



Europe's Warnings on Climate Change Belie More Nuanced Concerns

By Lawrence A. Kogan *

A Political 'Line Drawn in the Sand'

At the recent G8 summit in Heiligendamm, Germany, the current president of the European Union and Chancellor of Germany, Andrea Merkel, drew a political 'line in the sand' by demanding that national governments devise new constraints on human carbon dioxide emissions believed to contribute to global warming and climate change.

In doing so, she essentially expressed contempt for a prior U.S. communiqué signaling a fundamental difference in approach to this issue (i.e., the pursuit of technology-based solutions *rather than* mandatory emissions caps)¹. Ms. Merkel also ignored the positions of other nations, such as Australia, China and India, which prefer the American approach. Indeed, she admonished governments skeptical of the growing hysteria surrounding climate change that *all* international negotiations on reducing global carbon emissions *shall* remain within the existing United Nations structure, which she insisted, was "non-negotiable".²

While Ms. Merkel called for post-2012 government actions addressing climate change to fall squarely within the UN Kyoto Protocol framework, one must question the degree to which her message was nuanced. Did she intimate that other unrelated UN environmental treaties also would be involved? And, given the close dynamic between air and water, is one of them likely to be the UN Convention on the Law of the Sea?

World Businesses Placed on Notice

UK Foreign Secretary Margaret Beckett issued a similar warning to the world's businesses. She implored them to become actively engaged in the UN-based *multilateral* process of forming global agreements to curb climate change in order 'to cut their own business risks'. If they did not comply, she advised, they would have to accept the inevitable 'economic devastation of an unstable climate'.

Clearly, Ms. Beckett's appeal was directed toward industries' profit-loss sensibilities – i.e., business' aversion to economic risk. Yet, she had more within her sights than just property-casualty and business interruption (insurance) losses. Business involvement was also crucial, Ms. Beckett said, in order to prevent "governments from getting it wrong". Apparently, this means preventing the economic devastation that governments could wreak through politically arbitrary and imprudent policies that result in costly lawmaking and 'over-regulation', the introduction of ill-conceived and counterproductive economic incentives³, and the encouragement or support of top-down or ostensibly 'private' corporate accountability/social responsibility mandates that trigger market distortions.⁴

Sound Science Ignored, Fear Promoted

While standing their political ground, it was apparent that Madams Merkel and Beckett had side-stepped the important scientific debate that continues to rage throughout the world. This debate concerns the extent to which certain human activities can actually be *shown to cause* measurable global warming or to merely *correlate with* a barely observable rise in global temperatures that may or may not prove cyclical in nature. Ordinary scientists, engineers and business people, the world over, know quite well that there is a marked difference between causation and correlation, and that they can make rationally-based decisions in their daily lives guided only by the ‘knowables’ in life rather than the ‘unknowables’.⁵

The failure of these European leaders to discuss this issue, therefore, suggests a nuanced effort to base intergovernmental regulatory policy on popularly fanned fears about largely hypothetical, unpredictable and/or unknowable future natural and man-made *hazards* that have *not* yet been *shown* to pose direct ascertainable *risks* to human health or the environment. In other words, it is a disguised attempt to establish a new nonscientific international standard upon which national governments may rely to justify greater control over human economic activity and to base a new genre of trade protectionism.

Within European and UN legal circles, this standard is referred to as the *extra-WTO* Precautionary Principle.⁶ Many over-regulated European industries, including those in the automobile, chemicals, forestry products, poultry and livestock, electronics and electrical equipment, pharmaceutical/biotechnology and genetically modified food, feed and seed sectors, hope to benefit from the EU Commission’s global campaign to export onerous and costly precautionary principle-based regulations abroad.⁷ If adopted worldwide, such an unscientific standard would permit nations to severely restrict *ANY* inter- and intra-state trade, finance and technological innovation based on putative evidence of merely a *correlation* between a suspect product, substance or activity and some observable or anticipated change in the environment. It would also, in effect, permit governments (e.g., Germany, United Kingdom, The Netherlands,⁸ Finland, Sweden)⁹ to tax the ambient air and water that we all use to survive and prosper – i.e. the ‘*global commons*’^{10 11 12} - under the pretense of promoting sustainable development.¹³

In fact, Ms. Beckett invoked this rationale at the UN Security Council this past April, while Britain held its presidency.¹⁴ She insisted that the UN Security Council expand its jurisdictional mandate, traditionally limited to ‘prevention of conflicts’ and ‘maintenance of international peace and security’, so that it also covers ‘collective global environmental threats’ to sustainable development, such as climate change.¹⁵ It is not surprising, then, that she based her Security Council campaign on the recently issued Stern and UN Intergovernmental Climate Change Committee Reports¹⁶. Many left-leaning politicians, scientific academies and environmentalists in Europe and the United States have likewise used these controversial reports to squelch the scientific debate over the causes and effects of climate change.¹⁷

Curtailing Individual Rights and Freedoms, Especially that of Private Property

European leaders attending the G8 summit eagerly promoted strict centralized mandatory global emissions cap regulations as the *sin qua non* solution to what they perceive as the ‘greatest global hazard ever faced by humankind’. But, they also avoided discussion of the adverse impact that such rules would likely have on the ‘common’ people who national governments are entrusted to protect. In other words, they engaged, once again, in the French art of nuance a/k/a ‘code language’ to obscure the truth and prevent consideration of other plausible methods of problem-solving.¹⁸

The inconvenient truth these leaders have endeavored to hide is that, during the 21st century, protection of the environment will increasingly take priority over protection of human economic and political rights – i.e., private property and free speech. Unfortunately, only Czech President Vaclav Klaus has thus far demonstrated the character and determination to publicly expose and challenge this new ethic. In a recent Financial Times editorial, he argued that, “the biggest threat to freedom, democracy, the market economy and prosperity now is ambitious environmentalism”, which he equates with “a sort of centralized planning” reminiscent of communism. In his estimation, “The issue of global warming is more about social than natural sciences and more about man and his freedom than about tenths of a degree Celsius changes in average global temperature.”¹⁹

Surely European leaders readily acknowledge this simple truth amongst themselves. However, admitting it to the world is an entirely different matter. President Klaus not only deserves kudos for his honest assessment, but also a public hearing.

