

## The Creeping ‘Authenticity’ of Europe’s Intrusive Civil Law System \*

By Lawrence A. Kogan\*\*

### *Authenticity?*

During its 2008 rotating presidency of the European Union, France lobbied the European Parliament and European Commission to craft regional regulations that would ultimately result in the mutual recognition and enforcement<sup>1</sup> of EU member state ‘authentic acts’ legislation.<sup>2</sup> Generally speaking, authentic acts are drawn up legal instruments that follow a prescribed form, recognize and provide conclusive evidence that specific private agreements have been reviewed and approved by empowered public officials, and render such agreements legally enforceable in a court of law.<sup>3</sup> The concept of an authentic act does not, however, exist in common-law systems.<sup>4</sup>

A purported pan-European trade association<sup>5</sup> and several of its French notary trade association members<sup>6</sup> have justified such proposed legislation as necessary and indispensable to promoting ‘economic efficiency’ and ‘consumer protection’ throughout the region. Juan Bolás Alfonso,

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[http://itssd.org/2-13-09Kogan\\_LegalBackgrounder%20-%20FINAL.pdf](http://itssd.org/2-13-09Kogan_LegalBackgrounder%20-%20FINAL.pdf) and  
[http://www.wlf.org/upload/2-13-09Kogan\\_LegalBackgrounder.pdf](http://www.wlf.org/upload/2-13-09Kogan_LegalBackgrounder.pdf).

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<sup>1</sup> In other words, France sought to harmonize EU member state authentic acts legislation upward to French standards.

<sup>2</sup> Arguably, were it not for its uncanny resemblance to Monty Python’s timeless skit – *The Ministry of Silly Walks* – performed with aplomb by British comedic actor John Cleese <http://www.youtube.com/watch?v=IqhlQfXUk7w>, the Sarkozy Government’s proposal to extend throughout Europe the privileged monopoly long enjoyed by *les notaires de France*, and along with it, the intrusive French civil law system, (i.e., its proposal for the establishment of a European ‘Ministry of Silly Authentic Acts’) would likely have encountered much greater resistance by Anglo-American businesses and political leaders.

<sup>3</sup> See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union: England, France, Germany, Poland, Romania, Sweden*, Study for the European Parliament, Council of the Notariats of the European Union (No. IP/C/JURI/IC/2008-019) (Nov. 25, 2008) at pp. 2-11, at: <http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>.

<sup>4</sup> See European Parliament Resolution of 18 December 2008, with recommendations to the Commission on the European Authentic Act (2008/2124(INI)) at par. P, at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0636#BKMD-41>.

<sup>5</sup> See *Conseil des Notariats de l’Union Européenne - Council of the Notariats of the European Union* (CNUE) website, at: <http://www.cnue.be>.

<sup>6</sup> See, e.g., *Conseil Supérieur National du Notariat* (CSN) website at: [http://www.notaires.fr/notaires/notaires.nsf/V\\_TC\\_PUB/ENGLISH-HOMEPAGE](http://www.notaires.fr/notaires/notaires.nsf/V_TC_PUB/ENGLISH-HOMEPAGE); *Chambre des Notaires de Paris* website, at: <http://www.paris.notaires.fr>; *Mouvement Jeune Notariat* (MJN) website, at: <http://www.jeune-notariat.fr>.

President of the CNUE<sup>7</sup> said that such a horizontal regulation would make it possible to “remove the procedural requirements involved until now in areas such as family law and company law”, and would bring “considerable...benefits...in terms of costs and time...for citizens, families and business...”<sup>8</sup> Similarly, French and European Union officials have also weighed-in in favor of the proposal. Rachida Dati, the French Minister of Justice, stated that, “the movement of authentic acts will help to advance the freedom to come and go within the European Union...[E]voking authentic acts means talking about everyone’s everyday life, it means taking stock of what remains to be integrated in Europe”.<sup>9</sup> In addition, European Justice Commissioner Jacques Barrot noted how the authentic act was “essential in giving citizens greater legal certainty”, and that “an authentic act issued by a public authority can be a very strong basis for the European legal order”.<sup>10</sup>

### *Authentic Authenticity?*

Notwithstanding these public representations, it is precisely because *les Francais* are the lead promoters of this proposal that the authenticity of its objectives must be questioned. Is it consumer protection *or* industry protection-focused? And, is such legislation also intended to serve a higher purpose?

