

America Should 'Draw A Line In The Sand' Against European Lobbying For Precautionary Principle, White Paper Argues

The Institute for Trade, Standards and Sustainable Development claims that the European Commission has established a United Nations "beachhead" that threatens U.S. global marketing by subjecting exported chemicals to a risk-averse paradigm of regulations and trade barriers.

With the United Nations serving as its proxy, Europe is promoting a multi-pronged effort to impose the precautionary principle on the regulatory schemes of the United States and other countries, the Institute for Trade, Standards and Sustainable Development argues in a recent White Paper.

The paper, "Precautionary Preference: How Europe's New Regulatory Protectionism Imperils American Free Enterprise," was issued in July. It was authored by Lawrence Kogan, CEO of the Princeton, N.J.-based group.

The precautionary principle has its roots in German philosophy and is practiced widely in Europe. Among other things, it directs governments to ban or restrict the use of synthetic chemicals whose safety has not been established with absolute certainty.

The principle guides the environmental policies of the European Union, and it has been proposed in the United States in a handful of state and local jurisdictions – although few of these proposals have been adopted, so far (see *Insider*, Vol. 2, No. 11, "Precautionary Principle Pushed In United States," June 7, 2005).

But the principle has also served to guide the development of European regulations with major, international implications, including the Registration, Evaluation and Authorization of Chemicals (REACH) proposal – which would set up a regulatory (and potentially restrictive) framework requiring the submission of toxicity data on all of the 30,000 chemicals exported to Europe.

At the same time, the report asserts, "With guidance and assistance from the EU and the United Nations' Global Compact Office, Environment Program and Commission on Sustainable Standards, European-based environmental non-governmental organizations and social groups have developed and imposed on U.S. multinational companies and their small and medium-sized suppliers the duty/obligation to comply with Euro-style [corporate social responsibility] standards."

A 'LINE IN THE SAND'

Warning that the viability of U.S.-based companies is threatened by such standards, among other Euro-driven trends, the report "urges U.S. industry

The White Paper is available at:
www.itssd.org/white_papers.htm.

and government to draw an unwavering 'line in the sand' beyond which no extraterritorial EU environmental, health and safety rules may pass [domestically], unless scientifically, technically and economically justified.

"In other words," the report continues, "U.S. industry and government must quickly join ranks to protect the American enterprise system, its current comparative advantage in international trade and technological innovation and its longer-term national economic prospects.

"And," the report adds, "the United States must accomplish this without falling down the slippery slope of trade protectionism. All of these interests are now under threat from a European Union with grand ambitions – one that is endeavoring to shape the 21st century global agenda through its involvement with the United Nations as it aspires to become a global political and economic power in its own right.

"In essence," the report states, "U.S. industry and government must not permit the new global regulators and their civil society allies to unilaterally impose on America EU cultural preferences and legislative mandates by employing the precautionary principle under the guise of European enlightened altruism, i.e., sustainable development."

Insider asked Kogan to discuss his conclusions, and their implications for U.S. pesticide producers.

Insider: The White Paper points out that the EU moratorium against U.S. biotech products was lifted. Wouldn't that suggest that the EU lost that round?

Kogan: The moratorium was imposed in a factual sense by different member states. It wasn't the European Commission, which is the executive branch of European Community, which imposed the moratorium. It was imposed by member states that happened to act in concert. The European Commission negotiated with the governments of those member states to drop their de facto moratorium against biotech imports. The de facto moratorium was lifted as a quid pro quo for the European Commission adopting and implementing some regulations concerning traceability, pre-market authorization, and labeling of biotech products.

Insider: How does the EU Biocidal Products Directive [on non-agricultural pesticides and antimicrobials] requirement for pre-market authorization and study submission differ from the EPA study requirements for pesticide registration?

Kogan: The difference is that the information required by the Directive is based on a prior presumption that these things are harmful and need to receive authorization for their sale. EPA does not presume that everything is harmful [before a registration application is submitted].

"U.S. industry and government must quickly join ranks to protect the American enterprise system, its current comparative advantage in international trade and technological innovation and its longer-term national economic prospects." *Kogan Report*

In addition, the Directive affects the entire supply chain by affecting the processes and products necessary to produce the biocides. They follow the traceability regime established for biotech products to impose the burden of using the safest alternatives in the manufacturing process, even if the manufacturers are already in compliance with the [data] requirements of the Directive. That's part of the burden of the precautionary principle. It intrudes on the discretion of businesses to use the substances and processes they want for manufacturing. And, there are releases of proprietary information along the supply chain when you make regulatory filings.

Insider: The proprietary information isn't shielded?

Kogan: The intellectual property protections are inadequate, which, as a result, allow for the inadvertent disclosure of proprietary information.

Insider: Is there any congressional interest in enacting regulations similar to the REACH proposal from the European Commission?