Environmental Concerns Mask Deeper Constitutional Questions

As with magic, there is more to this new ethic than meets the eye. Further inquiry reveals how Europe’s global campaign against climate change and ‘globalization’ is ultimately grounded in its own existential struggle to survive as a political entity in the 21st century.²⁰ It is probable, as President Klaus intimates, that European leaders have fabricated, or at the very least, seriously exaggerated, the external threat of global climate change in order to justify the need for all European nations and citizens to work together under the auspices of a pan-European federal constitution.

The ability of European national governments to influence ‘globalization’ and mitigate its adverse environmental and economic effects on ordinary Europeans has waned rather than grown in recent years, and this, in no uncertain terms, terrifies them. European leaders believe they can best preserve Europe’s unity, *identity* and *raison d’être* by diverting the public’s attention away from the failed draft European constitution and by redirecting government energies (‘soft power’) collectively onto the world stage. Consequently, the need to “compensate for the declining problem-solving ability of the nation-state in the globalizing context” has quickly become the ‘order of the day’. And, although problem-solving appears *precautionary* in nature from an enlightened environmental point of view, it also serves a purely defensive purpose – to reverse European industries’ long-declining global competitiveness by responding to popular calls for trade protectionism. In the words of French President Nicholas Sarkozy, Europe must “protect its citizens [by] buying them time to adapt to the pressures of globalization”.²¹

Indeed, problem-solving has long been cited as one of three governance models/rationales legitimating

the need for a pan-European constitutional framework. Apparently, the other two rationales, namely, common political and ethical values and community-based fundamental rights,²² had not yet sufficiently matured²³ to persuade European citizens (particularly, the Dutch, French and British) participating in the 2005 referenda that the more-than-300-page draft European constitution was in their best interests to ratify.²⁴

As a result, some European leaders (notably Andrea Merkel,²⁵ Romano Prodi²⁶ and Nicholas Sarkozy²⁷) have since reconsidered these models and refocused their attention on problem-solving as the means to promote some level of constitutional convergence. However, given their obsession with climate change, the type of problem-solving these leaders have in mind is more likely *external* to the European Union – i.e., global in nature.²⁸ Whether recent closed-door efforts to resurrect certain aspects of the failed draft constitution are ultimately successful will depend on the form that the revised document assumes. Will the result be a new ‘slimmed-down’ treaty of confederation or a ‘rebranded’ federal ‘treaty-plus’?²⁹ Given the growing opposition to the creation of a European federal government from EU member states such as Britain,³⁰ the Czech Republic, Poland and Slovakia,³¹ this is at best uncertain.

Individual Constitutional Rights Are Not the Same in Europe and America

What is most troubling about this external strategy rationale is its failure to *expressly* recognize and safeguard the fundamental individual rights of European citizens.³² This result obtains because the constitutional rights of European citizens have long been viewed as ‘positive rights’ granted by the state to the people, rather than as ‘negative rights’ of the people recognized by the state.

A brief review of German legal and political history is quite revealing. According to Humboldt University law professor Dieter Grimm, the constitutions and bills of rights previously enacted by successive German monarchs were intended to preserve the legitimacy and survival of their dynasties, and little more. As a result, they created ‘positive’ rather than ‘negative’ rights that subsequently failed to endure the political whims of national parliaments and to secure consent from short-term-minded monarchs and unelected bureaucracies.³³

And, a review of France’s constitution is also instructive since it reveals the *current* status of private property rights in Europe. The French Constitution was recently amended in 2005 (for the 19th time since 2000) to include a new environment charter that provides French citizens with the ‘positive’ “right to live in a balanced healthy environment”.³⁴ The charter contains a series of environmental rights and responsibilities³⁵ that are consistent with those already found in European regional law. For example, the charter’s right of access to environmental information³⁶ is similar to that provided under the UN’s regional Aarhus Convention.³⁷ The Environment Charter is therefore likely to suspend the requirement of legal ‘standing’ to enable any member of the public “affected or likely affected by, or having an interest in environmental decision-making”³⁸ to demand an assessment, and then challenge the potential environmental impacts, of proposed economic activities to be undertaken on privately owned property.³⁹ Consistent with regional European law⁴⁰, the charter, in effect, creates a concomitant constitutional public right of action exercisable by private citizens, and a public obligation to ensure sustainable development,⁴¹ each grounded in the extra-WTO Precautionary Principle.⁴² According to French leaders,

it clearly reflects “France’s commitment to *global governance of the environment and to [the] creation [of] a United Nations Environment Organization*”⁴³ (emphasis added) that also “would require compulsory financial contributions” from global taxpayers at the expense of individual private property rights.⁴⁴

With this type of thinking, it is no wonder that neither the EU Charter of Fundamental Rights⁴⁵ nor the European Convention on Human Rights⁴⁶ recognizes the express *negative right* of European citizens to private property.

