U.S. Private Property Rights Under International Assault ©

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Institute for Trade, Standards and Sustainable Development

Presented at the

Tenth Annual National Conference on Private Property Rights
Of The Property Rights Foundation of America

Private Property Rights
- The Record & The Vision -

Albany, New York

October 14, 2006

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I. INTRODUCTION:

A. Identifying a Growing Problem:

Good afternoon, my name is Lawrence Kogan and I am with the nonprofit Institute for Trade, Standards and Sustainable Development (ITSSD). The ITSSD's charitable mission is to educate public policymakers, businesses and the public at large about how to promote a positive paradigm of sustainable development consistent with private property, free market and World Trade Organization rules-based principles. Our bottom line, in other words, is to preserve private property rights, tangible, as well as intangible, free markets and entrepreneurship, and benchmarked and balanced regulatory rulemaking from the encroaching body of socialist anti-market regulations currently being exported from the European Union. These concepts, unfortunately, are also under attack from populist-leaning Latin American government officials and activist civil society missionaries, who are proselytizing a new proposed anti-private property global legal framework in order to minimize the scope of private property rights throughout the world.

I have been engaged in international business and law practice for approximately 20 years, during which time, I have advised public as well as private companies on diverse international tax, trade, and commercial matters. I have also owned outright or in partnership shares in several international-focused entrepreneurial companies that held valuable tangible as well as intangible assets. Given my background and experience, I possess a strong belief in the positive role that private property and free markets serve in promoting entrepreneurialism, creativity, innovation and broad-based economic wealth.

Therefore, I am very troubled by the extent and seriousness of the current campaign that left-leaning foreign governments, activists and academics are waging against the American free market, private property and science and economics-based regulatory systems. I am even more offended, however, that many opponent-critics come from within our own midst i.e., there are many Americans (politicians and academics) now working alongside these zealots internationally and domestically in order to overhaul the American engine of economic freedom, innovation, growth and prosperity in the image of common-good oriented socialism. I believe that, such persons are either misguided or ideologically opposed to private property rights and free markets if they wish to see these U.S. systems replaced.

Each of these cases reflects a growing international dissatisfaction with and opposition to the 'American 'capitalist' system of 'risk and reward', individualism and strong private property ownership which are deemed inherently unfair, unequal, overly materialistic and morally debasing. American capitalism is pejoratively termed 'globalization' and identified as the cause of the world's ills. Capitalism /Globalization is viewed as evil precisely because it has been promoted by US government policies and carried abroad internationally by US multinationals without the consent of 'culturally sensitive' foreign governments and body politics within the countries where such companies have chosen to operate. These actors fail to state, however, that the very same governments that now criticize them and their American values, had induced them to settle there in the first place by way of incentives. In other words, whatever foreign direct investment and

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technology transfers accompanied these companies and indirectly benefited the host countries and their citizens was a direct byproduct of foreign government engagement. What these actors are not disclosing is that they oppose American capitalism primarily because they do not understand it well enough or allow it to take root in their countries long enough to make it work for their own industries and peoples.

Opposition to the American regulatory system has emanated primarily from the European Union, and it has been encouraged and assisted by several United Nations agencies and numerous socialist-minded academics and health and environmental activist groups. And, opposition to exclusive private property rights, particularly privately owned intellectual property rights, is being promoted by a well-funded growing populist and academic movement that favors 'open source'/ 'universal access to life sciences and information technology knowledge' ('A2K'). This movement has derived its strength from deep private funding sources and from the political posturing of the Government of Brazil, and the 'Friends of Development' – a group of developing and impoverished nations generally located in Latin America, Africa and the Caribbean that seek to acquire developed world knowledge, and ultimately wealth, at concession rate prices.

The first thing that you are likely to ask is, why, should any of us be worried about this if we cannot really see or experience it in action? These are indeed lofty notions - 'sustainable development', 'free trade' 'international standards', 'positive paradigm', 'exclusive rights', 'compulsory licensing'. What do they all mean and why are they relevant? Why should any of us consider what occurs at the WTO, the United Nations, the International Monetary Fund and the World Bank (otherwise known as the 'Bretton Woods System') to be important? Do these institutions have any direct impact on our daily lives – on our children's lives? Is it not true that our domestic political, legal and judicial systems protect us from economically harmful foreign and international rules?

After all, this is America and we do not initially rely on, nor do we expect or seek guidance from, governmental institutions, especially those that are international-based, in order to go about our daily business. For the most part, Americans do not prefer government intervention into their daily lives and seek to minimize such intrusions wherever possible. We created the current international system and the organizations that support it, largely based on what we considered to be, common sense, fundamental and inalienable freedoms and sacrosanct principles/values. These principles and values are contained within the U.S. Declaration of Independence, the U.S. Constitution and its accompanying Bill of Rights that serve as the cornerstone of our uniquely American free market /enterprise system. The Universal Declaration of Human Rights, for example, codifies these principles and values into law at the global level. Government intervention is called for only to ensure and to preserve fundamental, natural and inalienable individual human rights and freedoms, including the economic rights to private property and innovation. In other words, we catapulted to the international level the 'revolutionary' thinking of our founding fathers, whose foresight, resourcefulness and eagerness to escape a rigid, stagnant and war-torn European continent mired in quasi-feudalism, centuries ago, led them to rethink the role of government, individualism, free enterprise and private property rights that form the basis of our thriving national society today.