The December 2008 EU Parliament resolution proposing this regulatory solution *and* the literature surrounding it reveal that the French Government had sought early political support from the Parliament’s Legal Affairs Committee. Apparently, it was concerned about how the European Commission was being influenced by the Community’s growing number of practicing *avocats* consisting of both EU and non-EU transactional and litigation lawyers. These professionals are believed to be envious of the historic legal monopoly and lucrative fees earned by Europe’s civil law notaries, especially those licensed in France who handle real estate conveyances *in addition to* performing their official public duties, namely, authentic acts.<sup>11</sup>

<sup>7</sup> See *CNUE*, supra.

<sup>8</sup> See “A European Initiative for Authentic Acts: A Project Serving Citizens and Business” – Press Release, Conseil des Notariats de l’Union Européenne (Dec. 2, 2008) at: <http://www.cnue-nouvelles.be/en/000/actualites/cp-etude-acte-authentique-02-12-08-en.pdf>.

<sup>9</sup> See “Mrs Dati: The Movement of Authentic Acts is ‘What Still Has to be Integrated in Europe’” - Press Release, Conseil des Notariats de l’Union Européenne (Oct. 6, 2008) at: <http://pr.euractiv.com/?q=system/files/CP-Conférence-Acte-authentique-06-10-08-en.pdf>.

<sup>10</sup> “Furthermore, Mr Barrot declared the Commission’s intention to publish a Green Paper on Authentic Acts during 2009.” See “Jacques Barrot: ‘The Authentic Act, a basis for the European Legal Order’” – Press Release, Conseil des Notariats de l’Union Européenne (Sept. 11, 2008) at: <http://www.cnue-nouvelles.be/en/000/actualites/cp-congres-varsovie-11-09-08-en.pdf>. See also “Commission Calls on Notaries to Work Towards Building ‘European Legal Area’”, Professional Law Report, Confédération Fiscale Européenne (CFE) (Nov. 5, 2008) at: [http://european-tax-adviser.com/wordpress/wp-content/uploads/2008/11/plr\\_04\\_08.pdf](http://european-tax-adviser.com/wordpress/wp-content/uploads/2008/11/plr_04_08.pdf).

<sup>11</sup> See Gisela Shaw, *Notaires in France: An Unassailable Profession. Or are They?*, Notary Talk of England and Wales Blog (2007) at: [http://www.notaries.org.uk/articles/articles/notaires\\_in\\_france.html](http://www.notaries.org.uk/articles/articles/notaires_in_france.html); 13 International Journal of the Legal Profession 3, 243-271 (Taylor & Francis © 2006) at: <http://www.informaworld.com/smpp/content~content=a773399357~db=all~order=page>. See also Gisela Shaw, *Notaries in England and Wales*, Notary Talk of England and Wales Blog (2004) at: [http://www.notaries.org.uk/articles/articles/notaries\\_in\\_england\\_and\\_wales.html](http://www.notaries.org.uk/articles/articles/notaries_in_england_and_wales.html).

Indeed, in light of a competing 2008 study published by the Commission on the Latin notary system, it was feared that the Commission had already become biased against *les notaires*. In its reporting of this study's findings the World Bank emphasized how, "the highly regulated Latin notary system results in higher fees...[One] would be paying three times more in legal fees in France than in the Netherlands for the same €250,000 house."<sup>12</sup> It also cited study findings showing how "current regulation, especially the use of fixed fee scales and absolute restrictions on entry, (e.g. *numerus clausus*), are having an overall negative effect on consumer welfare."<sup>13</sup> Not surprisingly, the controversial study called for a regional "overhaul of the Latin notary system..."<sup>14</sup>

### ***Vive L'Authenticité***

Furthermore, by establishing the French model for authentic instruments as a legal precondition to entering into practically any private transaction contemplated by businesses and individuals within the EU, including those between continental and UK or Irish contract parties, the Sarkozy Government will succeed also in protecting at least two important French 'cultural' interests against the forces of globalization.