According to at least one scholar, European citizens are deemed to enjoy only an *implied* conditional right⁴⁷ to private property that is highly subject to ‘collective power’ and the ‘public interest’ – i.e., the ‘general will’.⁴⁸ For example, it is these forces⁴⁹ that often determine the scope and extent of an individual property right and how ‘fair compensation’ is to be calculated in the event government ‘takes’ property.⁵⁰ This means that property rights are generally not thought of as being *in opposition to* collective power and the public interest⁵¹, as they are in the U.S. In other words, individual property interests within Europe are viewed consistent with national and regional societal interests, and are thus susceptible to override by social interest-prone national and regional parliaments and to reinterpretation by progressive European national and regional courts legislating from the bench.

It is, perhaps, because the relationship between EU member state and European constitutional law has long remained in flux, especially on this point, that some European leaders are now endeavoring to amend the existing foundational treaties of the European Union/ European Community (e.g., the Treaty of Nice) so that they expressly incorporate what has, up until now, been recognized by European courts as only an implied right to property.

By contrast, the Fifth Amendment to the U.S. Constitution recognizes the negative right of exclusion possessed by American citizens. It also subjects *government* to the legal obligation to pay the property holder ‘fair and reasonable compensation’ where government is able to show that it has legally ‘taken’ private property for a necessary and bona fide ‘public use’, considering the degree to which government action has impaired the exercise of the property right ‘taken’ (i.e., the economic and social dislocation suffered by the property holder).⁵² It must be remembered that the U.S. ‘Bill of Rights’ circumscribes and informs the U.S. Constitution, and both documents anticipated the natural and common law right to property already possessed by individuals that each successive American government has sworn to protect for nearly 220 years. Consequently, the U.S. Bill of Rights, unlike its European counterparts, expressly recognizes and protects private property as a fundamental natural ‘negative right’ as against the arbitrary inclinations of government⁵³, as well as, against the rights of all others.

Conclusion – Europe Should Get its Own House in Order *Before* Pitching Global Climate Change Solutions

Most Americans will find it difficult to accept the evolving European governance model as a plausible archetype for the ethically responsible global society envisioned by European leaders. As long as that model continues to be anchored in an unreformed UN promoting precautionary principle-based

regulatory treaties, and remains premised on heavily subsidized socialist welfare-state economics, conditional positive individual rights and a sense of political correctness that favors consensus in lieu of debate, Americans are likely to be afforded fewer constitutional private property protections against wanton governmental intrusion than they are already guaranteed by the U.S. Constitution's Bill of Rights.

Considering the unsettled political and legal order within a motion-bound European Union uncertain of its own identity and destiny,⁵⁴ all Americans, especially those serving in the U.S. Congress, should therefore be leery of Europe's prescribed collectivist regulatory solutions to exaggerated global threats such as climate change.⁵⁵ European aspirations for a greater role on the world stage are admirable but evidently premature. Europeans would be wise to tend to their internal housekeeping affairs before embarking on ambitious global projects that are clearly beyond their current competencies and capabilities to achieve. This is likely to be the greatest contribution that Europe can make to U.S. national interests⁵⁶ and to the world at large.

* **Lawrence A. Kogan** is an international business, trade, and regulatory attorney. He is CEO of the Institute for Trade, Standards and Sustainable Development Inc., (ITSSD), a Princeton, New Jersey-based non-partisan non-profit international legal research and educational organization that examines international law and policy as it relates to trade, industry and positive sustainable development around the world.

¹ See Hugh Williamson and Edward Luce, "US and Berlin Clash on G8 Climate Text", *Financial Times* (May 25, 2007) at: <http://www.ft.com/cms/s/06be7a10-0ae1-11dc-8412-000b5df10621.html>.

² See Abhik Kumar Chanda, "Climate Change Burning Issue at G8 Summit as U.S. Claims Leadership Role", *Terra Daily* (June 3, 2007) at: http://www.terradaily.com/reports/Climate_Change_Burning_Issue_At_G8_Summit_As_US_Claims_Leadership_Role_999.html.

³ See "Beckett Warns Businesses to Back Climate Negotiations", *EnvironmentalFinance.com* (June 7, 2007) at: <http://www.environmental-finance.com/onlinews/0607bec.htm>.

⁴ See, e.g., Lawrence A. Kogan, "Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability" a forthcoming manuscript to be published in the September issue of the *Global Trade and Customs Journal*, Kluwer Law Publishers, the Netherlands.

⁵ See Lawrence A. Kogan, "The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science Assessing and Managing Risk", 5 *Seton Hall Journal of Diplomacy and International Relations* 1 (Winter/Spring 2004), pp. 77-123, at p. 83, at: <http://diplomacy.shu.edu/journal/KOGAN%20%20Precautionary%20Principle%20&%20WTO%20Law.pdf>.

⁶ See Lawrence A. Kogan, "World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes", 2 *Global Trade, and Customs Journal* 149 Kluwer Law Publishing (March 2007) at pp. 152 and 154, at: [http://www.itssd.org/Publications/GTCJ_04-offprints_Kogan\[2\].pdf](http://www.itssd.org/Publications/GTCJ_04-offprints_Kogan[2].pdf).

⁷ See "A New Form of European Protectionism: Exporting Precautionary Principle-Based Standards Abroad", Institute for Trade, Standards and Sustainable Development (2006) at: <http://www.itssd.org/Res%20Ipsa%20Loquitor/Res%20Ipsa%20Loquitor%20-%20A%20New%20form%20of%20European%20Protectionism%20-%20Exporting%20PP%20based%20stds%20abroad.pdf>.

. See also Lawrence A. Kogan, "Exporting Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers", Washington Legal Foundation Monograph (Sept. 2003) at: <http://www.itssd.org/White%20Papers/WLFKoganArticle2.pdf>; Lawrence A. Kogan, "Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise, Washington Legal Foundation Monograph (2005) at pp. 101-109, at: <http://www.wlf.org/upload/110405MONOKogan.pdf>.

