

1991

## Exporting Cigarettes: Do Profits Trump Ethics and International Law?

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### Recommended Citation

Robbie D. Schwartz, *Exporting Cigarettes: Do Profits Trump Ethics and International Law?*, 24 *Vanderbilt Law Review* 1009 (2021)

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# Exporting Cigarettes: Do Profits Trump Ethics and International Law?

## ABSTRACT

*In recent years, United States cigarette manufacturers have focused their efforts on foreign markets, especially Asia, Eastern Europe, and Third World states. This Note examines the impetus behind the manufacturers' strategy, as well as the ethical and legal conflicts it creates.*

*The increase in United States cigarette exports results from a decline in the United States market, favorable market conditions abroad, and United States legislation that encourages foreign trade. While cigarette manufacturers point to the positive impact tobacco has on the United States economy, others argue that increased exportation inevitably will result in catastrophic health consequences worldwide. This Note explores the various areas of international law that potentially impose a duty on the United States to restrict its export of cigarettes. The author recommends several changes that would reconcile the domestic benefits of cigarette exportation with the individual harm incurred abroad and the potential repercussions for violating international law.*

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## I. INTRODUCTION

United States tobacco companies have experienced a reduction in the domestic sales of cigarettes during the past fifteen years.<sup>1</sup> During this period, cigarette smoking in the United States has declined by more than twenty-five percent.<sup>2</sup> This decline is due partially to the Federal Cigarette Labeling and Advertising Act<sup>3</sup> (Labeling Act or the Act), which requires warnings of potential health hazards to be placed on each cigarette package.<sup>4</sup> Because of the Labeling Act, United States residents now are more aware of the dangers associated with smoking cigarettes.<sup>5</sup> The proliferation of health awareness in the United States is harming tobacco sales in the domestic market.<sup>6</sup> Consequently, the tobacco industry is reaching for new markets, notably Asia, Eastern Europe, and Third World states.<sup>7</sup> The United States government effectively supports these efforts because it does not require warnings or advertising restrictions on cigarettes produced for export by United States manufacturers.<sup>8</sup> In addition, the United States government has a policy of instituting economic sanctions on foreign states that restrict imported cigarettes and cigarette advertising.<sup>9</sup>

Although expanded world trade usually benefits all parties involved, increased export of tobacco products is not acclaimed universally. Some critics argue that the United States should not export products, such as cigarettes, that are recognized health hazards.<sup>10</sup> Moreover, the United States potentially could be violating its duties under international law when it fails to warn foreign consumers of the health risks associated with United States brand cigarettes.<sup>11</sup>

Section II of this Note discusses how domestic health awareness and legislation have compelled the cigarette industry to exploit foreign markets. Section III examines the economic and ethical conflict associated

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1. See *infra* notes 12-16 and accompanying text.
  2. See *infra* notes 13-15 and accompanying text.
  3. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-41 (1988)) [hereinafter Labeling Act].
  4. *Id.* § 1333.
  5. See *infra* note 39 and accompanying text.
  6. See *infra* notes 40-41 and accompanying text.
  7. See *infra* notes 42-43, 50-68 and accompanying text.
  8. 15 U.S.C. § 1340.
  9. See *infra* notes 104-38 and accompanying text.
  10. See, e.g., Albert Huebner, *Tobacco's Lucrative Third World Invasion*, 11 *BUS. & SOC'Y REV.* 49, 53 (1980).
  11. See *infra* Section IV.

with the unrestricted exportation of cigarettes. Section IV explores the potential liability of the United States under international law. Finally, this Note concludes that although the exportation of tobacco products should not be banned completely, the United States government should restrict exported cigarettes just as it restricts domestically sold cigarettes.

## II. THE SCOPE OF THE PROBLEM: WHY CIGARETTE MANUFACTURERS ARE LOOKING ABROAD

### A. *The Decline in the Domestic Market Because of an Increase in Health Awareness*

The number of United States residents who smoke cigarettes has decreased dramatically in recent years.<sup>12</sup> When the Surgeon General first issued a report on smoking in 1964,<sup>13</sup> more than half of the United States population smoked cigarettes.<sup>14</sup> In contrast, twenty-four percent of the United States population now smokes, according to 1989 statistics.<sup>15</sup> This downward trend in the number of United States smokers is likely to continue.<sup>16</sup>

Medical research revealed a link between health problems and smoking as early as 1939, when the first scientific study linking smoking and lung cancer was published.<sup>17</sup> Cigarette manufacturers discredited these unfavorable findings.<sup>18</sup> In 1954, E. Cuyler Hammond and Daniel Horn were the first to conclude affirmatively that smoking causes lung can-

12. OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL 270* (1989) [hereinafter 1989 SURGEON GENERAL'S REPORT].

13. SURGEON GENERAL OF THE UNITED STATES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964) [hereinafter 1964 ADVISORY COMMITTEE REPORT]. The Surgeon General at that time was Luther L. Terry. *Id.* at v.

14. Betsy A. Lehman, *Tobacco Merchants, U.S. Export Policies Ripped at Conference*, BOSTON GLOBE, May 22, 1990, at 1, 10.

15. *Id.* at 10. See also 1989 SURGEON GENERAL'S REPORT, *supra* note 12, at 270 (noting that the smoking rate among men has decreased from 50.2% in 1965 to 31.7% in 1987).

16. As Dr. C. Everett Koop, former United States Surgeon General, stated: "I do not believe the United States will ever again be a good market for tobacco products. . . . The curve is going down and accelerating." Lehman, *supra* note 14, at 1.

17. A. LEE FRITSCHLER, *SMOKING AND POLITICS: POLICY MAKING AND THE FEDERAL BUREAUCRACY* 16 (4th ed. 1989).

18. *Id.*

cer.<sup>19</sup> In 1957, the American Cancer Society, the National Cancer Institute, the American Heart Association, and the National Heart Institute joined together to study the proliferation of medical evidence regarding the dangers of cigarette smoking.<sup>20</sup> The study established beyond a reasonable doubt that cigarette smoking causes lung cancer.<sup>21</sup> On June 7, 1962, the Surgeon General of the Public Health Service appointed an advisory committee to review all literature examining the health effects of smoking.<sup>22</sup> Eighteen months later, on January 11, 1964, the Surgeon General's advisory committee released the first report<sup>23</sup> warning the public of the dangers associated with cigarette smoking.<sup>24</sup> The report declared that cigarette smoking is associated with oral cancer, as well as cancer of the lungs, larynx, esophagus, and urinary bladder.<sup>25</sup> Furthermore, the report connected smoking with chronic bronchitis, cardiovascular disease, pulmonary emphysema, bronchopulmonary disease, and low infant birth weight in mothers who smoke.<sup>26</sup> Based on these findings, the advisory committee to the Surgeon General concluded that smoking contributed to increased mortality.<sup>27</sup>

As a direct consequence of the 1964 Surgeon General's Advisory Committee Report, Congress enacted the Labeling Act.<sup>28</sup> The Act required that specific, nationally uniform statements warning consumers that smoking is dangerous to one's health, be placed on each individual package of cigarettes sold in the United States.<sup>29</sup> The original version of the

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19. *Id.* at 17.

20. *Id.* at 17-18 & n.3.

21. *Id.* at 18.

22. See H.R. REP. NO. 449, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 2350, 2351.

23. 1964 ADVISORY COMMITTEE REPORT, *supra* note 13; see also H.R. REP. NO. 449, *supra* note 22, reprinted in 1965 U.S.C.C.A.N. at 2351.

24. 1964 ADVISORY COMMITTEE REPORT, *supra* note 13, at 24-40.

25. *Id.* at 37.

26. *Id.* at 39.

27. *Id.* at 25-26, 35-37.

28. 15 U.S.C. § 1331. The legislative history of the Act indicates that Congress was acting in response to the Surgeon General's report: "The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by the Congress after considering all facets of the problem." H.R. REP. NO. 449, *supra* note 22, reprinted in 1965 U.S.C.C.A.N. at 2351-52. One week after the Surgeon General released the report, the Federal Trade Commission (FTC) proposed that a trade regulation concerning cigarettes be established. This proposed regulation required that cigarette labeling and advertising contain warnings of the health hazards associated with smoking. See *id.*, reprinted in 1965 U.S.C.C.A.N. at 2351.

29. 15 U.S.C. § 1333; see also Heather Cooper, Symposium Note, *Tobacco Litiga-*

Act mandated that the following warning appear on each package: "CAUTION: Cigarette Smoking May Be Hazardous to Your Health."<sup>30</sup> Evidence soon revealed, however, that this warning was relatively ineffective.<sup>31</sup> Indeed, one year after issuance of the warning no proof existed that cigarette sales had diminished.<sup>32</sup>

Because of these insignificant results, Congress changed the warning itself and the locations where it appeared.<sup>33</sup> In 1969, Congress amended the warning to state: "WARNING: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."<sup>34</sup> Initially, the warning was seen only in small print on the side of cigarette packages. Beginning in 1972, however, the warning appeared on all forms of advertisements in the United States, including newspapers, magazines, and billboards.<sup>35</sup> In 1982, Surgeon General C. Everett Koop's annual report on smoking and health characterized cigarette smoking as "the chief preventable cause of death in our society."<sup>36</sup> In 1985, a series of statements rotating every three months replaced the singular warning: "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy"; "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight"; "Cigarette Smoke Contains Carbon Monoxide"; and "Quitting Smoking

*tion: A Comparative Analysis of the United States and European Community Approaches to Combatting the Hazards Associated with Tobacco Products*, 16 BROOK. J. INT'L L. 275, 283 (1990).

30. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (amended 1970 and 1984), *reprinted in* 1965 U.S.C.C.A.N. 298, 299.

31. In 1967, Congress learned from the FTC's annual report that "there is virtually no evidence that the warning statement on cigarette packages (required by Congress) has had any significant effect." H.R. REP. NO. 805, 98th Cong., 2d Sess. 9 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3721; *see also* Cooper, *supra* note 29, at 283; FRITSCHLER, *supra* note 17, at 2.

32. FRITSCHLER, *supra* note 17, at 2; *see also* Fred H. Jones, Note, *U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets*, 14 N.C.J. INT'L L. & COM. REG. 439, 441 (1989) (commenting that the "impact of health awareness on smoking was relatively insignificant at first").

33. *See* H.R. REP. NO. 805, *supra* note 31, at 9-11, *reprinted in* 1984 U.S.C.C.A.N. at 3721-24.

34. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (amended 1984); *see also* H.R. REP. NO. 805, *supra* note 31, at 9-11, *reprinted in* 1984 U.S.C.C.A.N. at 3721-24.

35. FRITSCHLER, *supra* note 17, at 1; *see also* H.R. REP. NO. 805, *supra* note 31, at 11, *reprinted in* 1984 U.S.C.C.A.N. at 3724.

36. FRITSCHLER, *supra* note 17, at 114-15.

Now Greatly Reduces Serious Risks to Your Health."<sup>37</sup> These statements, which must be fifty percent larger than previous labels,<sup>38</sup> place greater emphasis on the specific risks associated with cigarette smoking. Growing public awareness of the dangers<sup>39</sup> has caused the per capita consumption of cigarettes in the United States to decrease continuously since the mid-1960s.<sup>40</sup> Thirty-three million adults in the United States quit smoking between 1964 and 1980.<sup>41</sup> Fewer smokers inevitably translates into decreased sales of cigarettes and lower profits for the tobacco industry. Logically, to compensate for this decline in United States sales, cigarette manufacturers must turn their efforts towards other markets.<sup>42</sup>

### B. *Market Conditions Abroad*

In contrast to the declining United States cigarette market, the markets in Asia, Eastern Europe, and the Third World offer the cigarette industry enormous growth potential.<sup>43</sup> Manufacturers are well aware of

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37. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 1985 U.S.C.C.A.N. (98 Stat.) 2200, 2201-02 (1984) (codified at 15 U.S.C. § 1333(a) (1988)). Scientific research on the effects of smoking convinced Congress that the labels needed greater specificity. See H.R. REP. NO. 805, *supra* note 31, at 12, *reprinted in* 1984 U.S.C.C.A.N. at 3725. Congress had learned that Sweden's multiple-message system was a significant factor in dramatically reducing Swedish smoking rates. *Id.*

38. 15 U.S.C. § 1333(b)(2).