First, it will be able to protect its own notaries as well as those operating within other civil law EU jurisdictions from the threat of competition posed by EU and non-EU *avocats*, accountants and real estate agents. This has become a quite sensitive matter since the onset of the current economic recession and the associated plummeting of real estate values. After all, to paraphrase French notarial scholar, Gisella Shaw, the bulk of French notaries' work is remunerated on the basis of a statutory fee scale based on a percentage of transactional value, the fee income from authentic notarial acts accounts for an average of approximately 90% of a French notary's earnings, and over half of a French notary's average annual income is currently attributable to its quasi-monopoly over access to land registries. It is for this reason that the 2008 EU Parliament resolution requested a regulatory exception for "commercial matters...which relate to immoveable property and which must or may be subject to entry or mention in a public register."<sup>15</sup>

Second, if the French notary profession is as essential and "of continuing importance to the Continental European civil law system",<sup>16</sup> as Ms. Shaw has found, then France will be able to defend the Napoleonic Code-based civil law system of *preventive justice* via a proactive assault upon the evidentiary rules of the due process-based Anglo-American common law system (*contentious justice*). Her conclusions have been corroborated by a recent 2008 EU Parliament study prepared by the CNUE. In comparing the authentic act laws of various EU member states, the study found that

<sup>12</sup> See *EU Executive to Shake up Notaries Services*, Doing Business Blog, World Bank Group (Feb. 19, 2008) at: <http://blog.doingbusiness.org/2008/02/eu-executive-re.html> .

<sup>13</sup> See Christoph U. Schmid, Steffen Sebastian, Gabriel S. Lee, Marcel Fink, and Iain Paterson, *Conveyancing Services Market*, Study COMP/2006/D3/003 (Dec. 2007) at p. 16, at: [http://ec.europa.eu/competition/sectors/professional\\_services/studies/csm\\_study\\_complete.pdf](http://ec.europa.eu/competition/sectors/professional_services/studies/csm_study_complete.pdf) .

<sup>14</sup> *Id*; See also "EU Executive to Shake up Notaries Services" *supra*.

<sup>15</sup> See Gisella Shaw, "Notaires in France: An Unassailable Profession. Or are They?" *supra*. See also "European Parliament Resolution of 18 December 2008, with recommendations to the Commission on the European Authentic Act (2008/2124(INI))", *supra* at par. Q.4 and ANNEX: DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL REQUESTED, at par. 4.

<sup>16</sup> *Id*.

“authentic instruments are *the* cornerstones of the concept of ‘preventive justice’” (emphasis added).<sup>17</sup>

According to the Parliament study, “Under the concept of preventive justice (‘voluntary jurisdiction’), the state does not *just* become involved in deciding legal disputes *ex post* (‘contentious jurisdiction’)...Instead, it provides for a preventive legal *control*<sup>18</sup> through authentication by authentication authorities” (emphasis added).<sup>19</sup> In other words, state officials are authorized to intrude into private transactions at their inception when the agreements they spawn can affect significant personal or property rights. Consequently, *before* a transaction may be completed, an “authenticating official [must] ensure that contractual provisions fully comply with the law..., that the parties have full (mental and legal) capacity to enter into their intended agreement and that they have fully understood the legal implications of their commitments.”<sup>20</sup> The ostensible objective is to “avoid costly and time-consuming litigation about the validity and meaning of contractual provisions after the transaction has been concluded”.<sup>21</sup>

Actually, given their dual public-private professional roles, civil law notaries in France, Germany and Spain are duty-bound to intervene and render legal advice in the course of their presiding over private transactions, in order “to keep the client well-informed as to the implications and consequences of the legal act which they are undertaking”.<sup>22</sup> In fact, the laws of such countries require that notaries provide advice also where the parties are well informed about the law and also have legal representation.<sup>23</sup> French law, in particular, indicates also that such “counseling obligation applies even where the notary is only charged with authenticating acts in which the terms have been

<sup>17</sup> See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, supra at Executive Summary, p. III and pp. 9 and 40 at: <http://www.cnue-nouvelles.be/en/000/actualites/aae-etude-acte-authentique-final-25-11-2008-en.pdf>.

