



REACH: A Disguised Trade Barrier That ‘Takes’ Private Property and Facilitates Global Regulatory Governance ©

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Europe’s *over*-regulation-prone lawmaking bodies yesterday announced that the European Parliament had finally approved for adoption and implementation the highly controversial ‘REACH’ chemicals regulatory regime.¹ REACH is certain to have a severely negative impact on *global* industry and international trade.

The Parliament’s adoption of REACH, which is premised on the extra-territorial, non-scientific, *Precautionary Principle*, followed from a political compromise reached two weeks ago between the regionally-focused European Commission and European Parliament and the more nationally-focused EU member states-based European Council. Pursuant to the compromise, the Commission *will* enact and begin implementing a final version of REACH that is substantially similar to that currently in circulation sometime during the spring of 2007.²

The EU Parliament decided to adopt REACH despite the repeated opposition voiced by European and foreign industries since at least 2003. In fact, exasperated European industry groups, including the European Chemical Industry Council (CEFIC), the European Association of Non-Ferrous Metals (Eurometaux), and the European engineering association Orgalime had just last week held a Brussels press conference in a last ditch effort to persuade the Parliament to abandon REACH’s very costly and onerous substitution, dossier preparation and burden of proof rules, which *will* “send[] the wrong signal to business communities in terms of investment and innovation.”³ Even EU Industry Commissioner Günter Verheugen made a passing reference to the REACH regulation when he stated this past November that, “We have to recognise that ... our environmental leadership could significantly undermine the international competitiveness of part of Europe’s energy-intensive industries and worsen global environmental performance by redirecting production to parts of the world with lower environmental standards.”⁴ Apparently, the Parliament ignored them, and acted in response to the favorable support that the compromise document had received from some European socialist party Parliamentarians⁵ and the public disparagement it had attracted from certain transatlantic environment extremist groups.⁶

Whatever final form it does assume, however, the regionally conceived REACH regulation should not be mistaken for other than what it really *is*: a carefully crafted legal instrument specially designed to facilitate the 21st century United Nations-based *global governance*⁷ of every nation’s industries, particularly those located and/or based in the United States.⁸ REACH also conveniently serves the well-lobbied⁹ economic interests of Europe’s ‘shell-shot’ industries. Having failed to prevent the adoption of REACH within their own backyard, European companies have called, behind closed doors, for its application to all industries operating within the *global* neighborhood.¹⁰

In this regard, REACH represents a new genre of disguised trade barriers that *will*, no doubt, violate at least three World Trade Organization agreements in several important respects.¹¹ REACH, even in its compromised form, *will* impose a variety of serious legal and economic costs upon *all* industries throughout the world, up and down global supply chains, no matter where they are located. REACH has been structured to restore European industry's global competitiveness by imposing upon other countries' industries the same highly onerous and costly European regulatory burdens and cultural preferences. In this way, the REACH regulatory regime 'levels the global economic playing field' for besieged European companies.¹²

Most importantly, REACH *will* reverse the legal burden of proof (i.e., both the burden of production of evidence and the burden of persuasion) from government to industry without regulators having conducted beforehand, either an 'adequate' scientific risk assessment as concerns any of the chemicals for which pre-market authorization will be required, or a rigorous economic cost-benefit analysis that considers the exorbitant expense and burdens associated with regulatory compliance and the development by industry of 'substitute substances' that do not presently exist *and* are acceptable to European regulators *and* civil society groups. REACH, consistent with the *extra*-WTO Precautionary Principle, which is premised on the notion of 'scientific uncertainty' in the eyes of legislator/politicians rather than on 'insufficient scientific (empirical) evidence' as determined by scientists, *will* thus require industry to prove a *negative*.