39. See 1989 SURGEON GENERAL'S REPORT, *supra* note 12, at 175-245 (noting the public's increased awareness of the relationship between smoking and various health hazards); Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 813-15 (1986) (noting that 90% of the public is aware of the health hazards associated with smoking).

40. In 1963, the average United States smoker over age eighteen consumed 4,345 cigarettes per year. TOBACCO INSTITUTE, TOBACCO INDUSTRY PROFILE 1 (1990) (text available from the Tobacco Institute). This number has decreased steadily to 4,100 per capita in 1975 and to 3,200 per capita in 1987. Jones, *supra* note 32, at 441; see also FRITSCHLER, *supra* note 17, at 2. In 1989, the per capita consumption declined to 2,926. TOBACCO INSTITUTE, *supra*, at 1.

41. FRITSCHLER, *supra* note 17, at 2.

42. See Sheila Tefft, *US Cigarette Producers Ignite Antismoking Crusade in Thailand*, CHRISTIAN SCI. MONITOR, Jan. 4, 1991, at 7 ("Tobacco companies aggressively pursue new markets abroad to offset lagging demand at home.").

43. While tobacco consumption is declining in industrialized nations by 1.1% each year, it is increasing in developing nations by 2.1%. "The tobacco promoters seem determined to turn developing countries into their biggest market." Fred Hiatt, *Tobacco Firms' Sales Efforts in Asia Draw Fire*, WASH. POST, Nov. 13, 1987, at F1, F3 (statement by Haldan Mahler, director general of the World Health Organization). In 1989, the United States exported approximately 141.8 billion cigarettes to 146 states. This amount represented a 20% increase over the previous year. TOBACCO INSTITUTE, *supra* note 40, at 3; see also Lehman, *supra* note 14, at 10.

this potential, as evidenced by their previous exploitation, having taken advantage of a similar situation in Latin America.<sup>44</sup> In 1964, the tobacco industry expanded its enterprise to Latin America in response to the Surgeon General's first report on smoking.<sup>45</sup> The cigarette manufacturers "conquered the Latin market in three steps."<sup>46</sup> First, United States companies broke down the trade barriers that placed restrictions on the sale of foreign brands.<sup>47</sup> Second, they bombarded the Latin American market with advertising.<sup>48</sup> Finally, they bought out most of the Latin American cigarette companies.<sup>49</sup> Some commentators believe that the cigarette manufacturers are using similar tactics to achieve the same success in Asia, Eastern Europe, and many Third World states.<sup>50</sup> The tobacco companies already have undermined most sales restrictions in these states and currently are attempting to remove marketing barriers.<sup>51</sup> If the tobacco companies achieve that goal, a deluge of cigarette advertising undoubtedly will bombard these targeted regions. Finally, if the United States tobacco companies eventually choose to appropriate foreign cigarette companies, few obstacles will hinder their goal.

The impetus behind this expansion process is partially due to the sheer magnitude of current and potential smokers in these regions,<sup>52</sup> which translates into an increased demand for cigarettes.<sup>53</sup> Statistics show that developing states comprise more than half of the world's population.<sup>54</sup> Consequently, the cigarette industry has an enormous number

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44. Peter Schmeisser, *When Health and Trade Policies Clash*, NAT'L J., Apr. 16, 1988, at 1016.

45. *Id.*

46. *Id.* (statement by Phillip L. Shepherd, an expert in Latin American tobacco marketing at Florida International University in Miami).

47. *Id.*; see also Gregory N. Connolly, *Political and Promotional Thrusts Worldwide by the Transnational Tobacco Companies*, in TOBACCO & HEALTH 1990: THE GLOBAL WAR 144 (B. Durston & K. Jamrozik eds., 1990) (Proceedings of the Seventh World Conference on Tobacco and Health).

48. Schmeisser, *supra* note 44, at 1016; see also Connolly, *supra* note 47, at 144.

49. Schmeisser, *supra* note 44, at 1016; see also Connolly, *supra* note 47, at 144.

50. See Schmeisser, *supra* note 44, at 1016.

51. See *infra* notes 104-38 and accompanying text.

52. Huebner, *supra* note 10, at 49.

53. Cf. Francine Schulberg, Comment, *United States Export of Products Banned for Domestic Use*, 20 HARV. INT'L L.J. 331, 335 (1979) (increased foreign population also has led to greater export of hazardous substances); Gabriel M. Benrubi, Note, *State Responsibility and Hazardous Products Exports: A Solution to an International Problem*, 13 CAL. W. INT'L L.J. 116, 116 (1983) (growth in Third World population has resulted in increased demand and importation of all types of consumer products).

54. Huebner, *supra* note 10, at 49.



of potential smokers to influence.<sup>55</sup> Furthermore, the staggering number of current smokers provides a ready-made market for United States cigarette companies. In China, for example, sixty-one percent of the men and seven percent of the women already smoke.<sup>56</sup> Similarly, in Japan, sixty-three percent of the men and thirteen percent of the women currently smoke.<sup>57</sup> Japan is the highest per capita consumer of cigarettes, and China is the highest gross consumer of cigarettes.<sup>58</sup> The former Soviet Union, with seventy million smokers, also provides the cigarette industry with a plethora of consumers for its products.<sup>59</sup> Moreover, its seventy million smokers only comprise an estimated twenty-five to thirty-five percent of its population; consequently, a large, untapped market of potential smokers exists.<sup>60</sup> These statistics, which are quite seductive to cigarette manufacturers, signify a market capable of enormous growth.

In addition to large populations, these states offer the cigarette industry an economic situation that presents ideal market conditions. Because indigent governments are reluctant to spend their scarce funds on anti-smoking campaigns, the general public likely will remain ignorant of the risks associated with cigarette smoking.<sup>61</sup> Furthermore, because many importing states are unwilling to forego tax revenues from cigarette

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55. *Id.* Tobacco companies have focused their efforts on women and youth, who traditionally have not smoked in many developing states, particularly Asia. See Hiatt, *supra* note 43, at F1. "The industry plan is to create demand among Oriental females. If you have one billion Oriental females who don't smoke as a market, that would more than replace the quitters in western Europe and North America." *Id.* (statement by Gregory N. Connolly, adviser to the World Health Organization).

56. Jing Jie Yu & Donald R. Shopland, *Cigarette Smoking Behavior and Consumption Characteristics for the Asia-Pacific Region*, in AM. CANCER SOC., WORLD SMOKING & HEALTH, Winter 1989, at 7, 7 (based on 1986 statistics).

57. *Id.*

58. Schmeisser, *supra* note 44, at 1016.

59. *Country Reports: U.S.S.R.*, in AM. CANCER SOC., 16 WORLD SMOKING & HEALTH: TOBACCO IN EASTERN EUROPE 12, 18 (1991). The former Soviet Union comprised the third largest tobacco market in the world. *Id.* at 18. The Soviets purchased approximately 420 billion cigarettes in 1990. In comparison, United States residents purchase 520 billion cigarettes are sold in the United States each year. Kevin Maney, *Sales of U.S. Cigarettes Smoke in U.S.S.R.*, U.S.A. TODAY, Sept. 10, 1991, at B1. All references to the Union of Soviet Socialist Republics throughout this Note refer to the state of that Union as it existed prior to its disintegration in December 1991.

60. *Country Reports: U.S.S.R.*, *supra* note 59, at 18.

61. See Huebner, *supra* note 10, at 49; see generally Joseph A. Kinney, *Tobacco's Global Economy: Is North Carolina Losing?*, in THE TOBACCO INDUSTRY IN TRANSITION: POLICIES FOR THE 1980s 119, 122-23, 127-28 (William R. Finger ed. 1981); Jones, *supra* note 32, at 442-43.

sales, they have imposed little or no restrictions.<sup>62</sup> The people and governments of these indigent developing states do not have the knowledge or resources to resist effectively the invasion of the United States tobacco industry into their society.<sup>63</sup> Additionally, some states have experienced severe shortages of both domestic and United States cigarette brands.<sup>64</sup> Low supply combined with high demand<sup>65</sup> has resulted in an economic boom for United States cigarette manufacturers. Many of these manufacturers have entered into agreements with the Soviet government to sell massive numbers of cigarettes.<sup>66</sup> According to an official from the United States Department of Agriculture, the Soviet orders will mean a "shot in the arm for farms and cigarette companies"<sup>67</sup> and will offset the annual decline in United States consumption.<sup>68</sup> Clearly, the economic conditions in many of these states provide a great incentive for domestic cigarette manufacturers to focus their energies abroad.

### C. *Domestic Legislation Encouraging Foreign Trade*

Increasingly restrictive federal and state legislation, as well as private prohibitions further impede domestic cigarette sales.<sup>69</sup> In addition to the

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62. Huebner, *supra* note 10, at 49.

63. *Id.* at 53. Because these governments cannot protect their own citizens, prophylactic measures by the United States may be the only method of ensuring that foreign cigarette consumers are not vulnerable to exploitation. *See id.*

64. Judith Egerton, *Philip Morris, R.J. Reynolds Arrange Huge Sales to Soviets*, *COURIER-JOURNAL* (Louisville, KY), Sept. 14, 1990, at A-1. Smokers in Moscow, Leningrad, and Gorky have protested the shortages and the high price of black-market United States cigarettes. *Id.*

65. "Soviets are heavy smokers, Soviet cigarettes are notoriously bad and the nation's tobacco industry has been in decline. U.S. brands are in such great demand, they often can be used as currency for taxi rides and other services." Maney, *supra* note 59, at B1.

66. *See* Egerton, *supra* note 64, at A-1. The Soviet Union recently has agreed to purchase 20 billion cigarettes from Philip Morris International Inc. and 14 billion cigarettes from R.J. Reynolds Tobacco International Inc. Although neither company revealed the terms of the agreements, based upon the average United States retail price of \$1.44 per pack, the two orders would be worth approximately \$2.5 billion. The Soviet order is the largest single sale that Philip Morris ever has made. *Id.* Reforms in the Soviet Union have increased opportunities for cigarette manufacturers even further. Maney, *supra* note 59, at B1. The movement towards a market economy will facilitate new deals, and foreign companies will have increased freedom in the sale, production, and advertising of cigarettes in the Soviet Union. *Id.*

67. Egerton, *supra* note 64, at A-1 (statement by Verner Grise, U.S. Department of Agriculture).

68. *Id.*

69. As of December 1987, during the 98th, 99th, and 100th Congressional sessions, nearly 100 bills addressing smoking or tobacco were introduced. OFFICE ON SMOKING

Labeling Act,<sup>70</sup> the cigarette industry must contend with legislation that has banned cigarette advertising from radio and television since 1971.<sup>71</sup> In 1986, the General Services Administration banned smoking in all 6,800 federal buildings.<sup>72</sup> That same year, the Department of the Army banned smoking in all of its vehicles.<sup>73</sup> In 1988, federal law prohibited smoking on commercial airline flights of two hours or less.<sup>74</sup> Less than two years later, this prohibition was extended to all domestic flights in the continental United States.<sup>75</sup> All fifty states and the District of Columbia have restricted the sale or use of tobacco products to varying degrees.<sup>76</sup> By November 1991, forty-six states and the District of Columbia had limited or banned smoking in various public places through legislative enactments.<sup>77</sup> Furthermore, as of February 1990, forty-four states

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AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *SMOKING AND HEALTH: A NATIONAL STATUS REPORT* 63 (2d ed. 1990) [hereinafter 1990 NATIONAL STATUS REPORT]. These bills fell into the following categories: (1) limitations on smoking in public places; (2) regulations of sale to and use of tobacco products by minors; (3) schools and school health education; (4) regulation of advertising practices; (5) commerce; (6) taxation; and (7) health and safety regulations pertaining to smoking and tobacco use. *Id.*

70. 15 U.S.C. § 1331.

71. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (1970) (codified at 15 U.S.C. § 1335 (1988)).

72. See Mike Causey, *Where There's Smoke*, WASH. POST, July 23, 1986, at B2. This rule affected most of the 2.8 million government workers by banning smoking in the open office spaces, lobbies, restrooms, elevators, and conference rooms. *Id.* If President Bush approves an executive order proposed by Health and Human Services Secretary Louis W. Sullivan, smoking will be banned completely in federal executive branch agencies and buildings. Spencer Rich, *Sullivan Proposes Executive Branch Smoking Ban*, WASH. POST, Mar. 23, 1991, at A10. The executive order, however, would not apply to Congress or the judicial branch. *Id.*

73. FRITSCHER, *supra* note 17, at 6.

74. Department of Transportation and Related Agencies Appropriation Act of 1988, Pub. L. No. 100-202, § 328, 1987 U.S.C.C.A.N. (101 Stat.) 1329-358, -382 to -383 (1987) (original version codified at 49 U.S.C. § 1374(d) (1988) (amended 1989)).

75. Department of Transportation and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-164, § 335, 103 Stat. 1069, 1098-99 (1989) (codified at 49 U.S.C.A. § 1374(d)(1)(A) (Supp. 1991)).

76. See 1990 NATIONAL STATUS REPORT, *supra* note 69, at 68.

77. As of February 1990, Alabama, Illinois, Missouri, North Carolina, Tennessee, Virginia, and Wyoming had not imposed limits on smoking in public places. See 1990 NATIONAL STATUS REPORT, *supra* note 69, at 68. Between February 1990 and November 1991, three states enacted legislation limiting smoking in specified public places. These states include Illinois (ILL. ANN. STAT. ch. 111 ½, para. 7651 (Smith-Hurd Supp. 1991) (Clean Public Elevator Act) and ILL. ANN. STAT. ch. 111 ½, para. 8201 (Smith-Hurd Supp. 1991) (Clean Indoor Air Act)); Tennessee (TENN. CODE ANN. § 4-4-121 (Supp. 1991) (Smoking Policies)); and Virginia (VA. CODE ANN. § 15-1-291.1 (Michie

and the District of Columbia had regulated the sale or distribution of tobacco products to minors.<sup>78</sup>

Additionally, Congress has enacted legislation both to restrict sales of cigarettes in the United States and to stimulate sales abroad. Section 1340, the export exemption to the Labeling Act, is evidence of the latter policy.<sup>79</sup> Although the Labeling Act establishes stringent requirements for cigarettes manufactured and sold domestically, no equivalent restrictions exist for cigarettes sold abroad.<sup>80</sup> Section 1340, entitled "Cigarettes for export," provides that "[p]ackages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter."<sup>81</sup> By excluding cigarettes produced for export from strict domestic labeling and advertising requirements, the United States government manifests an attitude of caveat emptor toward the foreign consumer.<sup>82</sup> This "buyer beware" policy indirectly promotes foreign markets to cigarette manufacturers. Logically, the tobacco industry capitalizes on these relaxed standards by concentrating more of its efforts abroad.<sup>83</sup>

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Supp. 1991) (Virginia Indoor Clean Air Act)). "Public places" may include public transportation, health care facilities, offices of health care practitioners, elevators, cultural and recreational facilities, restaurants, schools, retail stores, government buildings, private workplaces, or public meetings. 1990 NATIONAL STATUS REPORT, *supra* note 69, at 68.

78. 1990 NATIONAL STATUS REPORT, *supra* note 69, at 70-71. States without restrictions on the sale to or use of tobacco products by minors include Kentucky, Louisiana, Montana, New Mexico, Wisconsin, and Wyoming. *Id.* at 71.

79. See 15 U.S.C. § 1340.

80. *Id.* §§ 1331-40.

81. *Id.* § 1340. This section further states that "such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside the United States." *Id.*

82. The United States policy toward cigarette exportation is quite similar to its policy toward the exportation of domestically banned substances. In both instances, the United States has adopted a caveat emptor policy. See Schulberg, *supra* note 53, at 331; Patrick B. Seferovich, Comment, *United States Export of Banned Products: Legal and Moral Implications*, 10 DEN. J. INT'L L. & POL'Y 537, 539 (1981); Benrubi, *supra* note 53, at 123; Carolyn D. Greenwood, Note, *Restrictions on the Exportation of Hazardous Products to the Third World: Regulatory Imperialism Or Ethical Responsibility?*, 5 B.C. THIRD WORLD L.J. 129, 136 (1985). "Products are often shipped overseas without even informing the importer or the government of the importing nation of what the shipment contains; without labels containing appropriate warnings, use instructions, or ingredient lists; and sometimes accompanied by false or misleading advertising." Schulberg, *supra* note 53, at 331.

83. See Jones, *supra* note 32, at 444 & n.34; cf. Schulberg, *supra* note 53, at 332

Because section 1340 exempts exported cigarettes from the Labeling Act's requirements, foreign consumers receive inadequate warnings regarding the health risks associated with smoking.<sup>84</sup> As a result, the door has opened for potential foreign plaintiffs to bring suit against United States tobacco companies based on a failure-to-warn theory. In contrast, courts prevent smokers in the United States from bringing state common law tort claims against tobacco companies because the Labeling Act preempts a claim based on a failure-to-warn theory.<sup>85</sup> The courts rely on section 1334(a) of the Act,<sup>86</sup> which provides that no statements relating to smoking and health are required beyond those mandated within the Act itself.<sup>87</sup> Thus, courts reason that section 1334(a) exempts manufacturers from liability because these statutorily required warnings provide adequate information about the potential hazards of tobacco use.<sup>88</sup> The Act's stated purpose is the protection of the public by publicizing the health hazards associated with cigarettes.<sup>89</sup> Ironically, however, judicial interpretations of section 1334(a) have given the Act an alternative purpose that is more favorable to tobacco manufacturers than to the ultimate consumer; the public is informed, but the cigarette industry is immune from liability.<sup>90</sup> Clearly, the cigarette companies benefit from the legisla-

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("As domestic regulation increased . . . sales abroad [of hazardous products] multiplied as United States producers looked to the third world as a less restrictive market.")

84. See Jones, *supra* note 32, at 444 n.34.

85. See, e.g., *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (holding that state tort claims challenging the adequacy of warning labels on cigarette packages and advertisements are preempted by the Labeling Act), *cert. granted on other grounds*, 111 S. Ct. 1386 (1991); see also *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234-35 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987).

86. 15 U.S.C. § 1334(a).

87. The preemption provision of the Labeling Act states:

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

*Id.*

88. See, e.g., *Cipollone*, 789 F.2d at 187; *Roysdon*, 849 F.2d at 234-35.

89. See 15 U.S.C. § 1331.

90. See Douglas N. Jacobson, Note, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1053 (1989) ("[t]he Third Circuit's decision [in *Cipollone*] that the Federal Cigarette Advertis-

tively imposed warning requirement. As one commentator concluded, "[I]t is not surprising that there is some evidence that tobacco companies welcomed the warnings, since they suspected that the warnings would actually insulate them from liability."<sup>91</sup>

Because exported cigarettes do not have warnings on their packages,<sup>92</sup> the tobacco manufacturers cannot use the Labeling Act to preempt lawsuits by foreign nationals. Therefore, cigarette companies could benefit from placing warnings on cigarette packages sold abroad, despite the failure of the United States government to impose this requirement. These warnings might protect the tobacco industry from future suits by foreign consumers. Despite this potential benefit to the cigarette industry, it has chosen not to provide the warnings on exported cigarettes. The logical rationale for this decision is that the absence of warnings results in additional sales that outweigh the cost of potential lawsuits. The absence of warnings on exported cigarettes, made possible by section 1340,<sup>93</sup> apparently has been quite lucrative to the cigarette industry. One can syllogistically conclude that this financial gain has encouraged the industry to sell its products abroad.

Other legislation such as the Consumer Product Safety Act<sup>94</sup> and the Federal Hazardous Substances Act<sup>95</sup> potentially could benefit foreign consumers. One purpose of the Consumer Product Safety Act is "to protect the public against unreasonable risks of injury associated with consumer products."<sup>96</sup> The Federal Hazardous Substances Act regulates hazardous substances, defined as "[a]ny substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer."<sup>97</sup> The Consumer Product Safety Commission (CPSC) controls the sale of many consumer products through these statutes. Although these enactments benefit consumers in the United States, they currently are inadequate to protect foreign consumers<sup>98</sup> because of specific exemptions for exported items.<sup>99</sup> The CPSC has discretionary au-

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ing and Labeling Act preempted state common law tort claims effectively will bar a large number of future cases.").

91. Cooper, *supra* note 29, at 285; see also Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 643-45 (1987).

92. See 15 U.S.C. § 1340.

93. See *id.*

94. 15 U.S.C. §§ 2051-83 (1988).

95. 15 U.S.C. §§ 1261-77 (1988).

96. 15 U.S.C. § 2051(b)(1).

97. 15 U.S.C. § 1261(f)(1)(A).

98. See Schulberg, *supra* note 53, at 338.

99. See 15 U.S.C. § 2067(a); 15 U.S.C. § 1264(b)(3). Schulberg asserts that the

thority to prohibit specific exports that violate United States safety standards.<sup>100</sup> This authority, however, is limited to the export of goods already in domestic commerce.<sup>101</sup> The CPSC has no authority over goods produced exclusively for export.<sup>102</sup> Furthermore, even if these enactments applied generally to exported products, all tobacco products specifically are exempted from their scope.<sup>103</sup> Therefore, the statutes' inherent limitations frustrate their potential to protect foreign consumers.

Thus, the Labeling Act, the Consumer Product Safety Act, and the Hazardous Substances Act cannot protect foreign consumers because the United States government has determined that their reach should be limited to domestically sold products. Consequently, these enactments indirectly encourage United States tobacco companies to sell their products abroad, where fewer restrictions on cigarettes exist.

Congress has further reinforced this incentive through section 301 of the Trade Act of 1974.<sup>104</sup> The United States utilizes section 301 to remedy a foreign government's protectionist trade barriers.<sup>105</sup> Section 301

reason for the exemptions is that the statutes were drafted under "the assumption that each sovereign nation would protect its own citizens" from the dangers of the various products. In addition, Schulberg points out that Congress enacted these laws during a time of less economic interdependence and lower accessibility to foreign markets. Schulberg, *supra* note 53, at 338.

100. See Frank B. Cross & Brenda J. Winslett, "Export Death": *Ethical Issues and the International Trade in Hazardous Products*, 25 AM. BUS. L.J. 487, 501 (1987).