<sup>18</sup> “[T]he authentication of a contract serves as a legal control by the state: that might be **preliminary legality control**...but includes also **notification** of controlling agencies...In particular, the notarial intervention in authenticating a contract also obliges the notary to deny authentication and to notify the authorities in case of a suspicion of **money laundering**...[and/or]... the authentication and the notification duties of the authenticating official might help the state in **collecting taxes**” (emphasis in original). *Id.*, at pp. 24-25.

<sup>19</sup> *Id.*, at Executive Summary, p. IV and p. 3.

<sup>20</sup> *Id.*, at Executive Summary, p. IV, and pp. 3-4.

<sup>21</sup> This is deemed necessary to establish both ‘legal certainty’ and ‘legal security’. *Id.*, at Executive Summary, p. IV and p. 4. See also EXPLANATORY STATEMENT, ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL REQUESTED, contained in MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION with recommendations to the Commission on the European Authentic Act (2008/2124(INI)), accompanying EUROPEAN PARLIAMENT REPORT with recommendations to the Commission on the European Authentic Act (2008/2124(INI)), Committee on Legal Affairs, Rapporteur: Manuel Medina Ortega (A6-0451/2008) (11/19/08) at p. 7/10, at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0451+0+DOC+PDF+V0//EN>.

<sup>22</sup> “It is hardly to be contested that advice in the form of explaining the implications of the transaction, and of different contract clauses, to the parties, is an absolute requirement. This obligation is not mitigated even where the client is well-informed and does not seem to be in need of counseling. French case law from the Cour de cassation is particularly clear on this point. The case law of the Cour de cassation has removed all but the smallest limitations to the counseling obligation, to the point where the obligation has become virtually absolute...” See Ola Jingryd, *Impartial Contract-Engineering in Real Estate Transactions: The Swedish Broker and the Latin Notary*, at p. 86. (© Ola Jingryd 2008), accessible at: [www.diva-portal.org/diva/getDocument?urn\\_nbn\\_se\\_kth\\_diva-4768-2\\_fulltext.pdf](http://www.diva-portal.org/diva/getDocument?urn_nbn_se_kth_diva-4768-2_fulltext.pdf); For a discussion of German and Spanish requirements, See *Id.*, at p. 87.

<sup>23</sup> *Id.*



laid down without his participation”.<sup>24</sup> And, the broad duty to intervene and dispense advice in private transactions arises under French law “where the notary “realizes that a proposed contract clause is likely to cause future disputes, or where one of the parties is being unduly prejudiced.”<sup>25</sup>

### ***Authentic Denial of Due Process and Attenuation of Private Property Rights***

There are, of course, fundamental problems with universalizing any type of official instrument that, in the eyes of a judge, has “a greater probative value than a private agreement”.<sup>26</sup> Most significantly, it offends the principle of ‘due process of law’ which guarantees the determination of legal rights and obligations by the courts. According to the study’s English reporters, “such an approach would [not only] be too intrusive [of private rights, but]...would [also] run counter to existing principles of the common law evidence rules”.<sup>27</sup> In effect, “the binding probative value attached to [an] authentic act [would]...require a common law judge to accept strict rules of evidence for foreign authentic instruments and deny the judge [or other trier-of-fact] any discretion in weighing the documentary evidence.”<sup>28</sup> At least one other commentator has argued how such denial of due process violates the UK Human Rights Act 1998,<sup>29</sup> and by extension, Article 6.1 of the European Convention on Human Rights (‘ECHR’),<sup>30</sup> which it incorporates.<sup>31</sup>

Consequently, by promoting the free movement of authentic acts to common law jurisdictions

<sup>24</sup> “French courts have steadfastly affirmed the obligation to give counsel; the Cour de Cassation asserting in a 1989 ruling that the counseling obligation applies even where the notary is only charged with authenticating acts in which the terms have been laid down without his participation.” *Id.*, at p. 87.

