.

In May 2001, the UN took a major step toward effecting an international ban on many of the same pesticides that are banned in the United States. The Final Act of the Conference of Plenipotentiaries on the

194 See Dolmat-Connell, supra note 191, at 467-68.
195 See Kibel, supra note 188, at 414.
196 See id. at 417.
198 See Dolmat-Connell, supra note 188, at 467-68.
199 Dolmat-Connell, supra note 188, at 468-69.
200 Hofgard, supra note 180, at 661.
Stockholm Convention on POPs identified twelve POPs\(^{201}\) that should be banned.\(^{202}\) The Act calls on each participating country to prohibit the production and use of the twelve POPs.\(^{203}\) However, the UN identified several exceptions under which the POPs may be used. The Act fails to protect the world’s food supply because it allows the continued use of aldrin and dieldrin as insecticides.\(^{204}\) Furthermore, the Act does not apply to pesticide residues.\(^{205}\) Each country is allowed to apply to the executive director of the United Nations Environment Program who is the acting secretariat of the Act\(^{206}\) for an exemption for certain uses.\(^{207}\) The agreement is binding but the impact of the agreement on United States law and policy remains to be seen. As of this note Congress has not created any legislation limiting the export of banned pesticides beyond the Federal Informed Consent requirements.\(^{208}\)

IV. **DOMESTIC ACTIONS**

**A. Current Action by the United States**

The FDA acknowledged that the growth in the volume and variety of imported foods has significantly reduced the effectiveness of the traditional monitoring and border inspection methods of preventing the importation of adulterated foods.\(^{209}\) Therefore, the FDA has embarked on a variety of international activities aimed at addressing various issues in third world countries from whom we import food.\(^{210}\) The FDA’s Center for Food Safety and Applied Nutrition has created an action agenda for 2000-2002, which is

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\(^{202}\) See id. art. 3(1)(a).

\(^{203}\) See id. app. A.

\(^{204}\) See id. app. A n. i.

\(^{205}\) See id. art. 20(3).

\(^{206}\) See id. art. 8(1).

\(^{207}\) See generally 21 U.S.C. § 346a (2000). See 7 U.S.C. § 136o(a) (2000) “Notwithstanding any provision of this subchapter, no pesticide or device or active ingredient used in producing a pesticide intended solely for export to any foreign country shall be deemed in violation of this subchapter . . . .”

\(^{208}\) See Levitt & Wehr, supra note 129, at 1.

\(^{210}\) See Horton, supra note 89, at 145.
focused on: “1) Regulatory activities; 2) International harmonization; 3) Development, maintenance, and dissemination of CFSAN’s [Center for Food Safety and Applied Nutrition] science base; 4) Equivalence evaluations, food safety needs assessment, and food safety technical cooperation and assistance; and 5) International trade agreements and other trade related activities.”

The FDA’s efforts at increasing the regulation of imported foods is limited to the six point program articulated in response to the July 3, 1999 presidential memorandum dealing with unsafe imported foods.

The program focuses on identifying problem importers, prohibiting the re-importation of previously rejected foods, setting standards for private laboratory collection, increasing the analysis of imported foods and imposing fines for violations.

B. Suggested Action

There have been several attempts to enact legislation that would restrict the export of hazardous pesticides from the United States. For example, in 1980 Representative Michael Barnes, a democrat from Maryland, proposed a bill that would have prohibited the export of all hazardous products without a government license. However, the bill was defeated twice in committee.

In 1990, “Circle of Poison” legislation, which would have banned the exportation of certain illegal pesticides, including chlordane and heptachlor passed both the House and Senate. Unfortunately, it was killed in the eleventh hour by the Bush administration on behalf of the chemical manufacturers. Then, in 1994, President Clinton was unsuccessful in passing a similar bill.