101. *Id.*

102. *Id.*

103. See 15 U.S.C. § 2052(a)(1)(B); 15 U.S.C. § 1261(f)(2).

104. Pub. L. No. 93-618, § 301, 1974 U.S.C.C.A.N. (88 Stat.) 1978, 2041 as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301(a), 1988 U.S.C.C.A.N. (102 Stat.) 1107, 1164 (codified at 19 U.S.C. §§ 2411 (1988)).

105. 19 U.S.C. § 2411(a)(1) provides:

If the United States Trade Representative determines under section 2414(a)(1) of this title that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

benefits tobacco exporters because it "enables private individuals or companies to petition the USTR [United States Trade Representative] to carry out retaliatory economic sanctions against foreign governments that have unfairly restricted trade with the United States."<sup>106</sup> The USTR then institutes sanctions if foreign governments violated the United States rights under trade agreements or if an "act, policy, or practice . . . is unjustifiable and burdens or restricts United States commerce."<sup>107</sup> Section 301 has been called one of the "few effective measures available to private U.S. companies that help force open inaccessible markets or provide relief from the allegedly unfair foreign trading practices."<sup>108</sup>

The United States applied section 301 to states such as Japan, South Korea, Taiwan,<sup>109</sup> and, most recently, Thailand<sup>110</sup> for trade barriers placed on its domestic cigarettes. Japan's policy toward the United States tobacco industry made it the first state to feel the effects of section 301.<sup>111</sup> In 1985, in response to intensive lobbying efforts by United States manufacturers, Tokyo dismantled its state-run monopoly, the Japan Tobacco and Salt Corporation.<sup>112</sup> Japan, however, continued a twenty percent

19 U.S.C. § 2411(a)(1). The United States Trade Representative (USTR) reports annually on Foreign Trade Barriers to United States Commerce. In 1989, the USTR report divided trade barriers into eight categories. The categories relevant to tobacco exportation include import policies, standards, testing, labeling and certification; government procurement; export subsidies; and investment barriers. Jones, *supra* note 32, at 439 n.3 (citing OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1989 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADED BARRIERS 1-2).

106. Jones, *supra* note 32, at 440.

107. 19 U.S.C. § 2411(a)(1)(B)(ii). See Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series #10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211, 211-12 (1987); see also Bart S. Fisher & Ralph G. Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y INT'L BUS. 569, 573 (1982); Patricia I. Hansen, Note, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1122-23 (1987); David M. Pedley, Comment, *A Definition for "Unreasonable" in Section 301 of the Trade Act of 1974: A Consideration of the United States-Thailand Tobacco Dispute*, 5 EMORY INT'L L. REV. 285, 287 (1991).

108. Jones, *supra* note 32, at 439-40.

109. See Clyde H. Farnsworth, *Health Professionals Criticize U.S. Tobacco Export Policy*, N.Y. TIMES, July 20, 1989, at D13; Pedley, *supra* note 107, at 298-99.

110. *U.S. Initiates Section 302 Investigation of Thailand's Barriers to U.S. Cigarette Exports*, 6 Int'l Trade Rep. (BNA) 731 (June 7, 1989) [hereinafter *U.S. Initiates Section 302*]; see also Farnsworth, *supra* note 109, at D13.

111. See Jones, *supra* note 32, at 451-52. For a general discussion of the Japanese import situation as it existed in 1983, see Louis Kraar, *Japan Blows Smoke About U.S. Cigarettes*, FORTUNE, Feb. 21, 1983, at 99.

112. Schmeisser, *supra* note 44, at 1016.



tariff on all imported cigarettes.<sup>113</sup> In 1986, the USTR began section 301 investigations and threatened Japan with a list of possible retaliatory tariffs that might be placed on specific Japanese exports if Tokyo refused to lift its levy on United States cigarettes.<sup>114</sup> This threat compelled Japan to suspend its tariff on foreign cigarettes in October 1986.<sup>115</sup> As a result, the United States lifted its section 301 action.<sup>116</sup>

Similar actions recently have been taken against Taiwan and South Korea.<sup>117</sup> In each instance, the mere threat alone settled the issue without the United States having to resort to retaliation.<sup>118</sup> In 1986, Taiwan initiated an anti-smoking campaign that resulted in an eleven percent decrease in smoking over a two year period.<sup>119</sup> When the United States government threatened trade sanctions, however, Taiwan removed many of its trade barriers to United States cigarettes.<sup>120</sup> Within the year, United States tobacco companies increased their share of the Taiwanese market from one percent to seventeen percent,<sup>121</sup> and Taiwanese smok-

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113. *Id.* According to one United States negotiator, sales of United States tobacco products in Japan should amount to \$1 billion each year; in actuality, sales total approximately \$180 million. *U.S. Settles Tobacco Dispute With Japan, No Deal Reached With Brazil on Informatics*, 3 Int'l Trade Rep. (BNA) 1215 (Oct. 8, 1986) [hereinafter *U.S. Settles Tobacco Dispute*].

114. Schmeisser, *supra* note 44, at 1016; see also *President to Announce Clearer Trade Policy Stance Dependent on Opening Markets Abroad*, 2 Int'l Trade Rep. (BNA) 1100 (Sept. 11, 1985).

115. See Schmeisser, *supra* note 44, at 1016. Japan agreed to eliminate all tariffs on cigarettes, to end all discriminatory deferral of excise tax payments by its tobacco monopoly, and to terminate any discriminatory distribution practices. Determination Under Section 301 of the Trade Act of 1974-Memorandum for the United States Trade Representative, 51 Fed. Reg. 35,995-96 (1986); see also *U.S. Settles Tobacco Dispute*, *supra* note 113, at 1215.

116. 51 Fed. Reg. 35,995-96 (1986).

117. See Schmeisser, *supra* note 44, at 1016-17; Jones, *supra* note 32, at 452-53; Pedley, *supra* note 107, at 300-01.

118. See Schmeisser, *supra* note 44, at 1016-17; Jones, *supra* note 32, at 452-53; Pedley, *supra* note 107, at 300-01. In response to the announcement that the governments of the United States and China had reached an agreement regarding the section 301 investigation of the Taiwanese cigarette market, Richard L. Snyder, executive vice president of Philip Morris International stated, "The agreement confirms our belief that the Taiwanese government, like the government of the United States, values free and open trade between nations." *Philip Morris International on Opening of Tai [sic] Market*, PR NEWSWIRE, Dec. 9, 1986.

119. Lehman, *supra* note 14, at 10.

120. *U.S. Scraps Retaliation Plans After Taiwan Agrees to Import U.S. Beer, Wine, Cigarettes*, 3 Int'l Trade Rep. (BNA) 1484 (Dec. 10, 1986).

121. See Pedley, *supra* note 107, at 300.

ing rates rose by ten percent.<sup>122</sup> Furthermore, the United States tobacco companies' market share grew by almost 115 million dollars between 1986 and 1988.<sup>123</sup> Section 301 effectively increased the cigarette industry's ability to take advantage of an otherwise prohibitive Taiwanese market.

South Korea also restricted foreign access to its cigarette market. Indeed, until 1986, South Korean law made possession of foreign cigarettes by South Korean citizens illegal.<sup>124</sup> In January 1988, the United States Cigarette Export Association (USCEA) filed a complaint with the USTR<sup>125</sup> alleging that South Korea's unfair trade practices discriminated against the import and sale of United States brand cigarettes.<sup>126</sup> The USTR commenced investigations in February 1988. Less than three months later, South Korea eased its restrictions on imported cigarettes.<sup>127</sup> Consequently, the USTR halted its section 301 investigation on South Korea.<sup>128</sup> Before Korea had eliminated its restrictions, United States cigarette sales totalled 1.3 million dollars per year,<sup>129</sup> only 0.06 percent of South Korea's 2.1 billion dollar cigarette market.<sup>130</sup> With the trade barriers removed, the USCEA hopes to capture twenty-five percent of the South Korean cigarette market, worth as much as 520 million dollars per year.<sup>131</sup>

Most recently, the United States government has focused its efforts on Thailand's cigarette import policies.<sup>132</sup> The USTR initiated investiga-

122. See Lehman, *supra* note 14, at 10.

123. See Pedley, *supra* note 107, at 300-01 (citing PRICE WATERHOUSE, INC., THE ECONOMIC IMPACT OF TOBACCO EXPORTS ON THE UNITED STATES ECONOMY IV-12).

124. *Id.* at 301.

125. Initiation of section 301 Investigations; Korea's Restrictions on Access to Its Cigarette Market, 53 Fed. Reg. 4,926-27 (1988).

126. *U.S. Cigarette Exporters File Trade Complaint Against South Korea and Tobacco Monopoly*, 5 Int'l Trade Rep. (BNA) 105 (Jan. 27, 1988) [hereinafter *Exporters File Trade Complaint*]. These alleged unfair trade practices include fixing the prices of imported cigarettes at a prohibitively high level, imposing a 1% annual quota, prohibiting foreign investment opportunities, and banning virtually all forms of advertisement and promotion. *Id.*

127. *U.S., South Korea Settle Section 301 Case Against Import Barriers to U.S. Cigarettes*, 5 Int'l Trade Rep. (BNA) 684 (May 11, 1988). South Korea also agreed to allow advertising and sales promotions by foreign cigarette companies. *Id.*

128. Termination of Section 301 Investigation; Korea's Restrictions on Access to Its Cigarette Market, 53 Fed. Reg. 20,406 (1988).

129. See *Exporters File Trade Complaint*, *supra* note 126, at 105.

130. *Id.*

131. *Id.*

132. See *U.S. Initiates Section 302*, *supra* note 110, at 731.

tions<sup>133</sup> because the Thai government prohibited foreign companies from producing or distributing tobacco products in Thailand.<sup>134</sup> The United States threatened to retaliate on a list of Thai imports worth between 100 million dollars and 166 million dollars annually.<sup>135</sup> Less than five months after the USTR began its investigation, Thailand lifted its import ban.<sup>136</sup> As a result, the United States terminated its section 301 actions.<sup>137</sup> With the change in the Thai government's import policies, United States tobacco companies hope to sell in Thailand an additional 150 million dollars in cigarettes.<sup>138</sup>

Rising health awareness in the United States, hospitable foreign markets, and United States legislation have contributed to an increasing per capita consumption of tobacco in Asia, Eastern Europe, and the Third World. While tobacco consumption declines in the United States and other Western nations, the number of smokers increases in other regions of the world. For example, between 1970 and 1980, tobacco sales increased an estimated thirty-three percent in Africa,<sup>139</sup> an estimated twenty-four percent in Latin America;<sup>140</sup> and an estimated twenty-three

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133. Initiation of Section 302 Investigation; Thailand's Restrictions on Access to Its Cigarette Market, 54 Fed. Reg. 23,724-25 (1989).

134. See *U.S. Initiates Section 302*, *supra* note 110, at 731.

135. *U.S. Delays Release of Thai Target List Following Lifting of Tobacco Import Ban*, 7 Int'l Trade Rep. (BNA) 1581 (Oct. 17, 1990). This amount would be approximately equivalent to United States exporters' estimated losses because of Thai import policies. *Id.*

136. See *id.* The ban on cigarette advertising continues, and the dispute over this ban has catalyzed an antismoking campaign in Thailand. Tefft, *supra* note 42, at 7.

137. *Thailand Lifts Ban on Cigarette Imports, USTR Drops Unfair Trade Practices Case*, 7 Int'l Trade Rep. (BNA) 1794 (Nov. 28, 1990). USTR Carla Hills justified threatening Thailand with section 301 actions:

As long as Thailand sees fit to produce and sell its own cigarettes to its own people, we see no reason that foreign cigarette manufacturers should not have the same opportunity. We have been guided by the principles of obtaining fair and non-discriminatory access to the Thai market without in any way seeking to encourage smoking as a personal habit.