<sup>25</sup> “Explaining the legal implications of the transaction and of different contract clauses, ascertaining the informed will of the parties, and advising on the adequate means to accomplish the desired results is of course giving advice beyond the pro forma. Also, it is hardly a sustainable position that the notary can remain passive where he realizes that a proposed contract clause is likely to cause future disputes, or where one of the parties is being unduly prejudiced. In such instances, the reasonable conclusion is that the notary must intervene in some manner. French law suggests as much, and even derives the counseling obligation from the concept of *publica fides*: the notary is required, for the sake of the public interest in legal certainty, to produce acts that reflect the will of the parties. To accomplish that, the notary must give the parties appropriate counsel so that the result not only is legally valid but is also the most favorable solution to them. Finally..., the impartiality rules may at times force the notary to intervene in substance to promote an equitable agreement. Such intervention is of course a form of advice.” *Id.*, at pp. 87-88.

<sup>26</sup> See European Parliament Resolution of 18 December 2008, with recommendations to the Commission on the European Authentic Act (2008/2124(INI)) *supra* at par. K. See also Case C-260/97 *Unibank A/S v Flemming G Christensen*, judgment of 17 June 1999, wherein the European Court of Justice was asked to determine whether “whether an enforceable acknowledgement of indebtedness, drawn up without the involvement of a public authority, was an authentic instrument”. The ECJ ultimately held that, “Instruments drawn up between private individuals are not inherently authentic. The involvement of a public authority or any other authority empowered for that purpose by the state of origin is necessary to endow them with the character of authentic instruments.” See “Brussels Convention”, Law Society Gazette (May 2000) at: <http://www.lawsociety.ie/Gazette/May2000.pdf>.

<sup>27</sup> See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, *supra* at p. 153.

<sup>28</sup> *Id.*

<sup>29</sup> See “Human Rights Act 1998”, 1998 CHAPTER 42 at: [http://www.opsi.gov.uk/acts/acts1998/ukpga\\_19980042\\_en\\_1](http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1).

<sup>30</sup> “In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. See Article 6.1, “European Convention on Human Rights”, Rome (Nov. 4, 1950), at: <http://www.hri.org/docs/ECHR50.html#C.Art6>.

<sup>31</sup> See Gregory Taylor, *Art. 57 of E.U. Regulation 44/2001: Authentic Issues of Human Rights?*, Notary Talk of England and Wales (2005) at: <http://www.notaries.org.uk/page32/page27/page27.html>.

without simultaneously requiring the mutual recognition of UK, Irish and other common law nations<sup>32</sup> deeds and non-real estate-related documentation within civil law countries (i.e., by essentially “exclud[ing]...a number of legal traditions...from this area of justice”),<sup>33</sup> France will be able to create a more uneven playing field within Europe.<sup>34</sup> And, should France be successful in this endeavor, there would be little to prevent such a useful regulatory template from being embraced and adopted by the governments of Europe’s civil law-based trading partners located throughout the world, the businesses of which could ultimately obtain a competitive trade advantage over similarly situated Anglo-Americans.

This threat should not be summarily dismissed. European governments have developed a track record of employing another key civil law precept that denies due process to businesses and individuals - the extra-WTO precautionary principle - as a disguised protectionist barrier in international commerce.<sup>35</sup> Consequently, the creeping expansion of civil law authenticated instruments may actually reflect a trend.

It is in this context that the significance of the dual role played by *les notaires de France* in promoting legal certainty comes to light: 1) Notaries can and do raise the awareness of private parties about the impact of public environmental and health laws grounded in the precautionary principle on their contemplated commercial transactions; and 2) Notaries can and do largely assure via issuance of authenticating instruments that once those private contracts are executed, the parties to such agreements will comply with their terms and the requirements of the law, and will not readily pursue administrative actions/litigation against their contractual partners or the government.<sup>36</sup> In other words, civil law notaries can potentially affect an almost infinite variety of private contractual business arrangements (e.g., purchase-sale, leasing, lending, licensing, manufacturing, formulating, processing, assembling, disposing, etc.) and personal matters, the subject matter of which include and go beyond real estate (e.g., recognition of paternity and consent to adoption; matrimonial and

<sup>32</sup> Such nations would include Australia, Canada except for the Province of Quebec, England and Wales within the UK, Ireland, New Zealand and the United States except for the State of Louisiana. The laws of a number of nations throughout the world reflect the influence of both common law and civil law. See “Common Law”, Wikipedia at: [http://en.wikipedia.org/wiki/Common\\_law](http://en.wikipedia.org/wiki/Common_law) . See also “Civil Law (legal system)”, Wikipedia at: [http://en.wikipedia.org/wiki/Civil\\_law\\_\(legal\\_system\)](http://en.wikipedia.org/wiki/Civil_law_(legal_system)) .