⁸ "The Netherlands has extensive experience of using environmental taxation as a policy instrument. We led the way in

Europe in introducing a tax on electricity and natural gas, and we levy various other environmental taxes. Eleven per cent of total tax revenue can now be said to be 'green'. A large part of this revenue comes from excise duties on fuels, car taxes and tax on electricity and natural gas. We also have a number of other environmental taxes: taxes on groundwater, mains water and the dumping of waste. My government wants to do more. So we will be introducing taxes on air traffic. And also on packaging materials. We will also be raising excise duties on fuels and stepping up the environmental differentiation of car taxes. As a general principle, the new government wants to build environmental cost into market prices. Taxation is one way of doing this...[T]axation as an instrument to promote a more sustainable society is firmly on the European agenda – as underlined by this Tax Forum. Given that Europe's economies are increasingly interconnected, it is important that we act together on this issue." See Jan Kees de Jager, "Modernization of Tax Systems: Instrument for Sustainable Economic Growth", Speech by the State Secretary for Finance, The Netherlands at the Brussels Tax Forum, 20 March 2007, at: http://ec.europa.eu/taxation_customs/resources/documents/common/about/speeches/taxforum_2007/de_jager.pdf .

⁹ "It is increasingly clear...that countries are recognizing the power of tax restructuring to reach environmental goals." See Bernie Fischlowitz-Roberts, "Restructuring Taxes to Protect the Environment", Earth Policy Institute (2002) at: <http://www.earth-policy.org/Updates/Update14.htm> . "The main threats to the long-term sustainability of our civilisation are energy and climate change. I would like to recall that less than two weeks ago the Heads of State and Government of the 27 EU Member States endorsed a very ambitious plan for an EU integrated climate change and energy agenda. Taxation is one of the instruments that come into play in this context. The need to enhance the sustainability of our economies arises from the failure of market forces to address properly the entire costs and benefits of certain activities. Since they are not reflected in the market price we do not take account of them in our consumer and production decisions. The best way to correct this kind of market failure is to use market based instruments. Taxation is a traditional and well known tool of this kind...[This is] *the tax policy strategy of the European Commission and furthermore [hopefully] it will promote the cooperation between the European Union and other international players who face the same global challenges*" (emphasis added). See László Kovács, "Taxation for Sustainable Development", Opening Speech, Brussels Tax Forum (March 19, 2007) at: http://ec.europa.eu/taxation_customs/resources/documents/common/about/speeches/kovacs_taxforum_190307.pdf .

¹⁰ "A carbon or energy tax is often suggested as a means of generating revenues for global environment and sustainable development purposes. Closely related is the recent fund-raising provision of the Kyoto Protocol known as the Clean Development Mechanism (CDM) which is linked to carbon emission trading and joint implementation. *There are also ideas related to taxing international air transportation, international tourism, and even a surcharge on automobile registration...*We need to deal also with the underlying economic, demographic, and political forces. Whether in addressing wasteful consumption and production patterns, population growth, or inefficient energy and transport systems, the right policies always count. In other words, adequate finance without adequate policies will not deliver the full intended results. In fact, *the right policies concerning energy pricing and proper natural resource valuations can generate substantial financial resources*" (emphasis added). See Mohamed T. El-Ashry, "Financial Global Sustainable Development", International Conference in Preparation for the World Summit on Sustainable Development (Copenhagen, Denmark (June 11, 2001) at pp. 6-7 at: http://www.gefweb.org/participants/Secretariat/CEO/Denmark_Speech_June_11_2001.pdf .

¹¹ "In an ideal world, nation-states would do what they can to handle environmental problems with their own financial resources; *they should pay into international funds to do the things which are best done collectively; and the richer ones should subsidise the poorer countries...* But of course they don't - certainly not on the scale likely to be needed. This is why many advocates now call for financial mechanisms. In effect, ***these are new forms of taxation, which might be collected nationally but which would be available for collective use...***The leading example is the so-called 'Tobin Tax' on international financial transactions, originally proposed in order to damp down speculative currency movements. The more successful it is in doing so, the less revenue it will yield for global purposes. The more you try to raise, the more the risk of distorting financial markets or encouraging evasion. *The second group tries to exploit a hitherto-untapped source of revenue which no nation-state already 'owns', the most-discussed example of these 'global commons' is deep-sea mineral mining outside territorial waters.* The third consists of attempts to get sovereign states to dedicate some part of their present national tax base to global purposes, in the same way that *the European Union has an automatic right to part of the yield of VAT in member countries...Recent attempts at global taxation (the best example is the Law of the Sea Convention)* suggests that it will be very hard - but perhaps not impossible - to reach some compromise. The thirteen original United States eventually gave up some of their taxation powers to the new Federal Government because it proved impossible to manage their affairs otherwise, and because they were given an increased share in their control. Will the time come when a reformed United Nations will have the same success? (emphasis added)." See Peter Mountfield and Felix Dodds, "New Financial Mechanisms

for Sustainable Development - Green Taxes for Global Needs?”, Draft NGO Position Paper, NGO Steering Committee to the United Nations Commission on Sustainable Development (Feb. 2000) at:

http://csdngo.igc.org/finance/fin_paper_1_NFM.htm ; http://csdngo.igc.org/finance/fin_paper.htm .