Global industries will be compelled to demonstrate to the European Commission and to 'deputized' environmental extremists that their chemicals are 'safe' - harmless to human health and the environment, based on fears of future hypothetical hazards. The current system conditions regulation on the ability of European regulators (with minimal civil society participation) to demonstrate that particular industry chemicals are scientifically harmful or 'not safe', based on the presence of empirical evidence of actual risk. In other words, REACH *will* permit European bureaucrats and environmental extremists, without probable cause in fact, to intrude into and determine for private companies and individuals how they must structure their operations and affairs, and the extent to which they are entitled to profit from them. REACH *will* also permit such non-expert parties to dictate how companies design, manufacture, formulate, market, sell and then dispose of all chemical substances and the products which contain them, irrespective of the economic costs and the lack of presently available technological alternatives.¹³ Furthermore, REACH *will* impose a very costly and overly burdensome zero-risk threshold that is practically impossible to satisfy. And, in the hands of risk-averse European regulators intimidated by the European Parliament's politically influential socialist and environmentalist parties, REACH *will* employ an administratively created presumption of possible harm that is tantamount to a finding of 'guilty until proven innocent' - much like in a socialist 'police state'.

Premised as it is, on the Precautionary Principle, REACH *will* also violate the fundamental and inalienable exclusive private property rights, tangible as well as intangible, of WTO member industries (especially those small and medium-sized, based in the United States and developing countries),¹⁴ despite regulator assurances to the contrary.¹⁵ In addition, it *will* impose

unnecessary, and thus, illegal obstacles to international trade, where less trade-restrictive alternatives to achieve legitimate environment and health objectives are otherwise available and can be readily employed by European regulators.¹⁶

Furthermore, REACH *will* endanger global economic stability, international peace and security, and *positive* sustainable development because it will foster a new wave of trade protectionism that emboldens developing countries to unilaterally regulate and burden international commerce and technology without having the capacity themselves to effectively protect the environment or human health. Europeans conveniently forget how psychological factors largely rooted in populism, nationalism and trade protectionism during the 1930's contributed to the demise of the then relatively free trading system and led to global disorder and eventually to war.¹⁷

For these reasons, the ITSSD calls upon the United States Trade Representative and U.S. industry, as well as developing country governments and industries, to come together to plan and launch a full-scale WTO attack against the European Communities' blatantly illegal REACH regulation. The WTO has already disregarded the extra-WTO Precautionary Principle as a viable legal defense of the European Union's non-science-based biotech rules¹⁸. Considering what is at stake here, it is, thus, very likely to do the same as concerns Europe's unnecessarily trade-restrictive *and* non-science-based REACH chemicals regulatory regime.

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¹ 'REACH' stands for Registration, Evaluation, and Authorization of Chemicals. See EU Parliament Approves New Chemicals Regime", International Herald Tribune (12/13/06), at: (http://www.iht.com/articles/ap/2006/12/13/europe/EU_GEN_EU_Chemicals.php); "European Parliament Approved EU Chemicals Regulation on 13 December 2006: Most Significant Legislative Project in EU History Concluded", Kauppalehti Oy, Online (12/13/06), at: (<http://www.kauppalehti.fi/4/i/yritykset/sttptiedote.jsp?selected=kaikki&oid=20061201/11660110533000>); "EU Parliament Passes Unworkable REACH Legislation at the Expense of Global Trade & Competitiveness", American Chemistry Council (12/13/06), at: (<http://biz.yahoo.com/prnews/061213/dcw045.html?.v=81>).

²See "EU Wraps Up REACH Chemicals Safety Law", EurActiv.com (12/1/06), at: (<http://www.euractiv.com/en/environment/eu-wraps-reach-chemicals-safety-law/article-160158>).

³See "Businesses Fear Added Costs After REACH Deal", EurActiv.com (12/6/06), at: (<http://www.euractiv.com/en/environment/businesses-fear-added-costs-reach-deal/article-160309>), quoting CEFIC director-general Alain Perroy; "Eurometraux: Key points for Industry Press Conference on REACH" (12/6/06), at: (http://www.euractiv.com/29/images/EurometauxPressConfREACH_tcm29-160308.pdf); "Orgalime: A Downstream User's View on the REACH Trialogue Compromise", REACH Press Conference (12/6/06), at: (http://www.orgalime.org/Pdf/ORGALIME_editorial_notes.pdf).

