

REACH: The fight must go on

Lawrence Kogan, CEO of the non-profit **Institute for Trade, Standards & Sustainable Development**, believes that the REACH legislation can and must be fought via the World Trade Organisation

Many of Europe's largest companies and trade associations went along in the end with the final REACH iteration, apparently accepting it as 'the least-worst solution' to a long and arduous negotiation process (*SCM*, January-February 2007, page 8).

The fact is, though, that REACH ushers in a new, very costly paradigm of hazard-based regulatory governance that, on political whim and with the assistance of Socialist and environmental activist groups, has reversed the legal, economic and technological burdens of proof against industry. It favours an overwhelmingly elitist/statist/utopian EU government approach to public policy problems.

Whilst some organisations, such as the CIA, rolled over and played dead on REACH more than two years ago, others, like CEFIC, challenged underlying notions as inimical to both the industry's economic profitability and technological progress. For the most part, they still do - at least privately.

Large companies like BASF have publicly stated their readiness to comply fully with REACH. Perhaps they can afford the more than €550 million of projected additional compliance costs, unlike their small and medium-sized local competitors? Or perhaps they assume, behind closed doors, that it may actually cost them less because their large non-European competitors also will be saddled with such expensive, onerous and inefficient rules?

REACH is blatantly extra-territorial, violates national sovereignty and will soon be imposed on industry up and down global product/process supply chains. Thus it is in the economic, legal and political interests of non-European companies, especially those based in developing countries and within the US, to challenge it at the World Trade Organisation (WTO).

Indeed, this is arguably the whole purpose of the WTO's Dispute Settlement Body, when negotiations to resolve contentious disputes over national/regional regulations and standards prove futile. Without a consensus as to the meaning and scope of applicable WTO rules, litigation is the next best option.

REACH, like other EU precautionary principle-based regulations, imposes European cultural preferences on non-EU firms throughout the world. A WTO panel recently decided, however, that the precautionary principle is currently an extra-WTO concept that has no place within the WTO regime. This holds especially true for member country disputants that have not embraced it.

The reversal of the legal burdens of production and persuasion will have far-reaching legal, economic and technological downstream repercussions on all businesses, European and otherwise. It will trigger measurable consumer product and service cost increases and materially diminish private property values.

REACH also fails to accord adequate recognition, and thus sufficient legal protection, to private IP rights (proprietary testing data, formulae and other trade secret information). These will, of necessity, be passed on to the regulators via supply chain consortia-generated product dossiers submitted to secure authorisation. Thus, REACH paves the way for non-compensated regulatory 'takings' of private property for an ostensible public use, which may benefit other private parties.

REACH is the first of a two-step dance choreographed by the EC. The second involves the development of a new and more comprehensive UN-based multilateral chemicals management treaty built on the foundations of SAICM. SAICM would incorporate extra-WTO precautionary principle-based treaties, including POPs, LRTAP, Rotterdam-PIC and the Basel Convention's Ban Amendment. It could serve to establish the precautionary principle as an international treaty norm through subsequent treaty practice and the evolution of customary international law.

The Institute for Trade, Standards and Sustainable Development (ITSSD) cannot see any environmental benefits from these initiatives outweighing their severe economic, technological and societal costs. Apparently, neither can Brussels. Europe's institutions have expressly rejected any such notion of economic accountability within their regional administrative law regime (see, for example, the American Bar Association's recent report, http://www.abanet.org/adminlaw/eu/reports_rulemaking_06-30-06.pdf).



ITSSD research has revealed how the EU, led by France and other member states, has sought to legitimise and then universalise throughout the UN system an environment-centric doctrine of 'negative' (Malthusian) sustainable development that incorporates the precautionary principle.

Europe hopes that this, together with a resurrected EU constitution, will counter-balance the perceived hegemony of the US, the world's last superpower. It intends to wield precautionary principle-based regulations like REACH as a sword of international 'soft' power to carve out a new 21st century global paradigm in the image of UN Agenda 21.

Some American isolationists have endeavoured to shield the US by denying the existence of binding 'international law' and by calling for US withdrawal from the UN system. Consequently, the US has had little, if any, influence in the UN Environment Programme (UNEP), which is now funded primarily by the EU and its member states.

The US, nevertheless, has managed to shape UNEP treaties around the edges as a non-party. Whether or not the US should ultimately become a party to any of these regimes is a 'facts and circumstances' question deserving of a public debate, which is unlikely to occur before the 2008 presidential election.

European Socialist and liberal American politicians support environmental activism to promote Agenda 21 objectives, including multilateralism by default. The ITSSD, however, supports internationalism. We embrace international solutions to global problems to the extent that US national interests are advanced in the process. It may involve US participation in a 'coalition of the willing' to address certain global or regional issues or, it may, where the costs and benefits are to its favour, involve US participation in multilateral regimes.

The ITSSD also supports the US constitution, which is premised on the concepts of national self-identity, individual self-help and free trade. Unlike EU law, it promotes the least trade- and market-restrictive solutions to public policy concerns. It is the supreme law of the land for us, to a degree that international law can never be. Europe lacks such a defining national political identity and self-help ethic, despite its common economic market and the pursuit of a pan-European constitution.

Europe has created instead a regulatory leviathan atop an uneasy regional treaty-based confederation of independent sovereign states. Europeans, therefore, reflexively seek a multilateral solution to most public policy conundrums. Their sordid history of self-destructive nationalism, trade protectionism, human rights violations, health pandemics and environmental degradation leaves them little choice. Their regional concerns and regulatory prescriptions are then elevated to global consciousness at the UN through public fear-mongering (such as on global warming).

Europe's political experiment is fundamentally flawed, as it is based on the preservation of the polity at the expense of the individual. The US constitutional system, which has predominated the international legal and economic framework since World War II, is premised on the sanctity of the individual, whose efforts at self-help have been proven to benefit the overall good of the polity.

This important difference is analogous to the distinction between 'default' multilateralism and proven internationalism. It explains why the US and developing countries should firmly oppose Europe's unilateral imposition of multilateral precautionary principle-based regulations such as REACH.

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