¹² “Some suggestions for global revenue (Taken from Overseas Development Institute Briefing Paper and UNDP Human Development Report) [include]: 1. A tax on all or some international financial transactions (Tobin Tax) Variants include a tax on bond turnover, or on derivations [;] 2. Bit Tax - on Internet messages the suggestion is 1 cent per 100 messages [;] 3. *A general surcharge on international trade* [;] 4. *Taxes on specified traded commodities like fuel* [;] 5. A tax on the international arms trade [;] 6. *A charge on international flights [-] A variation is a tax on aviation kerosene* [;] 7. Surcharges on post and telecommunication revenues [;] 8. An international lottery [tax;] 9. A surcharge on domestic taxation (usually expressed as a progressive share of income tax [;] 10. *Royalties on minerals mined in international waters* [;] 11. Parking charges for satellites placed in geostationary orbit [;] 12. Charges for exploration in or exploitation of Antarctica [;] 13. *Charges for fishing international waters* [;] 14. Charges for use of the electromagnetic spectrum [;] 15. *A tax or charge on international shipping* [;] 16. *Pollution charges (eg dumping at Sea)* [;] 17. *A tax on traded pollution permits* [;] 18. A voluntary local tax paid to central global agency [;] 19. Sale of part of the IMF gold stock [;] 20 Dedication of some part of national or local taxes eg on luxuries (or surcharges on them)” (emphasis added). *Id.*

¹³ “It is a pleasure for me to speak to you today on *a subject that is close to my heart*. Using tax as a means to promote a more sustainable society” (emphasis added)). See Jan Kees de Jager, “Modernization of Tax Systems: Instrument for Sustainable Economic Growth”, *supra*. See also “The Role of Taxation in Sustainable Development: A Shared Responsibility for Developing and Developed Countries”, Institutional Approaches to Policy Coherence for Development - OECD Policy Workshop (May 18-19 2004) at p. 6, at: <http://www.oecd.org/dataoecd/24/25/31744387.pdf> . (“The role of taxation in sustainable development covers many aspects. The most commonly discussed ones are *the use of taxes or tax incentives designed to encourage or discourage specific behaviour that affect economic, environmental or social sustainability*. However, there is a more fundamental, although less often advocated, dimension to this issue. *Taxation is essential to sustainable development in that it provides governments with the necessary finance to effectively implement development policies. Objectives in terms of improving infrastructures, education, health, or environmental protection, cannot be achieved at no cost*” (emphasis added)).

¹⁴ See “Opening Statement of Margaret Beckett at UN Security Council Climate Change Debate” British Embassy Buenos Aires (April 17, 2007) at: <http://www.britishembassy.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1138870133146> .

¹⁵ See “Expanding the Scope of the UN Security Council Mandate to Include Promotion of Sustainable Development and Commitment to the Precautionary Principle”, Institute for Trade, Standards and Sustainable Development (2005) at: <http://www.itssd.org/Issues/ExpandingtheScopeoftheUNSecurityCouncilMandate.pdf> .

¹⁶ See “Speech of Margaret Beckett and UN Security Council Climate Change Debate On Energy, Climate and Security” Foreign and Commonwealth Office News (April 17, 2007) at: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1176454354972> .

¹⁷ See, e.g., “Royal Society Letter to ExxonMobil Requesting ExxonMobil to Stop Funding of Lobby Groups that Seek to Misrepresent the Scientific Evidence Relating to Climate Change” (Sept. 4, 2006) at: <http://www.royalsoc.ac.uk/displaypagedoc.asp?id=23780> ; “Rockefeller and Snowe Demand that Exxon Mobil End Funding of Campaign that Denies Global Climate Change”, Press Release, Office of United States Senator for Maine, Olympia Snowe (Oct. 30, 2006) at: http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9ACBA744-802A-23AD-47BE-2683985C724E ; Michael Erman, “Greenpeace: Exxon Still Funding Climate Skeptics”, Reuters (May 17, 2007) at: http://in.today.reuters.com/news/newsArticle.aspx?type=worldNews&storyID=2007-05-18T102946Z_01_NOOTR_RTRJONC_0_India-298816-1.xml&archived=False .

¹⁸ “‘Just because we are dealing with international affairs and diplomacy, there is no reason to be abstruse,’ [French President Nicholas] Sarkozy told reporters...distancing himself from the subtle, convoluted language that made French diplomacy

famous. ‘Perhaps if you talk frankly you find solutions more quickly. Sometimes...one uses so many codes that at the end no one is sure if they heard or understood something different’, he added...” See Crispian Balmer, “Sarkozy in a Hurry as He Bounds on to World Stage”, Reuters (June 8, 2007) at: <http://www.reuters.com/article/topNews/idUSL0779130820070608> .

¹⁹ “As someone who lived under communism for most of his life, I feel obliged to say that I see the biggest threat to freedom, democracy, the market economy and prosperity now in ambitious environmentalism, not in communism. This ideology wants to replace the free and spontaneous evolution of mankind by a sort of central (now global) planning. The environmentalists ask for immediate political action because they do not believe in the long-term positive impact of economic growth and ignore both the technological progress that future generations will undoubtedly enjoy, and the proven fact that the higher the wealth of society, the higher is the quality of the environment. They are Malthusian pessimists”.

See Vaclav Klaus, “Freedom, Not Climate is at Risk”, Financial Times (June 13, 2007) at: <http://www.ft.com/cms/s/9deb730a-19ca-11dc-99c5-000b5df10621.html> .

²⁰ See e.g., “EU Constitutional Crisis Warning”, MSN News (June 11, 2007) at: <http://news.uk.msn.com/Article.aspx?cp-documentid=5217820> .

²¹ “Mr. Sarkozy, on his first presidential visit to Brussels...called on Europe to ‘protect’ its citizens buying them time to adapt to the pressures of globalization.” See George Parker and Adam Jones, “Sarkozy Tells EU to Get Tough on Trade”, Financial Times (May 24, 2007) at p. 2.

²² See John Erik Fossum and Agustín José Menéndez, “The Draft Constitutional Treaty: Between Problem-Solving Treaty and Rights-Based Constitution”, Working Paper 2005/W/04, European Institute of Public Administration (2005) at: http://www.eipa.eu/files/repository/product/20070320125446_FC0504e.pdf .