*Id.*

138. *Complaint Against Thai Cigarette Barriers Trade Issue, Not Health Matter, Exporters Say*, 6 Int'l Trade Rep. (BNA) 1181 (Sept. 20, 1989) [hereinafter *Complaint Against Thai Cigarette Barriers*]. According to one United States congressman, the United States government is using "our tax dollars to force the Thai government to change their laws and give American tobacco companies carte blanche to addict women and children." *Tobacco Industry Attacked at Health Conference*, UPI, May 22, 1990, available in LEXIS, Nexis Library, UPI File (statement by Rep. Chester Atkins (D-Mass.)).

139. Kinney, *supra* note 61, at 168.

140. *Id.*

percent in Asia (excluding Japan).<sup>141</sup> Furthermore, in all three of these regions, increases in cigarette consumption between 1971 and 1981 surpassed population growth.<sup>142</sup> These figures demonstrate the rapid growth in cigarette consumption experienced in other regions of the world, which provides potential market expansion for United States tobacco companies.

### III. THE DEBATE: ECONOMICS VERSUS HEALTH

The cigarette exportation issue prompts much debate in the United States. One side of the debate focuses on the importance of cigarette exportation to the domestic economy. The other side focuses on the negative health effects associated with cigarette smoking and the unregulated sale of United States cigarettes abroad. The United States tobacco policy has been attacked as a double standard because it supports tobacco growers and cigarette manufacturers, yet concurrently provides funds for the prevention of cancer and other diseases associated with cigarette smoking.<sup>143</sup> Fundamentally, the controversy is whether the United States should sacrifice ethical considerations of health in exchange for economic benefits.

#### A. *Economics: The Argument for Cigarette Exportation*

Tobacco traditionally has been considered a necessity to the agricultural economy and the United States economy in general.<sup>144</sup> Indeed, in the early United States economy, tobacco was so important that it was used as currency.<sup>145</sup> The Agricultural Adjustment Act<sup>146</sup> underscored the significance of tobacco in 1938, by classifying tobacco as a basic agricultural commodity.<sup>147</sup>

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141. Huebner, *supra* note 10, at 52.

142. 1989 SURGEON GENERAL'S REPORT, *supra* note 12, at vii. Increases in cigarette consumption exceeded population growth by 77% in Africa, 30% in Latin America, and 30% in Asia. *Id.*

143. *Cf.* Cross & Winslett, *supra* note 101, at 487 (the United States policy toward the export of hazardous substances deemed a double standard); Louise B. Zornoza, Note, *The Ethics and Economics of Unapproved New Drug Export*, 21 GEO. WASH. J. INT'L L. & ECON. 315, 339 (1987) (commenting on the "ethical compromise of operating under a regulatory double standard"); Benrubi, *supra* note 53, at 126 (referring to a "double standard in American export policy").

144. Huebner, *supra* note 10, at 51.

145. Fritschler, *supra* note 17, at 7.

146. Agricultural Adjustment Act of 1938, ch. 30, tit. III, § 311, 52 Stat. 31, 45 (1938) (codified as amended at 7 U.S.C. § 1311 (1988)).

147. *Id.* § 311; *see also* Huebner, *supra* note 10, at 51. As a result of this classifica-

In 1989, Price Waterhouse analyzed the United States tobacco industry to determine its impact on the United States economy.<sup>148</sup> According to Price Waterhouse's summary, the tobacco industry provided 2.3 million jobs for United States workers in 1986.<sup>149</sup> Furthermore, during that same year, the tobacco core and supplier sectors<sup>150</sup> contributed 37.3 billion dollars to the gross national product and created 16.52 billion dollars in total tax revenue for local, state, and federal treasuries.<sup>151</sup> In 1989, the exportation of cigarettes contributed 4.33 billion dollars to the United States balance of trade.<sup>152</sup>

Tobacco and its profits accurately have been called "an addictive drug for governments."<sup>153</sup> Because of the tobacco industry's significant role in the United States, any action curbing the sale of cigarettes would have financial repercussions on the domestic economy.<sup>154</sup> The tobacco industry, which includes farmers, manufacturers, advertising agencies, shopkeepers, and tax collectors,<sup>155</sup> specifically would be affected at all stages

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tion, the industry received support payments. Furthermore, this classification facilitated the export of tobacco under the Lend Lease Act during World War II. Huebner, *supra* note 10, at 51.

In 1979 alone, the United States Department of Agriculture spent more than \$337 million on the tobacco industry through the Commodity Credit Corporation and the price support system. *Id.* During the same time period, the Department of Health, Education, and Welfare (now the Department of Health and Human Services) spent less than \$50 million on antismoking efforts. *Id.* As recently as 1985, Congress voted to retain the price support program for tobacco. Fritschler, *supra* note 17, at 8.

148. PRICE WATERHOUSE, INC., EXECUTIVE SUMMARY: THE ECONOMIC IMPACT OF THE TOBACCO INDUSTRY ON THE UNITED STATES ECONOMY (available from the Tobacco Institute).

149. *Id.* at 1.

150. The tobacco industry can be divided into three sectors: the core sector (including growers, warehousemen, manufacturers, wholesale traders, and resale traders); the supplier sector (including those industries, such as trucking and paper, that provide the core sector with the goods and services necessary to produce and distribute tobacco products); and the expenditure-induced sector (including those services and industries, such as housing and transportation, that provide goods and services needed by employees of the core and supplier sectors). *Id.*

151. *Id.* The expenditure-induced sector contributed an additional \$37.5 billion to the gross national product. *Id.* at 6.

152. 1990 TOBACCO INSTITUTE, *supra* note 40, at 3. This \$4.33 billion was an 18% increase over 1988 figures. *Id.*

153. Lehman, *supra* note 14, at 10 (statement of Rep. Chester G. Atkins (D-Mass.)).

154. *Cf.* Schulberg, *supra* note 53, at 335 (noting the existence of "domestic economic pressure to increase exports" of hazardous products).

155. *See supra* note 150; *see also* Fritschler, *supra* note 17, at 6. As Senator Jesse Helms (R-N.C.) once said in response to proposals during the early 1980s to eliminate

of tobacco production and sale.<sup>156</sup> Moreover, industries that depend on the sale of farm supplies, fertilizer, chemicals, machinery, and other products required in tobacco production would be affected detrimentally.<sup>157</sup> Counsel to the USCEA summarized the argument: "We have a superior quality product, and we make some money for the U.S. Not only for the cigarette business, but for the farmers and anyone associated with it."<sup>158</sup>

Proponents of tobacco exportation do not focus on the health risks associated with smoking. Rather, they prefer to discuss the importance of competitive and equitable access to a legal market.<sup>159</sup> Section 1340 of the Labeling Act<sup>160</sup> does not require the cigarette industry currently to place warnings on exported cigarettes.<sup>161</sup> In terms of future restrictions, however, the tobacco industry asserts that the United States government has no right to mandate warnings on exported cigarettes. According to the industry, dictating health policy to foreign governments would be naive, patronizing, and paternalistic.<sup>162</sup>

In contrast to the current domestic policy, the policies of foreign states have instituted many restrictions or bans on cigarette exporters.<sup>163</sup> The tobacco industry argues that these actions are inherently unfair because

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the tobacco price support program, "In North Carolina, tobacco isn't a commodity, it's a religion." *Id.* at 8 (citation omitted).

156. Patricia Buchholz, *Legal Aspects of the Control of Tobacco*, 4 LEGAL MED. Q. 14, 15 (1980).

157. *Id.* at 15.

158. Lehman, *supra* note 14, at 10 (statement by W. Andrew Copenhaver, counsel to the USCEA).

159. Amy Kaslow, *Cigarette Export Battle Heats Up*, CHRISTIAN SCI. MONITOR, Sept. 22, 1989, at 8. According to United States cigarette industry representatives, whether the USTR should work to open foreign markets to United States cigarette exports "is not [an issue] of health and safety, but one of fair market access." *Complaint Against Thai Cigarette Barriers*, *supra* note 138, at 1181. Owen Smith, President of the USCEA, reiterated the common argument: "Hundreds of millions of people will continue to buy and smoke trillions of cigarettes every year, even if manufacturers in the United States quit making cigarettes. . . . If U.S. manufacturers are inhibited from offering cigarettes in overseas markets, we will only be giving business back to the domestic monopolies." *Id.* See also *Bush Administration Export Policies at Odds With Public Health Goals*, GAO Report Says, 7 Int'l Trade Rep. (BNA) 726 (May 23, 1990).

160. 15 U.S.C. § 1340.

161. See *supra* notes 79-84 and accompanying text.

162. See Schmeisser, *supra* note 44, at 1017; Cross & Winslett, *supra* note 101, at 512-14; Benrubi, *supra* note 53, at 127.

163. See Jones, *supra* note 32, at 451-53. Of course, the United States use of section 301 nullified many of these restrictions or bans. See *supra* notes 104-38 and accompanying text.

those same foreign states allow the sale of their own domestically produced cigarettes.<sup>164</sup> In other words, these states effectively are closing their markets to all foreign tobacco producers.<sup>165</sup> Tobacco export proponents want "a level playing field for American tobacco producers so that if people are already allowed to purchase domestic cigarettes there should be an opportunity for U.S. companies to compete in those existing markets."<sup>166</sup> These export proponents argue that United States cigarette manufacturers deserve the same access to foreign markets as enjoyed by United States manufacturers of alcohol, cars, sugar, and motorcycles.<sup>167</sup> The tobacco industry points out that all of these products are potentially dangerous, but none is banned.<sup>168</sup>

Export proponents also are concerned that United States tobacco companies often are denied the right to advertise their product abroad.<sup>169</sup> According to the tobacco industry, this denial is unjust because once selling the product is legal, advertising also should be legal.<sup>170</sup> Moreover, if a state permits advertising of domestically manufactured cigarette brands, refusing United States companies that same benefit is inequitable.<sup>171</sup> Export proponents argue that advertising cigarettes, a product known to be dangerous to health, is not morally wrong because advertising does not affect the total demand for tobacco; advertising simply redistributes market share among competing brands.<sup>172</sup> In other words, tobacco companies are not convincing nonsmokers to begin smoking, but are persuading current smokers to switch from domestically produced cigarettes to United States brands.<sup>173</sup>

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164. See Lehman, *supra* note 14, at 10.

165. *Id.*

166. Farnsworth, *supra* note 109, at D13 (statement by Claire Buchan, spokeswoman for USTR Carla A. Hills).

167. PUBLIC AFFAIRS DIVISION, BRITISH MEDICAL ASSOCIATION, SMOKING OUT THE BARONS: THE CAMPAIGN AGAINST THE TOBACCO INDUSTRY 83 (1986) [hereinafter SMOKING OUT THE BARONS].

168. *Id.*

169. Lehman, *supra* note 14, at 10. As late as May 1990, cigarette advertising was forbidden in Thailand. *Id.* Unless this law changes, the United States could institute a section 301 action that would suspend all Thai exports. *Id.*

170. See SMOKING OUT THE BARONS, *supra* note 167, at 82 (1986).

171. Timothy A. O'Leary, spokesman for the USTR, defended the United States legal claims against Thailand because while smoking there is legal and the ban on cigarette advertising is disobeyed extensively by cigarette makers, United States tobacco products and advertising are effectively excluded. Lehman, *supra* note 14, at 10.

