

A New Form of European Protectionism: Exporting Precautionary Principle-based Standards Abroad

I. Environmental Protectionism Begins in Germany

The economic rationale underlying Europe's global exportation of the precautionary principle can be traced back to Germany's regional air pollution (acid rain) concerns.

“Initially precaution was [used] by German authorities in the early 1980's to justify unilateral application of technology based standards to reduce acid rain. But once in place, *the Germans pressed the EU to adopt similar standards across the rest of Europe, to prevent its own industries being placed at a competitive disadvantage.* This was not enlightened environmentalism at work but the dictates of a competitive market of member states... ‘The policy debate was more dominated by competitive considerations rather than environmental concerns...’ The ***precautionary principle*** therefore helped to lay the conceptual and legal basis for a proactive environmental policy, which once spread into Europe, was also directed at ensuring ‘burden sharing’ in order that German industry did not lose its competitive edge, but rather gain new markets for its environment-friendly technology and products” (emphasis added).

Andrew Jordan and Timothy O’Riordan, “The Precautionary Principle in Contemporary Environmental Policy and Politics”, Paper delivered to the Wingspread Conference, Racine, Wisconsin, January 23-25, 1998.

II. The EU Commission Extols the Virtues of Exporting Environmental Protectionism to non-EU Wood-Working Industries

The EU Commission has explained how the exportation of ostensibly voluntary sustainable forest management (SFM) standards, developed by private European environmental non-governmental organizations (ENGOS) in furtherance of express EU public policy goals, to other countries' forest-based industries enhances the competitiveness of EU forest-based industries.

“...EU forests are for their most part well managed, engendering higher costs to forest owners and to wood buyers, but no market advantage is accrued over competitors, many of whom do not always bear the full costs of SFM [sustainable forest management]. *Thus a key recommendation of the study [of the competitiveness of the European Union woodworking industries was to ‘export EU environmental (and social standards),* in other words, to promote the raising of forest management standards ***world-wide*** – which is good for forests – and thereby enhance competitiveness – which is good for [EU] forest-based industries” (emphasis added).

Jeremy Wall, “European Commission Views on Mutual Recognition Opportunities – A DG Enterprise View of Mutual Recognition Between SFM Certification Schemes in the Forestry Sector”, at p. 4 (June 7-26, 2000), at: (<http://sfcw.org/mutualrecognition/doc-pdf/MRSeminar2-1-8.pdf>).

III. Environmental Protectionism is Embraced by the European Chemicals Industry

Comments made by two prominent EU industry trade associations demonstrate the importance to EU industry of establishing a ‘level playing field’ internationally. According to Eurochambres (the Association of European Chambers of Commerce and Industry),

“There must be a ‘*level playing field*’ for chemicals (particularly *imported* chemicals) as constituents of finished products (e.g., toys, textiles). Substances with potential impact on human health or environment imported to the EU as constituents of products must not be exempt from notification. Controls must be in place to ensure that finished products imported to the EU do not contain untested and unregistered substances. This should ensure that EU manufacturers remain competitive with finished products from outside the EU” (emphasis added).

Eurochambres, “European Business Position on the ‘White Paper on the Strategy for a Future Chemicals Policy”, (Sept. 2001), at p. 6

And, according to CEFIC (the European Chemical Industry Council),

“*The chemical industry is truly global. The EU industry needs a level playing field with the rest of the world in order to compete.* There is not support for amending legislation in the USA or Asia, who are our main competitors, to take a parallel approach to REACH. There, REACH imposes a cost for chemicals testing and registration which our non-EU competitors will not have to bear. WTO rules and administrative practicalities prevent EU legislation from banning the import of finished articles containing non-registered substances...It is essential that a solution compatible with WTO rules be found to create a *level playing field between EU producers of both substances and finished articles, and non-EU manufacturers of the same finished articles who are excluded from the requirements of the REACH system*” (emphasis added).

“EU Chemicals Policy Review – The View of European Mid-Sized and SME Chemical Manufacturers”, CEFIC (the European Chemical Industry Council), at p. 4.