<sup>33</sup> See “Statement of Diana Wallis, MEP, UK - on behalf of the ALDE Group”, European Authentic Act - E-Justice - Cross-border implications of the legal protection of adults (debate) (Dec. 18, 2008) at: <http://www.europarl.europa.eu/sides/getVod.do?mode=unit&language=EN&vodDateId=20081218-10:17:26-176>.

<sup>34</sup> “The civil law notaries enjoy monopolistic status and are determined to retain this. The UK, Ireland and Nordic countries are not part of CNUE.” See Anthony Northey, *Bid By Civil Law Notaries to Protect Their Monopoly*, UK Law Society Gazette (Dec. 18, 2008) at: <http://www.lawgazette.co.uk/opinion/letters/bid-civil-law-notaries-protect-their-monopoly> ; Paul Rogerson, CCBE Warning on the Threat of Notaries, UK Law Gazette (Dec. 4, 2008) at: <http://www.lawgazette.co.uk/news/ccbe-warning-threat-notaries> . The CCBE is the Council of Bars and Law Societies of Europe.

<sup>35</sup> Even the French Government admits this is true. “[I]t is incontestable that the precautionary principle has been abused in some cases in recent years, with public authorities sometimes applying it for political purposes.” See *Opinion of the Committee for Prevention and Precaution About the Precautionary Principle*, Ministry of Ecology and Sustainable Development, Committee for Prevention and Precaution, (May 2004) at p. 5, at: [http://www.ecologie.gouv.fr/IMG/pdf/PPP\\_2004-05\\_PrecautinaryPrinciple.pdf](http://www.ecologie.gouv.fr/IMG/pdf/PPP_2004-05_PrecautinaryPrinciple.pdf) .

<sup>36</sup> “[T]he precautionary principle should not be the exclusive domain of public authorities... [W]e stress the importance for the precautionary principle to be applied by private decision-makers when their activity creates a collective risk for either the environment or public health.” *Id.*, at p. 10.

antenuptial agreements; wills and testaments; charitable donations; incorporation; partnership and joint venture agreements; stock transfers, etc.).<sup>37</sup>

If France's efforts are successful, therefore, the results could be quite sweeping. As one Italian legal commentator has noted, "The concept of the precautionary principle is different in civil law and common law, which have different approaches to the relationship between science and law. In the USA the regulation is 'science-based', meanwhile, in Europe the rule of science is determined through a 'policy – related' way."<sup>38</sup>

Under the common law notion of precaution (i.e., a precautionary approach), due process of law is maintained to the extent that laws and regulations recognize the evidentiary (arbiter of the facts) role played by administrative bodies, the courts and even juries, and the burden of proof is allocated accordingly (innocence is presumed). For example, government is required to prove conclusively that suspect products, processes or activities pose a significant ascertainable public environmental or health risk, as demonstrated by its performance of a scientific risk assessment and/or probabilistic risk computation, before the burden of production and persuasion shifts to the private party. In addition, due process is served to the extent government bears the burden, prior to the adoption of an economically significant regulation, to undertake an economic cost-benefit analysis showing that the public benefits to be derived by adopting and implementing said regulation in its proposed form will clearly outweigh its societal costs, including opportunity costs.<sup>39</sup>

By contrast, under the civil law notion of precaution<sup>40</sup> (i.e., the extra-WTO precautionary

<sup>37</sup> See *Comparative Study on Authentic Instruments National Provisions of Private Law - Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union*, supra at pp. 21-22.

<sup>38</sup> See Maria Vittoria Lumetti, *Precautionary Principle in Common Law and Civil law*, Abstract of presentation made at the international conference, *The Precautionary EMF Approach: Rationale, Legislation and Implementation, convened by the International Commission for Electromagnetic Safety* (Feb. 2006) at: <http://www.icems.eu/docs/Lumetti.pdf>.