172. See SMOKING OUT THE BARONS, *supra* note 167, at 84.

173. Lehman, *supra* note 14, at 10 (telephone interview with W. Andrew Copenhagen, counsel to the USCEA). Copenhagen asserts that the cigarette companies

### B. *Health: The Arguments Against Cigarette Exportation*

The argument against cigarette exportation focuses on the negative health effects of cigarette smoking. Health officials have charged United States tobacco companies with exporting death and disease in the form of cigarette addiction.<sup>174</sup> The catastrophic health consequences from smoking are indisputable.<sup>175</sup> Smoking-related diseases result in 2.5 million deaths per year worldwide, and that number is expected to reach twelve million per annum by the year 2050.<sup>176</sup> Moreover, an estimated 500 million of the current worldwide population will be killed by tobacco use.<sup>177</sup> In the United States, cigarette smoking is a major factor in eighty percent of lung cancer cases, about twenty percent of all cancer cases, eighty percent of emphysema cases, seventy-five percent of chronic bronchitis cases, and thirty percent of heart disease cases.<sup>178</sup> A significant number of premature deaths in the United States are caused by these cigarette-induced illnesses.<sup>179</sup> The rising use of tobacco abroad inevitably will result in similarly disturbing statistics.

According to export opponents, restricting the exportation of cigarettes is neither paternalistic nor imperialistic. When a foreign state authorizes United States tobacco companies to sell cigarettes, that state also gives the tobacco companies the choice not to sell cigarettes.<sup>180</sup> Either option interferes with the foreign state's national sovereignty, and, in actuality, the choice to sell is the more intrusive alternative.<sup>181</sup> Furthermore, the paternalism argument is especially inappropriate in situations when a foreign state actively decided not to import United States cigarettes, but was forced to change its position at the threat of section 301 sanctions.<sup>182</sup> The use of section 301 is inherently imperialistic because the United

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"aren't changing [smoking] patterns over there." *Id.* This statement is in direct conflict with the statistics provided in *supra* text accompanying notes 121-23, 139-42.

174. Lehman, *supra* note 14, at 1.

175. See *supra* notes 17-27 and accompanying text.

176. Lehman, *supra* note 14, at 10. The most notable smoking-related diseases include heart disease, cancer, and stroke. *Id.*

177. Kenneth E. Warner & Gregory N. Connolly, *Viewpoint: The Global Metastasis of the Marlboro Man*, 5 AM. J. HEALTH PROMOTION 325, 325 (1991). Cigarette smoking is widely known to be the greatest preventable cause of death. Lehman, *supra* note 14, at 10.

178. Huebner, *supra* note 10, at 52-53; see also *supra* text accompanying notes 25-27.

179. Huebner, *supra* note 10, at 53.

180. Cross & Winslett, *supra* note 101, at 512.

181. *Id.*

182. See *supra* notes 104-38 and accompanying text.



States forces its product on an unwilling state. In comparison, restrictions instituted by the United States on its products sold abroad are arguably less authoritarian. Unless foreign states affirmatively request that the United States not regulate cigarettes, "concern over paternalism or imperialism seldom provides a basis for refraining from the exercise of ethical judgment."<sup>183</sup>

Export opponents who focus on the detrimental health effects of cigarette smoking also disagree with the industry's assertion that once selling a product is legal, advertising that product also should be legal.<sup>184</sup> These commentators argue that tobacco merchandisers are promoting not just a product, but an entire way of life.<sup>185</sup> The advertisements project the popular United States lifestyle that is quite alluring, especially to youth.<sup>186</sup> Advertising depicts smokers as relaxed, sociable, attractive, and glamorous.<sup>187</sup> The youth receive the message that smoking represents sophistication and worldliness.<sup>188</sup> This form of advertising was extremely effective in the United States,<sup>189</sup> and tobacco merchandisers have discovered that the same images are useful abroad.<sup>190</sup>

Furthermore, export opponents dispute the tobacco industry's contention that advertising is being used only to shift the market share and not to increase cigarette sales.<sup>191</sup> Export opponents point to so-called empty

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183. Cross & Winslett, *supra* note 101, at 513.

184. See *supra* text accompanying note 170.

185. Huebner, *supra* note 10, at 50.

186. *Id.*; see also John Burgess, *Exports Fire Up Tobacco Industry: Anti-Smoking Groups Take Battle Over Health Abroad*, WASH. POST, Dec. 16, 1990, at H1. In the Philippines, a Winston commercial depicts young people dancing to rock music with the lyrics, "Give me the spirit of the U.S.A." *Id.* at H5; see generally Warner & Connolly, *supra* note 177, at 325 (referring to the Marlboro man as the "quintessential symbol of rugged American individualism").

187. SMOKING OUT THE BARONS, *supra* note 167, at 81.

188. A senior researcher at Worldwatch Institute in Washington stated: Simple tubes of tobacco have come to represent modernity, *savoir-faire*, and, in the minds of children, who for decades have plunked down nickels for candy cigarettes and bubblegum cigars, adulthood. Surveys among young Americans have shown that cigarette advertising reinforces the image of the smoker as "sophisticated" as well as "young, attractive, healthy, and sexy."

Huebner, *supra* note 10, at 50.

189. With this image of smokers being presented, not surprisingly, 75% of United States smokers took up the habit before the age of twenty-one, and 90% before the age of twenty-five. *Id.* (statement by Joseph Califano, former Secretary of the U.S. Dept. of Health, Education, and Welfare, at the Fourth World Conference on Smoking).

190. *Id.* at 50-51.

191. A Thai Embassy official stated, "The cigarette exporters make it sound as if all they're going to do is come in and get smokers to switch brands. But what they do is,

box inducements whereby cigarette companies offer a reward to individuals who can produce a specific number of empty cigarette boxes.<sup>192</sup> This tactic obviously is meant to increase the number of cigarettes each consumer smokes, which in turn leads to increased cigarette sales. As one advertising executive commented, the argument that cigarette advertising is not aimed at attracting new customers "is so preposterous it is insulting. . . . [It] flies in the face of all advertising knowledge and experience."<sup>193</sup> The purpose of advertising is to increase sales, and the tobacco industry is unlikely to abstain from expanding its market.

Opponents of cigarette exportation believe that the United States has a moral obligation to place some form of control on the tobacco industry with regard to cigarettes shipped abroad. These critics argue that foreign states and their citizens are ignorant of the dangers associated with smoking and must rely on information disseminated from the United States.<sup>194</sup> One member of the American Medical Association's board of trustees asks pointedly, "How can we promote an addictive product that we know causes cancer, emphysema, heart disease, birth defects and other illnesses?"<sup>195</sup> This double standard is exacerbated by the finding that many United States brands exported to the Philippines and Indonesia have double and triple the average tar content of cigarettes manufactured for domestic sale.<sup>196</sup> Consequently, many export opponents de-

they come in and target women and children, who generally do not smoke in Asian societies, and increase the number of smokers." *Complaint Against Thai Cigarette Barriers*, *supra* note 138, at 1181. Between 1987 (when Taiwan opened its market to United States cigarette companies) and 1989, smoking in Taiwan increased by 4%. *Id.* at 1182. Furthermore, because of Japanese advertising campaigns depicting young women smoking United States brand cigarettes, young Japanese women are four times more likely to smoke than their mothers. *Id.*

192. Kaslow, *supra* note 159, at 8. One example is an Asian advertisement that offered free admission to a company-sponsored rock concert for those individuals who brought five empty cigarette packs. Lehman, *supra* note 14, at 10.

193. SMOKING OUT THE BARONS, *supra* note 167, at 84 (statement by A. Dumas, *Cigarette Ads—Conscience Versus Profit*, BROADCASTING AND TELEVISION WEEKLY, Aug. 10, 1978).

194. See Benrubi, *supra* note 53, at 119-20. According to Dr. Donald Kennedy, Commissioner of the Food and Drug Administration in 1978, "Because [scientific expertise] is available to U.S. decision makers, there is widespread reliance on those decisions by countries both with and without the capacity to make their own." *Id.* at 119 n.20 (citing HOUSE COMM. ON GOV'T OPERATIONS, REPORT ON EXPORT OF PRODUCTS BANNED BY U.S. REGULATORY AGENCIES, H.R. REP. NO. 1686, 95th Cong., 2d Sess. 26-27 (1978)).

195. Farnsworth, *supra* note 109, at D13 (statement by Dr. Raymond Scalettar, Board of Trustees, American Medical Association).

196. Schmeisser, *supra* note 44, at 1017 (citing studies released by the Toronto-

mand an end to the exportation of cigarettes to Third World and other non-Western nations.<sup>197</sup> A less-radical position asserts that, at a minimum, the United States has a moral obligation to institute export legislation that would provide some measure of protection for foreign consumers.<sup>198</sup> This legislation should require cigarette manufacturers to meet the safety requirements of the state of origin.<sup>199</sup> For United States manufacturers, this essentially would mean that health warnings would be required on exported cigarette packages, and foreign television advertising would be banned.<sup>200</sup>

#### IV. A BASIS FOR IMPOSING RESTRICTIONS ON THE EXPORT OF CIGARETTES UNDER INTERNATIONAL LAW

Principles of human decency and fairness should prompt the United States to institute a policy regulating the export of cigarettes. Apparently, however, the United States government considers humanitarian and moral obligations<sup>201</sup> secondary to the adverse economic consequences<sup>202</sup> that would result domestically from such a policy. A second, and perhaps more influential, rationale for instituting governmental regulations might be the political and foreign policy interests involved. The United States stands to lose international respect by continuing to injure foreign nationals through its unregulated exportation of cigarettes.<sup>203</sup>

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based Addiction Resource Center).

197. See Huebner, *supra* note 10, at 53.

198. See Burgess, *supra* note 186, at H5 (many want exported cigarettes to bear health warnings); *cf.* Cross & Winslett, *supra* note 101, at 517-18 (duty to inform foreign consumers of potential harm associated with hazardous products); Schulberg, *supra* note 53, at 378-79, 381 (moral obligation to protect foreign purchasers of products banned for domestic use).

199. See Schmeisser, *supra* note 44, at 1017.

200. See *id.*

201. See *supra* notes 174-79, 194-98 and accompanying text.

202. See *supra* notes 148-58 and accompanying text.

203. *Cf.* Seferovich, *supra* note 82, at 542 ("If only from a political or foreign policy standpoint, the United States does not stand to gain international respect if it continues to pollute and harm others through the dumping of dangerous substances abroad."). Ted L. Chen, a consultant to the Taiwan health department and professor of public health at the University of Massachusetts, has compared the United States policy of promoting tobacco exports to the 19th-century opium wars. These wars forced the Chinese to buy opium from Western traders in exchange for Chinese tea and silks. See Farnsworth, *supra* note 109, at D13. The opium exchanges led to a most destructive period of opium addiction in China and resulted in Chinese resentment toward the West. *Id.* This comparison to the opium wars is indicative of a condemnatory disposition that is not beneficial for strong international relations.

Perhaps the maintenance of healthy foreign relations warrants a small economic sacrifice.

The third major rationale for instituting restrictions is that the United States may be violating its duties under international law. By not complying with international law, the United States risks economic or political retaliation by the international community.<sup>204</sup> This justification is perhaps the most significant because it has the greatest potential for capturing the attention of United States legislators. This section explores the international legal theories that potentially impose a duty on the United States to regulate exported cigarettes more effectively.

International law, unlike domestic law, is not established through legislative enactments or case law. No deliberative legislative body exists on the international plane.<sup>205</sup> Furthermore, the decisions of the International Court of Justice have no precedential value; the decisions are legally binding only upon the individual parties to each dispute.<sup>206</sup> International law forms when a general norm has achieved acceptance in the international community.<sup>207</sup> To determine whether the international community has accepted a given norm, the International Court of Justice examines, among other things, the following sources: customary international law as reflected in the consistent practice of states, international conventions, general principles of law recognized by civilized states, and judicial decisions.<sup>208</sup>

In determining whether the United States has a duty under international law to provide warnings on its cigarette labels, one initially would examine any international agreements or judicial decisions on the subject. Unfortunately, treaties and judicial decisions regarding international liability for health endangerment are few in number,<sup>209</sup> and none ad-

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204. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 reporters' note 2 (1987) [hereinafter RESTATEMENT].