IV. Environmental Protectionism is Adopted by the Downstream Industries that Use Chemicals in Germany and the EU

A report prepared for the Federation of German Industries (BDI), the largest Germany industrial trade association, called for the EU Commission’s exportation of the proposed REACH regime to other countries’ industries to level the global economic playing field for the German chemicals and downstream industries.

“The review of existing studies and the estimate on a European level shows that burdens by the new legislation on chemicals in Europe will potentially affect the Chemical Industry in a dramatic manner...Costs will burden mainly price-sensitive products. Changes in time to market, duty of authorization and duty for disclosure are issues which touch the innovative power of the European chemical industry...Industry does not expect an immediate innovative push. For this to happen,

global implementation of the EU substances policy would be a fundamental prerequisite. In such a situation, all products would be manufactured under comparable conditions and every producer would be confronted with the effects of the new substances policy. Through this equal pressure on all competitors, the producer with the most innovative product would have a competitive advantage and so there would be an incentive for innovation. However, as long as the global environment is not comparable and producers can manufacture their products outside Europe under easier conditions, then this hoped-for positive effect of an innovative push will tend to be transformed instead into the negative effect of a production loss... The fundamental aim of European legislation must be to achieve practical reform of the EU substances policy and so minimize the negative consequences for German industry” (emphasis added).

Arthur D. Little, “New Proposals for Chemicals Policy: Effects on the Competitiveness of the Chemical Industry - (Project EP/IV/A/2003/07/03-2) – Study for the Directorate General for Research”, (April 2004), at: (http://www.env-health.org/IMG/doc/adlittlestudy_Chempolicy_19apr04.doc).

V. The EU Commission Justifies Exporting Environmental Protectionism Throughout the World to Safeguard European Competitiveness

To protect the global competitiveness of Europe’s chemicals industry, the EU Commission has stated that it is necessary to promote the proposed REACH chemical regime as a global standard.

“As far as exports are concerned, there will be a potential risk of some loss of market share if prices of domestically produced chemicals are forced up due to REACH. This namely holds for cases where competitors exist on third markets that totally neglect the important European market. Indeed, it would be only these companies that would completely escape the REACH legislation and its testing and registration requirements and costs associated to this... In the longer run, the balance of impacts on competitiveness on these third markets as well as on the European market will also depend on the extent to which the REACH regime is successful in establishing itself as a new international standard. This would give the EU chemicals industry a substantial boost in terms of international competitiveness” (emphasis added).

European Commission Staff Working Paper, “Regulation of the European Parliament and of the Council, Concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency and Amending Directive 1999/45/EC and Regulation (EC) on {Persistent Organic Pollutants}”, [Draft] Extended Impact Assessment {COM (2003) 644 final}, SEC (2003) 1171/3 (10/29/03), at pp. 22-23.

VI. Health-Related Protectionism is Considered by Europe’s Poultry Industry Against Developing Countries

A consultant to the Association of Poultry Processors and Poultry Import and Export Trade in the EU Countries (‘AVEC’) recommended that the EU invoke the precautionary

principle during its trade negotiations with the Mercosur countries to protect the interests of the competitively disadvantaged EU poultry producers and their suppliers.

*“Our view in A.V.E.C... concerning the EU-Mercosur negotiations is, given the current state of play, that the disadvantages for European poultry producers outweigh the advantages of a free trade agreement... If trade in poultry meat is liberalised, the EU poultry producers as well as its suppliers (animal feed, cereal) will be subject to fierce competition, which will be difficult to fend off... The Commission has indicated that whereas a liberalisation of trade cannot be achieved without detrimental effects on the the main interests of EU agriculture, the sensitivity of agricultural products, such as poultry meat, will be taken into consideration. I take the liberty of proposing some measures, which could ensure that the EU poultry industry’s interests are taken into consideration and that consumer safety is not jeopardized... First of all the EU should carry out a wide benchmarking exercise in the Mercosur countries in all the relevant fields (e.g., food safety, animal welfare, veterinary inspections, hygienic requirements) to compare the performance between these countries and the EU. For instance, the Commission is in the process of establishing minimum standards for animal welfare on the basis of information from third countries... Secondly, we should only introduce a greater liberalization of the poultry market through progressive concessions within preferential tariff quotas, to the extent these exports comply with requirements pertaining to food safety, animal welfare, hygiene and environment. It is important that written declarations are made and control mechanisms (export certification programmes) introduced to verify compliance. In situations of doubt, the EU should apply **the precautionary principle**... Thirdly, we should ensure that imported poultry products are clearly and indelibly labelled providing the EU consumers with sufficient information about the origin of the product, the characteristics of the product, ingredients, etc... (emphasis added).*