<sup>39</sup> See Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk*, 1 SETON HALL J. DIPL. & INT'L REL. 82-88, (Winter/Spring 2004), at: <http://diplomacy.shu.edu/journal/new/pdf/VolVNo1/6%20-%20Kogan.pdf>.

<sup>40</sup> The civil law precautionary principle is often referred to as "*in dubio pro natura*, a Roman law principle for environmental protection that asserts that in case of doubt, any decision should favour the protection of nature." See Rolando Castro, *Protection of Sea Turtles: Putting the Precautionary Principle into Practice*, Caribbean Conservation Corporation (© 2005) at: <http://www.ccturtle.org/pdf/PrecautionaryPrincipleInCostaRicaTurtleBan.pdf>. "Generally speaking, the precautionary principle says that *in dubio pro natura*. If in doubt, decide in favour of the environment...*Ennaltavarautumisen periaate* or *varovaisuusperiaate* (in Finnish), *försiktighetsprincip* (in Swedish), *Vorsorgeprinzip* (in German), *principe de précaution* (in French), *principio de precaución* (in Spanish)." See Marko Ahteensuu, *IN DUBIO PRO NATURA? A Philosophical Analysis of the Precautionary Principle in Environmental and Health Risk Governance*, Public Defense of Doctoral Dissertation University of Turku, Finland (© 2008) at p.1, at: <https://oa.doria.fi/bitstream/handle/10024/38158/diss2008ahteensuu.pdf?sequence=1>; <http://www.soc.utu.fi/laitokset/iasm/research/defence.html>. See also François Ost, *The Philosophical Foundation of Environmental Law: An Excursion Beyond Descartes* Facultés universitaires Saint-Louis, Bruxelles, (Oct. 2001) at: <http://www.dhdi.free.fr/recherches/environnement/articles/ostenvlaw.pdf>; <http://www.mcxapc.org/static.php?file=chronique2001.htm>. ("The Precautionary Principle...entails a radical change in outlook: a reliance on progress and a basically favourable attitude to technology are here replaced by a need for caution. The principle of *in dubio pro natura* has been called into play: reversing the burden of proof, it is up to those undertaking any activity likely to transform the environment to demonstrate the absence of negative effects.") *Id.* at p. 7.

principle)<sup>41</sup>, the evidentiary requirement of due process is largely bypassed to the extent that *a priori* hazard categorization by government and civil society (i.e., a euphemism for environmental nongovernmental activist groups) of particular substances, processes or activities leads to a resulting strict liability-based regulation before the government is ever required to perform a scientific risk assessment (i.e., to produce evidence) demonstrating the likelihood/probable existence of a significant public environmental or health harm. As a result, the burden of proof (production and persuasion) is, at the outset, placed upon economic actors to show that suspect products, processes or activities pose no public environmental or health *hazard* at all (guilt is presumed).<sup>42</sup> Civil law precaution also bypasses due process insofar as it releases governments from the legal obligation to undertake a true economic cost-benefit analysis prior to adopting said regulation.<sup>43</sup> What is more, the civil law notion of precaution dispenses, where necessary (i.e., ‘to protect the public interest’), with the requirement that government protect against unauthorized disclosure to third parties of exclusive rights in privately held patents, copyrights and trade secrets<sup>44</sup> associated with suspect products, processes or activities, which must be submitted to regulators for the purpose of securing market authorization.<sup>45</sup>

International organizations and comparative law specialists have increasingly recognized that the attenuation of private property rights through denial of due process can be an unfortunate byproduct and/or feature of preventive justice. Consequently, they have suggested that policymakers and industry leaders devote more time and energy to reviewing the provisions of civil law country national constitutions.<sup>46</sup> An examination of the French Constitution, for example, would reveal the adoption of the civil law precautionary principle.<sup>47</sup> Also, the most recent draft of the Constitution of

<sup>41</sup> For the WTO’s view on the distinction between these two versions of precaution, See Lawrence Kogan, *WTO Ruling on Biotech Foods Addresses ‘Precautionary Principle’*, Washington Legal Foundation Backgrounder (Dec. 8, 2006) at: <http://www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf> .