205. *Id.* part I, ch. 1 introductory note, at 16-17.

206. Statute of International Court of Justice, art. 59, *reprinted in* Charter of the United Nations, Statute and Rules of Court and Other Constitutional Documents, 1947 I.C.J. (ser. D) No. 1, at 37, 49; *see also* RESTATEMENT, *supra* note 204, § 103 cmt. b.

207. RESTATEMENT, *supra* note 204, § 102(1).

208. See Statute of the International Court of Justice, *supra* note 206, art. 38; RESTATEMENT, *supra* note 204, §§ 102, 103. For more background on the sources of international law, see generally LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 35-136 (2d ed. 1987).

209. The dearth of legal activity in this area is because of the relatively recent international concern for individual health. See Schulberg, *supra* note 53, at 368; *see also* Ved P. Nanda & Bruce C. Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 155, 179 (1988).

dresses the narrow category of cigarette exportation.<sup>210</sup> Consequently, this section examines the state of the law in three analogous international fields: the doctrine of state responsibility, human rights law, and international environmental law. The judicial decisions, treaties, and customs dealing with these three categories provide a foundation for determining whether the United States has any duty under international law to regulate further cigarette exportation.

### A. *International Doctrine of State Responsibility*

The doctrine of state responsibility has its foundation in the concept of sovereignty,<sup>211</sup> which is defined as the right of each state to exercise independently its basic functions.<sup>212</sup> Sovereign rights, however, are not absolute, but rather are limited by the doctrine of state responsibility.<sup>213</sup> According to the doctrine of state responsibility, "[a] State will be found liable under international law if the consequences of activities within that State's control seriously injure persons or property of other States."<sup>214</sup> In these instances, the legality of the activity is irrelevant.<sup>215</sup> Consistent with this doctrine, several international cases establish that a state will be held liable if it permits its territory to be used in a manner that causes substantial damage to another state or another state's nationals.<sup>216</sup>

*The Trail Smelter Arbitration*<sup>217</sup> involved a dispute over damage to United States property caused by the emission of sulphur dioxide fumes from a private smelting operation in British Columbia.<sup>218</sup> The arbitration tribunal, established pursuant to a convention between the two party

210. Indeed, even the export of domestically banned or hazardous substances (a significantly broader field than cigarettes) is not subject to a specific international agreement. Seferovich, *supra* note 82, at 546; Greenwood, *supra* note 82, at 141; Nanda & Bailey, *supra* note 209, at 179.

211. See Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 54 (1975); Benrubi, *supra* note 53, at 133-34.

212. Handl, *supra* note 211, at 55; Benrubi, *supra* note 53, at 133-34.

213. Handl, *supra* note 211, at 55; Benrubi, *supra* note 53, at 133-34; Enrique Gómez-Pinzón, *State Responsibility for External Consequences of Domestic Economic-Related Acts*, 16 CAL. W. INT'L L.J. 52, 79 (1986).

214. Benrubi, *supra* note 53, at 134.

215. See Gómez-Pinzón, *supra* note 213, at 82-83.

216. See Schulberg, *supra* note 53, at 370.

217. Trail Smelter Arbitral Tribunal (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), reprinted in 35 AM. J. INT'L L. 684 (1941); see also Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259 (1971).

218. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 692-93; Rubin, *supra* note 217, at 259-60.

states, analogized the situation to United States trespass and nuisance law<sup>219</sup> because the smelter plant posed a serious risk to United States property.<sup>220</sup> In holding Canada liable under international law for the damage caused by one of its nationals, the tribunal declared that under both international law and the law of the United States, "no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . on or to the territory of another or the properties or persons therein."<sup>221</sup>

The tribunal's pronouncement is particularly significant in determining whether the United States violates international law by exporting cigarettes without warnings. In *Trail Smelter*, the tribunal held the Canadian government liable for the private acts of its nationals, regardless of whether the government was directly responsible for the injury.<sup>222</sup> Similarly, the United States may be violating international law by permitting the export of cigarettes without warnings, even though the government is not harming foreign citizens directly.<sup>223</sup> Although the narrow interpretation of *Trail Smelter* confines the holding to international pollution caused by noxious fumes, the case has been construed broadly to hold that "nations have a responsibility to ensure that activities within their territory do not cause damage in the territory of another state."<sup>224</sup> By permitting the export of cigarettes without warnings, the United States is allowing activities within its "territory"<sup>225</sup> (manufacturing and selling cigarettes) "to cause injury"<sup>226</sup> to the nationals of a foreign state.

In the *Corfu Channel* case,<sup>227</sup> Great Britain brought an action against Albania in the International Court of Justice for damage sustained when two British ships struck mines in Albanian territorial waters.<sup>228</sup> Al-

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219. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 713-16; Rubin, *supra* note 217, at 262-63.

220. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 716-17; Rubin, *supra* note 217, at 266-67.

221. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 716; Rubin, *supra* note 217, at 267.

222. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 716-17; Rubin, *supra* note 217, at 266-67.

223. See Schulberg, *supra* note 53, at 370-72.

224. *Id.* at 371.

225. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 716; Rubin, *supra* note 217, at 267.

226. *Trail Smelter*, reprinted in 35 AM. J. INT'L L. at 716; Rubin, *supra* note 217, at 267.

227. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), reprinted in 43 AM. J. INT'L L. 558 (1949).

228. *Id.* at 562.

though Albania was not directly responsible for the laying of the mines, the court held Albania liable for the damage to the ship.<sup>229</sup> The court determined that Albania was required to inform others of the mine fields in its territorial waters because every state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>230</sup> In *Corfu Channel*, as in *Trail Smelter*, the court imposed liability despite a lack of negligence on the part of the defendant state.

The *Lake Lanoux* case<sup>231</sup> further reinforces the principle that one state cannot exercise its rights while harming the interests of another state.<sup>232</sup> In *Lake Lanoux*, Spain asserted that France was using lake waters in a manner that violated a treaty guaranteeing the natural flow of the River Carol into Spain.<sup>233</sup> In holding that France was not abusing its rights, the arbitration tribunal distinguished between activities with purely domestic implications from those with consequences in foreign states.<sup>234</sup> According to the tribunal, a state has "the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that . . . it has a real solicitude to reconcile the interests of the other [state] with its own."<sup>235</sup> Thus, when a state has alternative means of achieving a goal, the doctrine of state responsibility obligates a state to select the path that will not harm a foreign state.<sup>236</sup>

*Corfu Channel*, *Trail Smelter*, and *Lake Lanoux* support the proposition that states have a duty to prevent their nationals from injuring a foreign state or its citizens. Furthermore, states will be held responsible for allowing injurious activities to continue. Judicial decisions on the subject of state responsibility support a finding that the United States has a duty under international law to protect foreign nationals from the dangers of United States brand cigarettes. Therefore, the United States violates international norms when it allows private tobacco companies to export cigarettes—a product that inevitably will injure foreign consumers—without any warnings.

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229. *Id.* at 582.

230. *Id.* at 571.

231. *Lake Lanoux Case (Fr. v. Spain)*, reprinted in 53 AM. J. INT'L L. 156 (1959).

232. See Gómez-Pinzón, *supra* note 213, at 85.

233. *Lake Lanoux*, reprinted in 53 AM. J. INT'L L. at 158-59.

234. See *id.* at 170.

235. *Id.* at 169.

236. Gómez-Pinzón, *supra* note 213, at 85.

### B. *International Law of Human Rights*

A duty to regulate the export of cigarettes also stems from the international law of human rights. Human rights refers to the freedoms and benefits that, according to contemporary moral values, every human being should enjoy.<sup>237</sup> Whereas the state responsibility doctrine focuses upon injuries to a foreign state or its citizens, human rights law is concerned only with injuries to natural persons, and it applies to all human beings, not just foreign nationals.<sup>238</sup> Human rights law originated after World War II with the adoption of the United Nations Charter (the Charter).<sup>239</sup> According to the Charter, the United Nations (UN) and its member states have a duty to use international cooperation to solve international economic and humanitarian issues and to promote respect for human rights.<sup>240</sup> Member states agree to advance "solutions of international economic, social, health, and related problems."<sup>241</sup> The United States, as a member of the UN and a signatory to the Charter, is bound by the Charter's provisions. If the unrestricted exportation of cigarettes is deemed an economic, social, or health problem, then the United States and all UN members have a duty to seek a solution.<sup>242</sup>

Because the UN Charter does not specifically define or enumerate the meaning of human rights and fundamental freedoms, the UN established the Universal Declaration of Human Rights.<sup>243</sup> The Universal Declaration enumerates a list of basic civil rights, as well as economic, social, and cultural rights, including the right to work, to education, to an adequate standard of living (including medical care), and to various other social services.<sup>244</sup> The Universal Declaration was adopted in the form of a non-binding resolution, but various commentators argue that it has ac-

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237. See RESTATEMENT, *supra* note 204, § 701 cmt. a.

238. *Id.* part VII introductory note, at 144.

239. *Id.* at 144-45.

240. U.N. CHARTER art. 1, para. 3.

241. *Id.* art. 55(b).

242. *Cf.* Schulberg, *supra* note 53, at 372 (the United States and all United Nations members have a duty to find a solution to the problem of hazardous exports).

243. G.A. Res. 217, U.N. Doc A/810, at 71 (1948); see generally FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 364 (1990). The General Assembly approved the Universal Declaration of Human Rights without dissent, although eight states abstained. Since its approval, virtually all states have asserted at least some support for the Universal Declaration. See RESTATEMENT, *supra* note 204, part VII introductory note, at 145 n.2.

244. See NEWMAN & WEISSBRODT, *supra* note 243, at 364; RESTATEMENT, *supra* note 204, § 701 reporters' note 6.



quired the status of customary law.<sup>245</sup> In 1966, the UN adopted two international covenants on human rights to give greater specificity to the Universal Declaration and to furnish documents that individual states could ratify.<sup>246</sup> Although the original plan was to create a single instrument that included all the rights delineated in the Universal Declaration, two separate covenants eventually developed—the Political Covenant addresses political and civil rights, and the Economic Covenant covers economic, social, and cultural rights.<sup>247</sup> The United States, however, is not a party to the covenants.<sup>248</sup>

Because the United States is not a party to either covenant, it technically is not bound by them. If, however, the United States ratifies the covenants, or if states regard the covenants as evidence of customary law, then the United States will be obligated to take the appropriate steps to achieve the goals of the covenants.<sup>249</sup> Significantly, article 12 of the Economic Covenant includes the right to physical and mental health.<sup>250</sup> Foreign consumers of cigarettes, unlike consumers in the United States,<sup>251</sup> are largely unaware of the health risks associated with smoking.<sup>252</sup> Ar-

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245. RESTATEMENT, *supra* note 204, § 701 reporters' note 2.

246. NEWMAN & WEISSBRODT, *supra* note 243, at 364. These covenants entered into force in 1976 after being ratified by 35 states, the number required to bring them into effect. Egon Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511, 512-13 (1976).

247. See NEWMAN & WEISSBRODT, *supra* note 243, at 364.

248. See Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 385 & n.86 (1985). Former President Jimmy Carter did sign the covenants and submitted them to the Senate for advice and consent to ratification. The objection of the Reagan and Bush administrations is that if economic, social, and cultural goals are viewed as rights, governments will deny civil and political rights in the search for economic stability. NEWMAN & WEISSBRODT, *supra* note 243, at 390.