Henning Christophersen, “Some Aspects of Agricultural Trade – The Case of the European Poultry Industry”, II Conference With Representatives from the European Civil Society, Business Community & Academic Community on EU-Mercosur & the EU-Chile Association Negotiations (Feb. 12, 2002), at: (http://europea.eu.int/comm/external_relations/mercosur/conf/hc.htm).

VII. Health and Environmental Protectionism Are Employed by Europe’s Agriculture and Biotech Industries

One recent World Bank report found that smaller EU farmers and less developed EU biotech companies lobbied for strict biotech regulatory controls (i.e., disguised trade barriers) for economic reasons. They feared that the increased competition from the higher volume and lower cost exports of U.S., Canadian and Argentine GM food producers would drag down both European GM and non-GM food prices.

*“Our results suggest that heightened domestic consumer or environmentalist opposition to GM crops is not the only reason why there has been a moratorium on the production and sale of GM foods in regions like the EU. Rather, differences in comparative advantage in the adoption of GM crops may be sufficient to explain the trans-Atlantic difference in GM policies. On the one hand, it is rational for producers in the EU (whose relatively small farms would enjoy less gains from the new biotechnology than broad-acre American farms) to reject GM technologies **if that enables them, with the help of consumer and environmental lobbyists, to argue for restraints on imports from GM-adopting countries**... When faced with a more efficient competitor, the optimal response of farmers in countries with a comparative disadvantage in GM adoption is to lobby for (or at least not resist) more-stringent GM standards...” (emphasis added).*

Kym Anderson, Richard Damania and Lee Ann Jackson, “Trade, Standards and the Political Economy of Genetically Modified Food”, World Bank Development Research Group, World Bank Policy Research Working Paper 3395 (Sept. 2004), at pp. 3-4.

VIII. Environmental Protectionism is Behind Europe’s Campaign to Influence Australian and American Policy on Global Warming

Australian and European scholars have found that the Kyoto Protocol and the EU greenhouse gas emissions trading regulations that implement it are nothing more than disguised EU trade barriers imposed to appease green groups and protect the interests of noncompetitive EU industries burdened with higher than average regional regulatory costs.

“...Kyoto activism is in reality not about saving the world. It is about exploiting Green sympathies and justified environmental concerns to convince the world that it should accept a new form of *European protectionism*...“If one looks at the world from Brussels, the Ruhr or Berlin, the motivation for pushing centrally planned Kyoto controls becomes understandable. *Political and industry leaders, as well as the people, observe the growing political costs of proliferating interventionism, fuel levies, high taxes, and collective welfare for a rapidly aging population.* Europe’s increasingly corporatist-collectivist policy design confronts them with the loss of manufacturing prowess and, more recently, deflation. However, they are loath to surrender the dream of a regulated, featherbedded social democratic society to competitive world markets and young, energetic competitors outside.

...[I]t is easier to cope with a rationing system such as the Kyoto controls if one has little or no economic growth, as is the case in Europe. *Fast-expanding economies with growing populations, such as Australia or America, easily overshoot fixed targets.* Moreover, the baseline for the Kyoto calculations contains, in the case of Germany, not only West German emission levels, but also the massive emission of East German industry, which was quickly wound down after the fall of the Berlin Wall as it was uncompetitive. It is therefore easy for the Europeans to hold themselves up as paragons of Kyoto compliance. Europe’s remaining industry core is based on metal products and high skills. European industry and tax collection are directly affected when potential disasters in Gladstone – or skilled people in Vancouver or Ohio with access to cheap energy, metal ore, technology and skills – set out to conquer world markets with new metal products. *It is only natural for Europeans to try and handicap the new competition by seeking supposedly virtuous pretexts, such as saving the world from global warming...Seen in this light, the European Union’s Kyoto drive only replicates EU tactics of fuelling global GM hysteria to protect the interests of EU agriculture...*” (emphasis added)

Dennis Dutton and Wolfgang Kasper, “Green Protectionism”, The Centre for Independent Studies, *Policy* Vol. 18, No. 4 (Summer 2002-2003) at p. 24.