Kogan: There isn't any effort to adopt REACH as a federal statute, wholesale, but the GAO recently issued a report that talks about the ability of EPA to conduct a viable scientific risk assessment of chemicals. The conclusion of the report, which was commissioned by a partisan group of congressmen, was that the EPA does not have that ability, and, therefore, needs to change the TSCA and FIFRA statutes to provide it with that ability. [See *Insider*, Vol. 2, No. 14, "Disputes Arise Over Possible Extensive New Data Requirements," Aug. 2, 2005.] The appendix to the GAO report plainly refers to the REACH proposal.

Insider: The White Paper suggests that the GAO investigation was related to a UN Environment Programme Finance Initiative report. Are you suggesting a direct link between the UN and the GAO investigation?

Kogan: There was an interesting confluence of events, to say the least. UNEP has been the focal point for UN activities

A PESTICIDE.NET PROFILE

LAWRENCE KOGAN

Attorney Lawrence Kogan, CEO of the Institute for Trade, Standards and Sustainable Development, has tackled a particularly complex advocacy – one that involves a comprehensive knowledge of international environmental and treaty law – but his background has prepared him well.

In fact, he says, "the things I'm working on now are easy compared to the tax treaties I worked on."

A native of Long Island, N.Y., Kogan is experienced in international business, trade and regulatory law. He has a Bachelors of Arts in Philosophy and Political Theory from Boston University, a law degree from the University of Miami (Coral Gables), and a Masters of Laws in Taxation from Georgetown University.

Since then, he has worked as an international, corporate tax attorney in New York City with some very-well-known firms. He has also advised Bush administration officials, congressional panels, and foreign trade officials on issues involving the World Trade Organization, the European Union, and customary international law.

He served as "COO and general counsel for an import/export company for 11 years," Kogan says, adding, "That work enabled me to travel to Europe and Asia, and I spent quite some time working with the Europeans, many of whom became friends – so it was very disheartening when I learned what was going on beneath the surface of European politics."

Asked how he came to co-found the ITSSD, Kogan says, "The spark was my work for the Foreign Trade Council, which is, perhaps, the oldest trade advocacy group in Washington. My work received a great deal of recognition from U.S. industry and government as well as foreign governments and intellectuals."

Besides his work for the Council, Kogan became motivated to start his group (which was launched last April) after meeting his eventual co-founder, Slavi Pachovski – the first Bulgarian to represent his country as Permanent Representative to the United Nations after the fall of the Iron Curtain.

"We were both taking a course at Seton Hall [South Orange, N.J.] on international financial institutions," Kogan recalls. "Slavi is a leading expert on the genesis of European Community law and the use of standardization as a trade protectionist tool – which is why he wanted to join with me in creating this organization."

Although deeply immersed in his advocacy work, Kogan still sets aside time to continue his studies; currently, to pursue a Masters Degree in Diplomacy and International Relations at the John C. Whitehead School of Diplomacy at Seton Hall.

on the exactly the same activities that the Europeans are focusing on. It also happens to be coincidental that many of the initiatives being proposed in the U.S. at the state and local level by civil society groups cite UN declarations and the UNEP programs. Is there any evidence showing a direct link to the GAO report? No. But, I surmise that there must be an indirect linkage based on all the activity coming out of UNEP; the references in the initiatives proposed at the state, local and even federal levels; and how hard Europe has been pushing its agenda through UNEP.

Insider: Given the large databases on U.S.-registered pesticides, do you think the REACH requirements would still impose additional testing mandates on domestic pesticide exporters?

Kogan: You would think that would be duplicative, based on how thoroughly pesticides have been studied, so the question would be what additional aim would be achieved by imposing REACH on pesticide manufacturers? I imagine that REACH, being based on the precautionary principle, would shift the burden of proof to industry and would change the standard of proof from significant harm to any potential harm. REACH also applies to the risk of any potential harm.

Insider: Do you feel that the risk assessment paradigm established by the Food Quality Protection Act could be modified to re-establish the Delaney Clause [which prohibited the use of food additives known to be carcinogenic] for pesticide regulation, even though Delaney was eliminated from pesticide regulation in exchange for industry agreement to support FQPA enactment?

Kogan: Delaney is the precursor to the precautionary principle, and, therefore, there is an attempt on multiple fronts to reinstate a form of Delaney through the precautionary principle for all types of chemicals and substances, including pesticides. That effort is being led by the NGOs, but there are also bills going through certain state legislatures with an interest in Delaney – and there are some members of Congress looking into that, as well.

Insider: The White Paper maintains that Europe has been eager to provide China with technology, “especially if it disadvantages U.S. industry,” and asserts that Europe hopes “to move China towards European precaution-based regulatory rules.”