⁴ See Andrew Bounds, Green Laws 'May Harm Europe's Economy', Financial Times.com (11/23/06), at: (<http://www.ft.com/cms/77516e6a-7b2e-11db-bf9b-0000779e2340.html>).

⁵ See “Agreement on REACH Regulation”, PSE – The Socialist Group in the European Parliament (12/1/06), at: (<http://www.socialistgroup.eu/gpes/newsdetail.do?lg=en&id=26390&href=home>).

⁶ See “REACH Compromise Under Fire”, EurActiv.com (12/4/06), at: (<http://www.euractiv.com/en/environment/reach-compromise-fire/article-160203>); “REACH, A Deal Too Far”, World Wildlife Fund (12/1/06), at: (http://www.panda.org/about_wwf/where_we_work/europe/what_we_do/epo/index.cfm?uNewsID=88380).

⁷ “Thus, the institutionalization of precautionary norms and ideas means that segments of what would once have been considered domestic policymaking may, increasingly, be carried out at the international level, which reinforces multilateral processes and underlines the importance of the convening, coordinating, and facilitating roles of international institutions such as the United Nations Environment Programme (UNEP).” See Steve Maguire and Jaye Ellis, “Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors”, pp. 505-526, at p. 506, in “Global Governance: A Review of Multilateralism and International Organizations”, W. Andy Knight, S. Neil MacFarlane and Thomas G. Weiss, eds., Vol. 11 No.4 (Lynne Rienner Publishers, Oct.-Dec. 2005), at: (<http://www.rienner.com/ggsample.pdf>).

⁸ See Lawrence A. Kogan, “Exporting Precaution: How Europe’s Risk-Free Regulatory Agenda Threatens American Free Enterprise”, Washington Legal Foundation Monograph (Nov. 2005) at pp. 11, 49, 87-91, at: (<http://www.wlf.org/upload/110405MONOKogan.pdf>).

⁹ See Lawrence A. Kogan, “Trade Protectionism: Ducking the Truth About Europe’s GMO Policy, International Herald Tribune (11/27/04), at: (http://www.ihf.com/articles/2004/11/27/edkogan_ed3.php).

¹⁰ See Lawrence A. Kogan, “Exporting Precaution: How Europe’s Risk-Free Regulatory Agenda Threatens American Free Enterprise” *supra*, at pp. 101-109.

¹¹ See Lawrence A. Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science”, National Foreign Trade Council (May 2003) at pp. 82-106, at: (http://www.wto.org/English/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf).

¹² See Lawrence A. Kogan, “Exporting Europe’s Protectionism”, *National Interest* (Fall 2004) pp. 91-99, at p. 95, at: (<http://www.keepmedia.com/pubs/NationalInterest/2004/09/01/586792?extID=10026>).

¹³ Also, a Precautionary Principle-based REACH will be unable to ensure that greater risks to human health and the environment will not materialize through use of mandated substitute substances and products, and thereby likely trigger what risk managers term a ‘risk-risk’ scenario. “Policymakers face a serious dilemma. If they design policies according to the risk perceptions of lay people, they actually may tolerate more real sacrifices in terms of lives lost or human suffering than necessary. If they follow only the advice of the professional experts, they may lose public support or even sympathy.” See Ortwin Renn, “Risks and Society,” Presentation made at the Directorate General, Health and Consumer Protection, International Conference: “Risk Analysis and Its Role in the European Union,” Brussels (July 18-19, 2000), available online at http://europa.eu.int/comm/food/risk/session1_1_en.pdf).

www.konsumentamverkan.se/evenemang/brysselriskprogram.html, cited in Lawrence A. Kogan, “The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk”, *Seton Hall Journal of Diplomacy and International Relations* V(1), Winter/Spring 2004, pages 77-123 at p. 77, at: (<http://diplomacy.shu.edu/journal/KOGAN%20-%20Precautionary%20Principle%20&%20WTO%20Law.pdf>).