<sup>42</sup> For example, “In Europe corporate innocence is not assumed. Indeed, a vast slab of EU laws evaluating the safety of tens of thousands of chemicals, known as REACH, reverses the burden of proof, asking industry to demonstrate that substances are harmless. Some Eurocrats suggest that the philosophical gap reflects the American constitutional tradition that everything is allowed unless it is forbidden, against the Napoleonic tradition codifying what the state allows and banning everything else.” See *Brussels Rules OK; How the European Union Is Becoming the World’s Chief Regulator*, ECONOMIST, Sept. 20, 2007, at 68 (emphasis added), available at [http://www.economist.com/world/europe/displaystory.cfm?story\\_id=9832900](http://www.economist.com/world/europe/displaystory.cfm?story_id=9832900) .

<sup>43</sup> See, e.g., Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European ‘Fashion’ Export the United States Can Do Without*, 17 TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW 491, 505, 513-517 (Spring 2008), at: <http://www.itssd.org/Kogan%2017%5B1%5D.2.pdf> .

<sup>44</sup> See *REACH Compromise Under Fire*, EurActiv.com (12/4/06), at: <http://www.euractiv.com/en/environment/reach-compromise-fire/article-160203> ; Jeroen H. J. den Hartog and Mark G. Paulson, *Europe’s ‘REACH’ Initiative Will Impact Trade Secrets*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.) (June 2006) at: <http://www.wlf.org/upload/061606dehartog.pdf> .

<sup>45</sup> *Id.*, at pp. 531-532.

<sup>46</sup> See *Supplement to ITSSD Response to the WIPO Report on the International Patent System Paragraph 104* \* (Document SCP/12/3), Institute for Trade, Standards and Sustainable Development (Nov. 7, 2008) at: [http://www.wipo.int/scp/en/meetings/session\\_13/pdf/itssd\\_supplement.pdf](http://www.wipo.int/scp/en/meetings/session_13/pdf/itssd_supplement.pdf) .

<sup>47</sup> See French Constitution, Environment Charter, Article 5; *Constitutional Bill on the Environment Charter - Speech by M. Jean-Pierre Raffarin, Prime Minister, to the meeting of Parliament in Congress, French Embassy in the United Kingdom* (Feb. 28, 2005) at: [http://www.ambafrance-uk.org/Constitutional-bill-on-the.html?var\\_recherche=raffarin](http://www.ambafrance-uk.org/Constitutional-bill-on-the.html?var_recherche=raffarin) ; *Congress Revises the French Constitution*, Government Portal, Republique Francaise (Feb. 28, 2005) at:



the European Union incorporates it as well.<sup>48</sup> Hopefully, such efforts will help to reduce the growing number of international public policy disputes that have arisen between common law and civil law jurisdictions with respect to what may best be characterized as *creeping public interests*.

As is typically the case, if one digs deep enough among the nuances and verbiage accompanying proposed legislation, one will eventually unearth the true intentions of the promoter. Here, the evidence reveals that there is a whole lot more behind the Sarkozy Government's initiative than achieving trade protectionism. France's authentic acts proposal seriously challenges the underlying foundations of the common law legal system, the economic freedoms it has provided and the Anglo-American way of life.

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[http://www.archives.premier-ministre.gouv.fr/villepin/en/information/latest\\_news\\_97/congress\\_revises\\_the\\_french\\_52453.html](http://www.archives.premier-ministre.gouv.fr/villepin/en/information/latest_news_97/congress_revises_the_french_52453.html). See also Gabriel Calzada, Cécile Philippe and Xavier Méra, *The Precautionary Principle: A High Risk Principle*, 25 *Economic Affairs Journal* 60-62 (Wiley & Sons © 2008), Abstract at: <http://www3.interscience.wiley.com/journal/118695827/abstract?CRETRY=1&SRETRY=0>.

<sup>48</sup> See Article III-233.2 (*ex Article 174.2 TEC*), "The EU Constitution" at: [http://en.euabc.com/upload/rfConstitution\\_en.pdf](http://en.euabc.com/upload/rfConstitution_en.pdf).