In view of the Chinese environmental track record – such as reports that a Chinese province supposedly dedicated to “organic” food production has exported produce with residues of conventional pesticides, along with the uncontrolled sulfur dioxide emissions from Chinese electric utilities – are the Europeans naïve in hoping that the Chinese will actually adopt precautionary regulations in exchange for Western technology?

Kogan: They’re not naïve because Europeans take a long view on most things. They believe that through the process of time and persuasion, and

the fact that they present the largest market for Chinese exports, that they can persuade the Chinese to come along with their view.

In order to have a bilateral agreement with the Chinese, there would have to be some agreement on the stringency of their Euro-based regulations, and, in order to do that, you would have to have some type of harmonization of regulatory frameworks.

Insider: How would the Europeans know if the Chinese were enforcing the precautionary regulations?

Kogan: They already have a science and technology office in Beijing and they're working with the Chinese on a daily basis. So, what they're trying to do through their science and technology agreements is to bring the Chinese along to harmonize their regulatory approach with the European approach.

Insider: The Chief of the UN Treaty Section is quoted as saying that public and NGO pressure is an important tool to compel corporate compliance with "global environmental standards" by "shaming" them. That official mentions Home Depot and Citibank, but he doesn't mention any European-based multinationals or corporations. Do you feel that official is targeting U.S. companies, in particular, for a "shame game?"

Kogan: I believe that the UN is being used as a proxy to promote European values, and those values are not consistent with U.S. values. The whole notion of globalization has an anti-American sentiment attached to it, and there are many documents on our web site under the Issues section that point that out. So, while I believe that they are targeting all multinationals, I also believe that they are, now, specifically targeting U.S. companies which have thus far not cooperated with the effort to impose international corporate social responsibility norms.

Insider: Do you foresee a scenario in which U.S.-produced pesticide products could be subjected to trade barriers because their producers have been "shamed" by non-compliance with those "norms"?

Kogan: There's this notion of social blacklisting, and that is quite possible because if companies are not deemed socially responsible, according to principles first articulated by the Global Compact Office of the UN, it is quite possible that companies that do not meet the emerging standards will be blacklisted, and that social blacklisting could have an impact on regulators as well as consumers.

Insider: Who do you foresee issuing the blacklists?

Kogan: Most likely Greenpeace, the World Wildlife Fund, Friends of the Earth, and they would exaggerate their perception of reality from the facts. The more interesting issue is that of government procurement contracts. If governments adopted these standards in their procurement practices, you could see regulations come on line that have a social responsibility dimension.



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Insider: What are your predictions for the progress of European standards in the United States?

Kogan: This is going to be a difficult challenge for the United States to overcome because it requires coordination on multiple levels, and the Europeans have had a lot of time to create this labyrinth of rules and standards – and this is also part of the overall movement towards global governance, which many commentators have found to be inimical to U.S. national security, our economy, and other interests.

Our response to the challenge depends on the willingness of industry to work alongside government and other groups to promote an alternative paradigm to one that enshrines the precautionary principle. Europe and the UN are promoting a negative paradigm based on a premise expounded by [19th century social theorist] Thomas Malthus. There is another, positive paradigm of sustainable development which does not require using the precautionary principle, and which is based on the notion of international free market environmentalism, private property rights, intellectual property protection and free markets.

We think the recent Vioxx decision [awarding \$235 million to the widow of a man who was allegedly killed by the Merck heart medication], is a significant reflection of the precautionary principle. A recent *Financial Times* article framed the issue of Vioxx litigation as one of public perception – not of regulatory compliance or common law requirements. The article suggests that the public, which was once willing to assume some risk [from pharmaceuticals] in exchange for the hope of quality-of-life improvement, is no longer willing to accept those risks.

But, in terms of the global perspective, the biggest issue we'll be dealing with is whether "better safe than sorry" is evolving into a customary, international legal norm. Once that occurs, countries that are not parties to treaties could be bound by that norm. That's the issue I'm now addressing for the International Law Association. The precautionary principle is embedded in some environmental treaties, but the U.S.

approach to that term is different than what the Europeans envision. So, if the U.S. is a party to such a treaty, you could have two types of interpretation and implementation. The question is, is it better to be outside the regime and have no influence by persistently objecting to its existence, or to create a separate, contrary practice within the regime? It depends on whether you can form a coalition of other treaty parties to go along with you. If you're a lone wolf it may be self-defeating to ratify a treaty and stand out as the sole contrarian. That's the big issue the U.S. will be facing – whether we stand alone or accept European values.

The Europeans believe in the "General Will" principle of Rousseau. They believe in consensus, and they disparage our frontier mentality, which has made us a nation of inventors and gives us a competitive advantage. It's killing them economically, so they're collaborating with idealists to set

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their agenda. Europeans have governance mechanisms that impart authority to civil societies, which monitor everyone else. On one level, it's like living in one those towns that tell you what color to paint your front door. On another level, they seem to believe that they are destined to be our philosopher kings. 

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