¹⁴ See Jeroen H. J. den Hartog and Mark G. Paulson, “Europe’s ‘REACH’ Initiative Will Impact Trade Secrets”, Washington Legal Foundation Legal Backgrounder Vol. 21 No. 20 (June 2006) at: (<http://www.wlf.org/upload/061606dehartog.pdf>). A different type of ‘taking’ of private property for ‘public use’ without ‘just compensation’, in a U.S. constitutional sense, will also occur to the extent that regulations adversely affect the value of economic assets owned by businesses and individuals. “[A]s the [P]recautionary [P]rinciple comes to be more influential internationally and domestically, and particularly as it finds its way into the texts of statutes and conventions, a certain degree of uncertainty about the regulatory environment is created, and those with a stake in substances with POPs-like properties become vulnerable to the regulatory process. They face uncertainty as to whether these substances will eventually be regulated, and *therefore economic uncertainty; investments in activities that depend on access to such substances may lose some of their value as a result*” (emphasis added). See Steve Maguire and Jaye Ellis, “Redistributing the Burden of Scientific Uncertainty: Implications of the

Precautionary Principle for State and Nonstate Actors” *supra* at p. 519.

¹⁵ “Efforts were also made to preserve **confidentiality of sensitive business information** as data is circulated along the supply chain with data protection rights extended from three to six years. Companies will be allowed to keep details confidential such as the full composition of a preparation, its precise use, tonnage and links with downstream users” (emphasis in original) See “REACH Compromise Under Fire” *supra*.

¹⁶ See Lawrence A. Kogan, “Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science”, *supra*; Lawrence A. Kogan, “EU Regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three-Dimensional Trade Strategy That Ignores Sound Science”, National Foreign Trade Council (August 2003), at pp. 18 fn 57, 19, 20 fn 61, 22 fn 71, 33 fn 98 and 39, at: (http://www.wto.org/English/forums_e/ngo_e/posp47_nftc_eu_reg_final_e.pdf); Lawrence A. Kogan, “‘Enlightened’ Environmentalism or Disguised Protectionism: Assessing the Impact of EU Precaution-Based Standards on Developing Countries”, National Foreign Trade Council (April 2004), at: pp. 19-32, 66-89, at: (http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_e.pdf). For an opposing viewpoint, See *Generally* Christian Tietje and Sabastian Wolf, “REACH Registration of Imported Substances – Compatibility With WTO Rules”, Institut für Wirtschaftsrecht, Martin Luther University (July 2005), at: (<http://www.wirtschaftsrecht.uni-halle.de/Heft42.pdf>).

¹⁷ See Joan E. Spero and Jeffrey A. Hart, *The Politics of International Economic Relations* (5th ed. S. Martin’s Press 1997), at pp. 1-2, 52; See also Lawrence Ziring, Robert Riggs and Jack Plano, *The United Nations – International Organization and World Politics*, (3rd Ed. 2000), at pp. 1-2, 386-389, 392-394, 407-410, 421-422; See generally Ngaire Woods, ‘Chap. 13 – Bretton Woods Institutions’, *Oxford Handbook on the United Nations*, Thomas G. Weiss and Sam Daws eds., (Oxford University Press 2006), at: (<http://www.globaleconomicgovernance.org/docs/UN%20Woods%20Final.pdf>).

¹⁸ See Lawrence A. Kogan, “WTO Ruling on GM Foods Addresses ‘Precautionary Principle’”, Washington Legal Foundation Legal Backgrounder, Vol. 21 No. 38 (12/8/06), at: (<http://www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf>).