²³ “The text of the Draft and its provisions come closest to the third, rights-based, model... The strong evolutionary component embedded in th[e] value-based conception of constitution means that it is particularly hard to establish whether the constitutional draft properly embodies the core tenets of this conception of the legitimacy of the EU... [T]he Union has clearly transcended beyond the problem-solving conception, and the Draft underlines this in both symbolic and substantive terms... The Draft entails a formalisation of the norms which allocate competences among the Union and the Member States, the affirmation of direct legitimacy and parliamentary democratic legitimacy as the pillars of the democratic legitimacy of Union law, the formal incorporation of a catalogue of fundamental rights binding all institutions acting within the scope of Union law, and the constitutionalisation of key elements of European identity. *This conclusion does not deny the fact that there are many features of the substantive constitutional order to be established by the Draft that will still reflect the Union’s roots in an international organisation. We have also demonstrated that the Union still retains some elements of a problem-solving organisation...* Our main finding is that the Draft does not merely simplify or solidify the Union in its present status but is evocative of an entity that is still very much in motion. We have established that the most appropriate direction is from problem-solving to either value-based or rights-based polity. In that regard, we found that the substantive contents of the Draft speak more clearly to the rights-based conception of the Union than to the value-based one. This is reflected in the combined willingness to formalise and further enrich the common institutional structures and foundational values of the Union, while retaining a complex, federal-type political structure, and which is also still quite different from what would be the case in a nation-state building process” (emphasis added). *Id.*, at pp. 47-49.

²⁴ See “Dutch Say ‘No’ to EU Constitution”, BBC News (June 2, 2005) at: <http://news.bbc.co.uk/1/hi/world/europe/4601439.stm> ; Kirsty Hughes, “What ‘Non’ Means”, BBC News (May 29, 2005) at: <http://news.bbc.co.uk/1/hi/world/europe/4552937.stm> ;

²⁵ See David Charter, “Merkel Revives a Slimline Constitution”, The London Times (April 21, 2007) at: <http://www.timesonline.co.uk/tol/news/world/europe/article1685618.ece> .

²⁶ See “Prodi to Rally Support in Strasbourg for EU Constitution”, Associated Press (May 21, 2007) at: <http://www.iht.com/articles/ap/2007/05/22/europe/EU-GEN-EU-Constitution.php> ; “Prodi and Sarkozy See ‘Common Goals’ on EU Reform”, EurActiv.com (May 29, 2007) at: <http://www.euractiv.com/en/future-eu/prodi-sarkozy-see-common-goals-eu-reform/article-164058> .

²⁷ “French President Nicolas Sarkozy is expected to urge Poland to drop its objection on a voting system in the draft EU constitutional treaty Thursday in talks with top Polish leaders in Warsaw.” See “France's Sarkozy to urge Polish ‘Compromise’ on EU Treaty”, *Jurnalo Online Newspaper* (June 14, 2007) at: http://jurnalo.com/jurnalo/storyPage.do?story_id=41799 ; See “Sarkozy Must Push for New EU Constitution: Hungary”, *EU Business* (May 9, 2007) at: http://www.eubusiness.com/news_live/1178719201.26 ; Sarkozy Heads to Spain to Push Slimline EU Treaty”, *EU Business* (May 30, 2007) at: http://www.eubusiness.com/news_live/1180551601.48 ; “Sarkozy Pushes for

EU Shift By Brown”, Financial Times (June 4, 2007) at: http://www.ft.com/cms/s/06a185ee-12d0-11dc-a475-000b5df10621.dwp_uuid=70662e7c-3027-11da-ba9f-00000e2511c8_i_rssPage=70662e7c-3027-11da-ba9f-00000e2511c8.html ;

²⁸ “The historic mission of European integration is to satisfy the expectations of our nearly 500 million citizens. They want better life, more security, more solidarity and sustainable development. But *the European Union cannot deliver prosperity, security, solidarity and sustainability if it does not tackle the global challenges*. We need to compete successfully in the global market, we need to guarantee the security of our energy supply, *we need to protect the environment and slow down the climate change, we need to maintain our social achievements*” (emphasis added). See László Kovács, “Taxation for Sustainable Development”, *supra*.

²⁹ See Nicholas Watt, “Rebranding Plan for Failed EU Constitution”, Guardian Unlimited (May 29, 2006) at: <http://www.guardian.co.uk/eu/story/0,,1785206,00.html> ; See Mark Tran and Ian Traynor, “UK Welcomes German Proposals on EU Constitution”, Guardian Unlimited (June 15, 2007) at: <http://politics.guardian.co.uk/eu/story/0,,2104071,00.html> ; “EU Leaders Line Up for Treaty Talks” EurActiv.com (May 24, 2007) at: <http://www.euractiv.com/en/future-eu/eu-leaders-line-treaty-talks/article-163986> ; “Parliament Pushes for ‘Treaty Plus’”, EurActiv.com (June 7, 2007) at: <http://www.euractiv.com/en/constitution/parliament-pushes-treaty-plus/article-164376> ; ‘Amato Group’ Puts Forward New Treaty Proposal” EurActiv.com (June 5, 2007) at: <http://www.euractiv.com/en/future-eu/amato-group-puts-forward-new-treaty-proposal/article-164289> ; “Now or Never for the EU”, New Europe Weekly (June 16, 2007) at: http://www.neurope.eu/view_news.php?id=75121 .