IX. The EU is Endeavoring to Change WTO Rules to Permit ‘Good’ Health and Environmental Protectionism

The EU Commission has stated how it seeks to reinterpret existing WTO rules so that they take into account non-science and non-economic considerations.

“[T]he WTO must be reformed... Its rulebook needs to be rewritten and civil society more closely involved so that environmental and social concerns can be considered alongside trade and development issues... In the EU’s view... a new round of WTO negotiations should... *address a number of civil society concerns, by clarifying WTO rules on trade and the environmental agreements, labeling, public health and the application of **the precautionary principle**...*” (emphasis added).

“Trade: Removing Barriers, Spreading Growth – The European Union: A Global Player”, The European Commission Delegation to Lithuania, at: (http://www.eudel.lt/en/eu_global_player/trade.htm).

Former EU Trade Commissioner (and current candidate for WTO Director-General) Pascal Lamy defends EU precautionary principle-based protectionism as reflecting a ‘cultural preference’ (good protectionism) distinguishable from garden-variety protectionism. In a speech to a Greens/European Free Alliance conference at the European Parliament on March 5, 2004, he stated the following:

“Our dispute with the United States over its extra tariffs on steel... [which] were clearly designed to protect an uncompetitive industry... [should be contrasted with]... [o]ur refusal to import genetically-modified maize or soya that we have not authorized... *[The latter] ...is not protecting a European industry (we do import soya and maize that are not genetically modified) but reflects our society’s highly precautionary preference in this area... [W]e must be careful to make the distinction between protectionism, which means discriminating between imported and domestic products in a way that favours the latter, thus protecting domestic manufacturers, and the legitimate protection of social choices.*”

*... Public policy is the expression of a particular country's social choices. Increasingly, trade in goods and services embodies these choices, making international trade today the point at which **different collective preference systems intersect**. These systems reflect the values of a given society, and in the EU's case they have been democratically defined in consultation with civil society and parliaments, giving them a solid legitimacy. *Public opinion in our countries – not as averse to globalisation as is sometimes claimed – is nevertheless highly aware of the potential dangers, and unequivocally insists that our social choices, and our public policies, must be preserved.* It is up to us to heed what they are saying.*

*... The WTO system is... an international instrument that should enable States to go on opening up their markets while still retaining the capacity to make public policy choices. It is up to us to help the system adapt as trade itself evolves... So what should be the relationship between the WTO's essentially commercial raison d'être, however open to a measure of collective **preference**, and rules set forth in other fora such as the ILO, UNEP or the multilateral environmental agreements (MEAs)? We need to improve the compatibility of the trade and non-trade elements and ensure they mesh more closely, as the report just brought out by the Commission under the ILO's aegis suggests.*

Finally, let us imagine for a moment what might happen if WTO members enjoyed an untrammelled right to adopt any measure they pleased, however unfair, unreasonable or unrelated to any agreed international framework. That would set us on a very dangerous road towards blinkered, selfish protectionism. That would not be “**good protectionism**” at all, and the fact that we and other WTO members have spent 50 years building a system within which we renounce our

freedom to follow such policies is, I submit, no bad thing” (emphasis added).

Pascal Lamy, “Co-existence Between Public Policy and Free Trade: Can We Achieve Good Protectionism?”, Conference of the Greens/**European Free Alliance** at the **European** Parliament, Brussels (5 March 2004), at: (http://www.greens-efa.org/pdf/documents/GlobalTradingSystem/TradingSystemSpeechPLamy_en.pdf).

Former EU Enterprise Commissioner Erkki Liikanen commented about how the EU wishes to take over international standardization to provide its regional industries with a competitive advantage.