The EPA has the power to revoke both tolerances and action levels for banned pesticides. Unfortunately, it has been taking on average over 6 years per use to revoke a tolerance level. The long delay is the result of the

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211 Levitt & Wehr, supra note 129, at 2-3.  
212 See id. at 6.  
213 See id.  
215 See id. at 1036.  
216 See Laurel Druley, Still Dumping After All These Years, MOTHER JONES, at http://www.motherjones.com/news_wire/velsicol.html (last visited Nov. 11, 1997).  
217 See id.  
218 See id.  
219 See GEN. ACCOUNTING OFFICE, supra note 36, at 12.  
220 See id.
following reasons: one, the EPA gives a time allowance for food producers to exhaust their remaining stocks of the pesticide and for contaminated products to move through the market; two, revocation has not been a top priority; and three, there are no guidelines for linking revocation to cancellation.221

The regulatory constraints and fiscal realities of the import process make it unlikely that the FDA will ever be able to eliminate the importation of contaminated foods through a regulatory scheme. Therefore, the FDA has looked to other options for controlling the use of pesticides on imported foods. The FDA is moving toward a strategy of helping the originating countries improve their information and production techniques.222 Some commentators support holding exporting countries responsible for the safety of their products and reducing import controls.223 They argue that border checks are more expensive for the importing United States than the originating country and the quality of perishable products are diminished by being held in storage while inspections are conducted.224 However such an approach would not be reliable while the producing countries continue to rely on banned pesticides for pest and insect control. The regulatory burden of monitoring banned pesticides could be completely eliminated with a prohibition on exporting banned pesticides.

V. CONCLUSION

The repeal of the Delaney Clause is a move from a precautionary zero tolerance system to a more risky “science based” system. The new statute allows the EPA to base its decision on the then current scientific knowledge. The problem with using a scientific standard is that scientific evidence can be flawed. A mistake in determining the level of risk presented by a pesticide can cost lives. One of the major reasons why cancer research is so inconclusive is the long latency periods.225 This means that a mistake today may not be detected until years later at which point the exposure levels could be enormous. The Delaney Clause was developed when the effects of DDT were very salient and the focus was on protecting human safety first.

221 See id. at 5.
222 See Horton, supra note 89, at 146.
223 See id. at 148.
224 See id.
225 See CROSS, supra note 33, at 13.
The EPA has stated on several occasions that a regulatory scheme, which is grounded in border inspections, is an inadequate method for maintaining food safety. A self-regulatory scheme will remove some of the burden from the EPA but it will not be effective for preserving food safety. This holds especially true if the main pesticides used in growing the foods is the same pesticide we are trying to avoid when importing the food.

The shift in pesticide regulatory policy is more a reflection of politics than science. If it were based on science then it seems logical that the EPA would have been required to remove all tolerances for pesticides that are banned until they were able to obtain the necessary scientific evidence to support subjecting the American public to the risk.

International treaties can play a major role in moving the United States toward prohibiting the export of banned pesticides. The UN treaty on POPs has brought us one step closer to affecting a global prohibition on the trade in banned pesticides. It has effectively shifted the burden to the country importing the pesticide to justify the use of the banned pesticide. This shift in the way the international market views pesticides may signify that the international community is unwilling to accept the high risks associated with using banned pesticides. However, it is quite clear that neither the NAFTA, the GATT, nor the UN have the power to drive such an initiative.

The United States has the opportunity to lead the way in creating a safer food quality standard in the international market and it must step up to the challenge. The fact that we are one of the largest exporters of the banned pesticides and we are a world leader in both technology and science would allow us to take the lead in setting a standard that the world would willingly follow. By prohibiting the export of banned pesticides the United States would also significantly reduce the amount of lethal pesticides used by third world countries and it would force them to seek out better technologies. The long-term effects of eliminating the use of POP's throughout the world would far outweigh any short-term loss that may be experienced by the pesticide manufacturing industry. There is the possibility, however, that a prohibition will have negligible negative affect. The pesticide manufacturers, if forced to, may simply shift their focus to the many other pesticides, which are not banned and are safer.

Congress, by enacting the FQPA, has empowered the EPA to set standards that balance the value of having a variety of foods reaching the American market versus the health risks of ingesting dangerous pesticides. Unfortunately this sort of calculus fails to consider all of the relevant factors. Congress and the EPA should also consider the cost of the American lives
lost from cancer and pesticide poisonings and the benefit of prohibiting the export of banned pesticides.