³⁰ “Blair: ‘No Point’ to Return to EU Constitution”, DW-WORLD.DE Deutsche Welle (June 14, 2007) at: <http://www.dw-world.de/dw/article/0,2144,2608258,00.html> ; “Tories Attached EU Constitution Plan”, Yahoo UK & Ireland News (June 15, 2007) at: <http://uk.news.yahoo.com/epolitix/20070615/tpl-tories-attack-eu-constitution-plan-0a1c1a1.html> (“The Conservatives have criticised the negotiations on plans to replace the failed European Union constitution. The Tories are angry over a letter from German chancellor Angela Merkel to other leaders in which she says that most members want keep the ‘substance’ of the original document, defeated in French and Dutch referendums in 2005”); “Czech, British PMs Discuss EU Summit”, Prague Daily Monitor (June 13, 2007) at: http://launch.praguemonitor.com/en/106/czech_politics/8178 .

³¹ See James G. Neuger and Jonathan Stearns, “EU Sets End-of-Year Target for Rewriting Constitution” Bloomberg.com (March 25, 2007) at: <http://www.bloomberg.com/apps/news?pid=20601087&sid=aalBmfQ.IB6g&refer=home> ; “Poland Threatens to Block EU Treaty Negotiations”, EurActiv.com (June 12, 2007) at: <http://www.euractiv.com/en/future-eu/poland-threatens-block-eu-treaty-negotiations/article-164505> ; Claudia Kade, “Merkel Fails to Win Over Poland in EU Treaty Talks”, Reuters (June 16, 2007) at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061600532.html> ; Cf. “Sarkozy and Kaczynski ‘Confident’ About EU Treaty Deal”, EurActiv.com (June 15, 2007) at: <http://www.euractiv.com/en/future-eu/sarkozy-kaczynski-confident-eu-treaty-deal/article-164625> ; “Czech, French ForMins Slightly Optimistic About EU Summit”, CeskeNoviny.cz (June 15, 2007) at: http://www.ceskenoviny.cz/news/index_view.php?id=257813 .

³² See Anthony Coughlan, “A Critical Analysis of the EU Draft Constitution”, TEAM Secretariat, the European Parliament TEAM Working Paper No. 10 (2003) at: <http://www.teameurope.info/wp-analysisconstitution.nr10.pdf> .

³³ “One purpose of the American Revolution, therefore, was to strengthen and protect the people’s fundamental rights. Consequently, fundamental rights ‘could from the very beginning be negative rights’ that served primarily to protect individuals from the government...In contrast...the inclusion of positive rights in German law can be traced to the fact that European constitutions, unlike the U.S. Constitution, did not establish an entirely new political entity because the nation-state existed before the constitutions emerged. This meant ‘they never changed the tradition of the state,’ and part of this saved tradition, especially in Germany, was that ‘the state always retained the role of being the representative of the higher aspirations of society.’ See Elizabeth Katz, “German High Court Has More Power Over Legislature, Grimm Says”, University of Virginia Law Blog (March 9, 2006) at: http://www.law.virginia.edu/html/news/2006_spr/grimm.htm .

³⁴ French Constitution, Environment Charter, Art. 1. See also “The Need to Act”, Ministère Des Affaires Etrangères, République Française Government Portal at: http://www.diplomatie.gouv.fr/en/article-imprim.php?id_article=4596 . “The adoption of the Charter is a crucial step in the history of rights in our country. As a result of President Chirac’s unshakeable will, *the Charter raises sustainable development to the highest level in our legal structure*, alongside the 1789 Declaration of the Rights of Man and of the Citizen and the preamble to the 1946 Constitution. France will therefore be the first country to devote an entire constitutional declaration to *the right to the environment*” (emphasis added); “Constitutional Bill on the Environment Charter - Speech By Jean-Pierre Raffarin, Prime Minister, to the Meeting of Parliament in Congress”, Embassy

of France in the United States (Feb. 28, 2005) at: http://www.ambafrance-us.org/news/statmnts/2005/raffarin_environment_022805.asp.

³⁵ “The charter was seen as a sort of nuclear option that would catapult France to the forefront...on all [environmental] matters European...Moreover, by elevating the country's environmental profile, [former French President Jacques] Chirac would drive the wedge deeper between Paris and...the White House. ‘The charter enables France to stick its thumb in the eye of the U.S.,’ says...[David] Michel of the Center for Transatlantic Relations at Johns Hopkins University.” See David Case, “Liberte, Egalite, Environment? French Constitution Gets a Dash of Green”, *Grist Environmental News and Commentary* (July 14, 2005) at: <http://www.grist.org/news/maindish/2005/07/14/case-france>.

³⁶ French Constitution, Environment Charter, Art. 7.

³⁷ See, e.g., United Nations Economic Commission for Europe (UN/ECE) “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters”, done at Aarhus Denmark (‘Aarhus Convention’) (6/25/98) at: <http://www.unece.org/env/pp/documents/cep43e.pdf>; See also Aarhus Convention, Art. 2.4 and Arts. 5.3-5.5.

³⁸ See Aarhus Convention, Art. 2.5.

³⁹ See Aarhus Convention, Arts. 5.6 and 6.

⁴⁰ See Maastricht Treaty (Treaty on European Union), Article 174.2 at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>.

⁴¹ See “Message from Jacques Chirac, President of the Republic to the participants of the Third Global Forum on Sustainable Development”, Embassy of France in the United States (Dec. 2, 2005) at: http://www.ambafrance-us.org/news/statmnts/2005/chirac_environment120205.asp.

⁴² French Constitution, Environment Charter, Art. 5. “In particular, the Charter introduces *the precautionary principle* into the constitutional texts. This principle ‘is designed to take action in the case of scientific uncertainty about the consequences of dangers to the environment’” (emphasis added). See “Congress Revises French Constitution”, *Republique Francaise Government Portal* (Feb. 28, 2005) at: http://www.ministre.gouv.fr/en/information/latest_news_97/congress_revises_the_french_52453.html.