“In the global marketplace Europe is in a very strong position because it has linked European standardization as closely as possible to international standardization...[The EU has]...realized the value of [using] national and regional standards as stepping-stones to international standardization...Cooperative agreements already exist between international and regional or national standards organizations...[This has]...offer[ed] [the EU] a systematic framework to take over international standards and/or to contribute to the international standards making process...European standards provide a powerful means of enhancing the competitiveness of companies in Europe and creating the single European market. This success also ensures Europe a very powerful position in worldwide-standardization”(emphasis added).

Comments of European Enterprise Commissioner Erkki Liikanen, “Commission Marks World Standards Day With Focus on Environment and Standards”, EU Institutions Press Release, IP/01/1408 (Oct. 12, 2001), at: (<http://europa.eu.int/rapid/start/cgi>); “Report From the Commission to the Council and the European Parliament on Actions Taken Following the Resolutions on European Standardization Adopted by the Council and the European Parliament in 1999”, COM (2001) 527 final (Sept. 26, 2001), at par. 49 at 20; “European Policy Principles on International Standardization”, Commission Staff Working Paper, Commission of the European Communities, SEC (2001) 1296 (July 7, 2001), at par. 9 and 26 at pp. 5 and 10.

X. Exporting Environmental Protectionism to Developing Countries

The EU Commission has determined that EU trading partners should adopt EU precautionary principle-based regulations and standards to improve the competitiveness of European products.

*“[T]he adoption overseas [by EU trading partners] of standards and regulatory approaches based on, or compatible with...European practices [is necessary] in order to improve the market access and competitiveness of European products...Developments in the Community’s legal framework have propelled the EU towards improving the effectiveness of regulatory authorities in protecting an ever-increasing number of public policy interests such as health and safety, the environment, and consumer interests. In this respect, it is worth mentioning...the recent Commission Communication on the **precautionary principle**, where the Commission considers that the principle has a scope to cover measures for protection of human, animal and plant health in addition to environmental aspects”* (emphasis added).

“Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: A Tool Box of Instruments”, Commission of the European Communities, Commission Staff Working Paper, SEC (2001) 1570 (Sept. 28, 2001), at pp. 5 and 8.

The EU Commission has sought to integrate EU technical standards within China’s regulatory framework to address food-safety and environmental issues.

“Europe should offer its environmental energy know-how to China to help develop efficient and clean industrial processes and energy production...The EC should in particular help China integrate environmental priorities such as the prevention of industrial pollution and greenhouse gas emissions, and the conservation of biological diversity further into national economic policy-making processes...[C]ollaborative projects to support future policies and *integration into China of EU technical standards, in such areas as the environment, energy, transport, food safety and consumer protection* may be supported” (emphasis added).

“Commission Working Document – Country Strategy Paper 2002-2006 & China and National Indicative Program 2002-2004”, European Commission, IP/02/349 (Brussels, Mar. 1, 2002), at pp. 4-5.

The EU science counselor in Beijing has applauded the EU-China Science and Technology (S&T) program, claiming that it has helped to shape China’s environmental and food safety regulatory and technical standards frameworks in Europe’s image.

“...In the last two years...EU-China S&T relations have made a large step forward – both in terms of policy and of its operational consequences...Our S&T relations clearly contribute to the overall positive political relations between the EU and China...*The INCO programme has successfully supported selected policies like health, environment, food security and safety, sustainable agriculture, and overall policy development research. It has contributed to move China towards European models: China has a de facto moratorium on GMO food, uses European car emission standards, supports bio-energy and sustainable agriculture, and even China tries to copy elements of our way to manage the Framework Programme...Our projects already show an impact on regulatory activity in China...Trade issues are increasingly reliant on scientific support, like radiation emissions of mobile phones, certified BSE-free cosmetics, or hormones in chicken meat...China’s policies for GMO food follow the EU positions closely and are subject to strong pressures from the US*” (emphasis added).

J. Sanders, EU Science Counsellor Beijing, “EU-China S&T Relations” (Nov. 2002), at: (<http://europa.eu.int/comm/research/iscp/countries/china/cn-doc5.pf>).