249. Paragraph (1) of article 2 of the International Covenant on Economic, Social and Cultural Rights sets forth the basic obligation of parties "to take steps," individually and through international assistance and cooperation, "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" by the covenant "by all appropriate means, including legislative measures." Newman & Weissbrodt, *supra* note 243, at 390 (quoting the International Covenant on Economic, Social and Cultural Rights).

250. *Id.* at 392. For a general discussion of the rights set forth in this Covenant, see Phillip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

251. For discussion of the United States public's awareness of smoking hazards, see *supra* notes 39-42 and accompanying text.

252. See *supra* text accompanying notes 61-63.

guably, the United States refusal to supply foreign nationals with this information would violate article 12 of the Economic Covenant. If the United States violates article 12, it accordingly violates human rights.

The United States supports two UN agencies concerned with human health: the Food and Agriculture Organization (FAO) and the World Health Organization (WHO).<sup>253</sup> This support provides further evidence of the United States obligation to enforce human rights.<sup>254</sup> The FAO is concerned mainly with protecting humanity from hunger, ensuring higher standards of living, and bettering the condition of rural populations.<sup>255</sup> The WHO coordinates all international activities in the field of health by maintaining international health services, promoting and conducting health research, and improving teaching standards in the health and medical professions.<sup>256</sup> The preamble to the WHO constitution "declares that the enjoyment of the highest attainable standard of health is a fundamental right of every human being and that Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."<sup>257</sup> As a signatory to the UN Charter, and a participating member in the FAO and the WHO, the United States is obligated to protect the health of consumers worldwide,<sup>258</sup> including consumers of United States brand cigarettes. As one commentator summarized, "[T]he United States has in fact 'promised' to concern itself with those very things which the present export system has failed to do: protect human health and the world environment."<sup>259</sup>

### C. *International Environmental Law*

The development of international environmental law is still in its beginning stages. As a result, legal precedents in this area are limited.<sup>260</sup> Nevertheless, the small number of international agreements and organizations do establish a clear trend toward controlling world trade to prevent potential adverse health consequences.<sup>261</sup> Non-binding declarations

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253. Seferovich, *supra* note 82, at 541-42.

254. *Id.*

255. NEWMAN & WEISSBRODT, *supra* note 243, at 15.

256. *Id.*

257. *Id.*

258. *See* Seferovich, *supra* note 82, at 542.

259. *Id.*

260. *See* Schulberg, *supra* note 53, at 368; *see also* Nanda & Bailey, *supra* note 209, at 179.

261. *See* Seferovich, *supra* note 82, at 546; *see also* Schulberg, *supra* note 53, at 368.

and the principles established by international organizations are significant because they create community expectations, influence state behavior, and sometimes attain the status of customary international law.<sup>262</sup>

The initial movement into the area of international environmental law occurred in 1972 at the Stockholm Conference on the Human Environment (the Stockholm Conference).<sup>263</sup> At the Stockholm Conference, delegates from 113 states, including the United States, drafted the Declaration on the Human Environment,<sup>264</sup> which, although not binding on any state, indicates the emergence of customary international law in this area.<sup>265</sup> Two of the principles set forth in the Declaration establish the basic rules concerning state responsibility for environmental damage to another state. According to principle 21 of the Declaration, "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>266</sup> These principles demonstrate a growing concern for the protection of human health as well as the environment.

Another consequence of the Stockholm Conference was the 1972 establishment of the United Nations Environment Programme (UNEP), the official UN agency dealing with environmental matters.<sup>267</sup> The UN established UNEP to advance environmental cooperation among the member states and to coordinate other related agencies and programs.<sup>268</sup> Although UNEP is dedicated specifically to the environment and not human beings, it has been involved actively with the international trade of potentially hazardous products and the effects on the ultimate consumer.<sup>269</sup> Furthermore, the main objective of UNEP "is to establish a

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262. See Nanda & Bailey, *supra* note 209, at 179.

263. See *Report of the United Nations Conference on the Human Environment* (Stockholm), U.N. Doc. A/CONF.48/14/Rev. 1 (1973) [hereinafter *Stockholm Conference*].

264. *Id.* at 3-5.

265. Schulberg, *supra* note 53, at 368-69.

266. Stockholm Conference, *supra* note 263, at 5. While principle 21 establishes a certain responsibility on the part of states, principle 22 delineates the potential liability accompanies that responsibility: "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." *Id.*

267. See Philip Alston, *International Regulation of Toxic Chemicals*, 7 *ECOLOGY* L.Q. 397, 411 & n.58 (1978); Seferovich, *supra* note 82, at 546; Schulberg, *supra* note 53, at 369.

268. See Alston, *supra* note 267, at 411; Seferovich, *supra* note 72, at 546.

269. See Schulberg, *supra* note 53, at 369.

warning system to provide notice to countries whose environment and human health may be affected by the export of hazardous substances.<sup>270</sup> Because of the attention paid to human health and the ultimate consumer, the purpose of UNEP relates to the problems associated with the unregulated export of cigarettes.

In 1989, under the auspices of UNEP, over one hundred states adopted the Final Act of the Basel Conference on the Control of Transboundary Movements of Hazardous Wastes.<sup>271</sup> The Basel Conference drafted and adopted the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention or the Convention),<sup>272</sup> which developed in response to increasing concerns regarding the potential dangers of hazardous waste exports.<sup>273</sup> Although the Basel Convention has many components, its main purpose is to provide "a procedural 'prior informed consent' mechanism ensuring that hazardous wastes and other wastes are not exported unless the state of import has consented in writing to the specific waste import, based on detailed information provided by the state of export."<sup>274</sup> This system is beneficial because it provides importing states with accurate information on which to base their decisions and, subsequently, maintain their sovereignty.<sup>275</sup> Additionally, under the Basel Convention, an exporting state will be held liable if that state knowingly engaged in misinformation or fraud preventable through vigorous enforcement of its domestic laws.<sup>276</sup> Although the Basel Convention has not yet entered into force, its establishment is evidence of a worldwide commitment to the prevention of environmental and human injury.

In addition to the aforementioned international declarations and organizations, several other organizations influence the export of environmentally harmful substances. The Organization for Economic Cooperation and Development (OECD) is an intergovernmental organization dealing with transnational pollution and other environmental problems.<sup>277</sup> The OECD has recommended restricting the manufacture

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270. Seferovich, *supra* note 82, at 546.

271. David J. Abrams, Note, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801, 804 (1990).

272. *Id.*

273. *Id.* at 817.

274. *Id.* at 820.

275. *See id.* at 826; Cyrus Mehri, Note, *Prior Informed Consent: An Emerging Compromise for Hazardous Exports*, 21 CORNELL INT'L L.J. 365, 387 (1988).

276. *See Abrams, supra* note 271, at 838.

277. *See Schulberg, supra* note 53, at 369.

of toxic substances that damage the earth's environment<sup>278</sup> and strongly advocates a "polluter pays principle."<sup>279</sup> Other relevant organizations include the International Agency for Research on Cancer (IARC) and the International Register of Potentially Toxic Chemicals (IRPTC).

Smoking is not a specific concern of these international agencies and agreements; they concentrate upon substances that directly damage the environment. The rationale behind protecting the environment is, in part, to ensure the continuation of human life. The protection of human life through environmental control is analogous to the protection of human life through cigarette control. International environmental law itself does not establish that the United States has a duty to regulate further the exportation of cigarettes. The combination of environmental law, the state responsibility doctrine, and human rights law, however, reflects a common theme that states have a fundamental duty to protect human lives worldwide. Accordingly, the United States has a duty under international law to protect foreign consumers by warning them about the health risks associated with United States brand cigarettes.

## V. SUGGESTIONS FOR THE FUTURE

The export of cigarettes to Asia, Eastern Europe, and the Third World clearly benefits the United States economy.<sup>280</sup> An absolute ban of such exportation would be utterly detrimental, and perhaps foolish.<sup>281</sup> A compromise solution is in order, however, because profit maximization at the expense of worldwide health is unjustified. The United States government especially should be concerned about the current cigarette export policy because it potentially violates a duty established by the doctrine of state responsibility, human rights law, and international environmental law. The consequences of violating international law might include economic or political retaliation by the international community.<sup>282</sup> The United States must reconcile the domestic benefits of cigarette exportation with the individual harm incurred abroad and the potential repercussions for violating international law.

First, the United States government should mandate that the tobacco industry notify cigarette-importing governments of the potential harm associated with smoking. Foreign governments should be supplied with this information to institute any prophylactic measures necessary for the

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278. See Nanda & Bailey, *supra* note 209, at 181; Alston, *supra* note 267, at 423.

279. See Alston, *supra* note 267, at 422; Seferovich, *supra* note 82, at 547.

280. See *supra* notes 148-52 and accompanying text.

281. See *supra* notes 153-58 and accompanying text.

282. See RESTATEMENT § 905 reporters' note 2.

welfare and protection of their people. Second, the United States should refrain from section 301 threats when a foreign government subjects United States brand cigarettes and cigarette advertising to the same laws that apply to that foreign state's own cigarette brands. When the foreign state establishes sales or advertising restrictions across the board, it is not being ethnocentric; rather, the foreign state is protecting the health of its citizens. If the use of section 301 is not prohibited in these situations, a foreign state will be unable to take advantage of its newly acquired knowledge regarding smoking hazards. Third, the United States government should apply the warnings required in section 1333(a)-(c) of the Labeling Act to cigarettes produced for export.<sup>283</sup> The warning requirements will ensure that information regarding the health hazards of smoking reaches foreign consumers directly, which will allow individuals to assess the dangers and independently determine whether to assume the risks associated with smoking. Finally, all exported cigarettes must meet the same quality control standards that the United States has established for all domestically-sold cigarettes.

Although these proposed policy amendments will lessen the tobacco industry's potential profits, they will not prevent foreign citizens from smoking if they so choose. This policy allows for a manageable compromise, providing some degree of protection to human health, while saving the tobacco industry from severe financial deprivation. These provisions will help eliminate deceptive trade practices and, subsequently, will promote healthy foreign relations. By instituting these proposed measures, the United States would meet its ethical and legal responsibilities.<sup>284</sup>

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283. Sections 1333(a)-(c) sets forth the required warnings and warning formats for cigarette packages, advertisements, and billboards. Moreover, it lays out the plan of rotating statements. 15 U.S.C. §§ 1333(a)-(c). For this requirement to have any substantive effect, the warnings must be written in the language of each importing state. Sections 1333(d) and 1340 of the Act would have to be repealed because they specifically exempt exported cigarettes from the aforementioned warnings. 15 U.S.C. §§ 1333(d), 1340.

284. On June 26, 1991, Rep. Chester G. Atkins (D-Mass.) introduced two bills aimed at "disolv[ing] the marriage between the tobacco industry and the trade offices of the US government." Renu Sehgal, *Curb Sought on US Aid to Tobacco Firms*, BOSTON GLOBE, July 7, 1991, at 9. Under the first bill, the Cigarette Export Labelling Act, exported cigarettes would be subject to the same restrictions that the current Labeling Act imposes on domestically sold cigarettes. H.R. 2779, 102d Cong., 1st Sess., 137 CONG. REC. E 2381 (daily ed. June 26, 1991) (statement by Rep. Atkins). The second bill, the Cigarette Export Reform Act, would bar the United States from using section 301 or other measures to force foreign states to relax their laws regulating tobacco. H.R. 2781, 102d Cong., 1st Sess., 137 CONG. REC. E 2381 (daily ed. June 26, 1991) (statement by Rep. Atkins).