⁴³ See “Constitutional Bill on the Environment Charter - Speech By Jean-Pierre Raffarin, Prime Minister, to the Meeting of Parliament in Congress”, *supra*.

⁴⁴ See “Chairman’s Summary Note of the 9 November Meeting of the Round Table on Sustainable Development – Global Public Goods”, Organisation for Economic Co-operation and Development, General Secretariat, SG/SD/RT(2004)8 at p. 3 at: <http://www.oecd.org/dataoecd/18/27/34354955.pdf>.

⁴⁵ See CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01) at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

⁴⁶ See “Convention for the Protection of Human Rights and Fundamental Freedoms” (1950), European Court of Human Rights (Sept. 2003) at: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁴⁷ According to at least one European constitutional law scholar, there is only “*an implied right to compensation* for the expropriation of property. *There is no express guarantee of compensation in P1-1* [the First Protocol to the European Convention on Human Rights], and hence the... European Court of Human Rights [has]...develop[ed]...compensation principles [that reflect its] views on the nature of the interest protected by a human right to property” (emphasis added). See Tom Allen, “Compensation for Property Under the European Convention on Human Rights”, *The Berkeley Electronic Press* (2006) at pp. 2, 4, 7 and 9, at: <http://law.bepress.com/expresso/eps/1875>.

⁴⁸ See, e.g., Article 1, Protocol 1, “Protection of Property”, Ensuring the Collective Enforcement of Certain Rights and Freedoms Other Than Those Included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms (1952), “Convention for the Protection of Human Rights and Fundamental Freedoms” *supra* at p. 22. It provides that, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions *except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest* or to secure the payment of taxes or other contributions or penalties” (emphasis added).

⁴⁹ See e.g., Article 17 ‘Right to Property’ of the European Charter of Fundamental Rights which provides that, “No one may be deprived of his or her possessions, *except in the public interest and in the cases and under the conditions provided for by*

law, subject to fair compensation being paid in good time for their loss. *The use of property may be regulated by law in so far as is necessary for the general interest*” (emphasis added).

⁵⁰ “The case law [of the European Court of Human Rights] reveals that the Court applies three different conceptions of the P1-1[property] interest...the legal, economic and social models...[T]he legal model conceives of the human rights interest in property in terms of the existing law of the relevant member state...The economic and the social models concentrate on the social function of property, although the focus is different. The economic model focuses on the objective value of the property; in most cases, the Court assumes that this is the market value... Finally, the social model...seeks to identify the values of individual autonomy, dignity and equality that underpin other Convention rights, but as they relate to access and control over resources...[T]he member states generally do require compensation for expropriation... “[I]t may be the case that compensation rules of a given state are indeed derived at least partly from a sense of fairness, and from a theory of the commensurability of money and property” (emphasis added). See Tom Allen, “Compensation for Property Under the European Convention on Human Rights”, *supra* at pp. 33-36. P1-1 refers to Article 1, Protocol 1 of the European Convention on Human Rights.

⁵¹ “[A] liberal/legalist conception of property puts private interests in opposition to collective power and the public interest. ‘Collective forces, under this conception, are clearly external to the protection that property, as an entity, affords.’ Moreover, it assumes equal stringency for all rights of property, in the sense that all are equally worthy of protection against collective power. This is what distinguishes it from the conceptual framework of the integrated view, as it holds that the content of property can be determined without reference to the social context: the possibility that collective interests exert pressure for a re-drawing of the boundaries of individual autonomy does not mean that those boundaries are defined by collective interests” (emphasis added). *Id.*, at pp. 36-37.

⁵² See Lawrence A. Kogan, *Brazil’s IP Opportunism Threatens U.S. Private Property Rights*, 38 UNIV. OF MIAMI L. REV. 1 (Fall 2006) 103-113 at: [http://www.itssd.org/Publications/IAL105-II\(frompublisher\)\[2\].pdf](http://www.itssd.org/Publications/IAL105-II(frompublisher)[2].pdf).

⁵³ As U.S. founding father James Madison eloquently wrote in Federalist Paper No. 10, “The protection of...the faculties of men, from which the rights of property originate...is the first object of government” (emphasis added). In addition, in Federalist Paper No. 54, Madison wrote that “Government is instituted no less for protection of the property, than of the persons, of individuals.” Lastly, Madison wrote in the March 29, 1792 issue of the National Gazette that, “In a word, as a man is said to have a right to his property, he ay be equally said to have a property in his rights” (emphasis added). *Id.* at 17-18.

⁵⁴ “[T]he European Union is both a contested entity and an ‘entity in motion’....The very labeling of the Draft as ‘Treaty establishing a Constitution for Europe’ reflects the Union’s ambiguous and contested character. These traits invariably rub off on the process and on the outcome: Is the Draft actually a constitution; is it a treaty; or is it some kind of a mixture?...[T]here are different conceptions of the European Union qua political community. This amounts to saying that the type of political community we find the Union to be has clear and obvious implications for which constitution it should have.” See Tom Allen, “Compensation for Property Under the European Convention on Human Rights”, *supra* at pp. 2-3.

⁵⁵ See “G8 SUMMIT - Merkel Calls for 'New Impetus' in Climate Change Fight”, Thompson Financial (June 6, 2007) at: <http://www.forbes.com/business/feeds/afx/2007/06/06/afx3792599.html>.

⁵⁶ See Marcel H. Van Herpen, “The Failed European Constitution and U.S. Interests”, *In The National Interest* (July 8, 2005) at: <http://www.inthenationalinterest.com/Articles/July%202005/July2005Herpen.html>.