B. <u>The Current U.S. and International Private Property System is Being Challenged</u>:

The post-WWII international system to which I now refer, is grounded on such precepts and reflects the costly lessons that American leaders had learned from prior wars and atrocities. Notwithstanding the stresses that it has had to endure, both during and after the Cold War, this system has functioned very well and, for the most part, has achieved its primary goal: to secure international peace through establishment of free capital markets and investment, individual political and economic freedom, and promotion of free trade and economic development. Indeed, this *is* precisely what has brought the world, not to mention the United States, so much wealth, advanced scientific discoveries, technological innovations, improved health care, and economic and social development during the course of the past sixty years.

Other countries would surely be foolish not to continue maintaining and further enhancing the current international system, given its overwhelming success – would they not? Indeed, one may argue that foreign governments would even be inviting economic, scientific and technological stagnation and malaise were they to modify this system as profoundly as is now being proposed by health and environmental ('green') activists, left-leaning academics and socialist party leaders in many European, Latin American and African governments.

These constituencies are now trying to eliminate all 'risk' from our everyday lives through imposition of wave after wave of costly and onerous non-science-based regulations upon companies in all industries operating throughout Europe, along global supply chains, and within the United States itself. Advocates of what has come to be known as 'over-regulation' claim that, it is absolutely essential that the public be protected from the uncertain and unforeseen future health and environmental threats potentially posed by reckless, morally bereft and exploitative industries and by the dangerous untested novel technologies they seek to deploy. In other words, they aim to replace the empirical evaluation of current actual knowable risks with the identification of future hypothetical unknowable hazards.

These constituencies also seek to remove one of the greatest incentives to scientific and technological innovation the world has ever known – temporary but exclusive private intellectual property rights in discoveries, inventions and creations, and in derivative commercialized know-how and expressions. In its place, this movement endeavors to establish a new global paradigm of 'open source' and 'universal access' to knowledge at concession rate prices. In other words, its proponents endeavor to 'take' private property for 'public use' or 'private domestic industry use' without paying the owners 'just compensation' – i.e., to redistribute global wealth. This not only threatens intangible intellectual property rights, but also tangible real and personal property rights as well.

What most of you may not fully realize is that intangible assets such as intellectual property rights – patents, trade secrets, copyrights, trademarks and brand names are all forms of exclusive private property afforded temporary but exclusive protection by the U.S. Constitution. Over the past twenty years, especially, intangibles such as intellectual property rights, have become extremely valuable economic (balance sheet) assets, so valuable in fact, that they comprise an ever-growing share of a company's worth. Actually, intangible assets, goodwill included, now comprise approximately 75

percent of the worth of an average U.S. business, and at least 45 percent of the U.S. gross domestic product. This is greater than the GDP of any other nation in the world.

If this is, indeed, the case why then, must we fix an international system that 'aint' broke? Do other countries seek these changes merely because they do not 'get it'? Could it simply be that these societies are inefficiently structured and organized and their people incapable of being productive? Or is there more to their opposition? Is it because certain foreign governments plainly refuse, on an ideological level, to motivate their people to be more productive and to enable them *individually* to take advantage of the many opportunities that await them? Is it because the government in power does not wish to lose control to an empowered, knowledgeable and wealthy population? Alternatively, is it because of the policy failures and endemic corruption of foreign governments, which prevent them from providing their peoples with adequate education and health care, and the means to feed their families? Is it because these countries lack a proper national enabling environment that fosters free enterprise, private property ownership and individual creativity and discovery, which in turn, has rendered their industries less competitive?

Or, do these groups primarily oppose globalization, and seek, on an ideological and almost fanatical level, to promote social parity over social progress in the name of achieving 'sustainable development' – which assumes the need for greater equity not only between wealthy and poor nations but also within societies and between generations? In other words, is their opposition to the current international system grounded in trade protectionism, political populism, and/or ideological paternalistic *socialism* (i.e., redistribution of wealth notions), or all of the above? Would it not be more logical for them to exert their efforts learning the secrets of acquiring the 'tools' of innovation and economic growth in order to take advantage of this wildly open and successful system? Would it not be better than trying to erect from scratch a new untested and prohibitively costly paradigm, another new experiment so to speak, which may have potentially negative social and economic consequences for developing country citizens, and the world at large? Are we not really speaking, once again, about the virtues of 'enabling' other peoples to excel on their own and to enhance their individual welfare by providing a facilitative market-friendly 'enabling' environment, versus providing them with enhanced welfare-style aid programs that only foster continued dependence on aid handouts?

But getting back to my original question, why should any of you be worried? If you are not an importer-exporter or an emerging or foreign market investor, why must you follow international affairs and care about evolving foreign legal and economic principles and systems? Why should you be concerned about the status of government-to-government negotiations over international economic matters (e.g., at the World Economic Forum) and over international regulatory harmonization (at the WTO and the UN or between the US and the EU)?

Why? Because an evolving body of international legal norms has developed as the result of the activities of civil society groups and populist national governments, organized under the auspices of the United Nations is quickly coming our way. It very much resembles the deadly tsunami waves triggered by last year's undersea earthquake that took place beneath the coast of Indonesia and Thailand and that eventually made their way to the distant shores of India, Africa and Australia. Just

like there are no borders in the oceans to prevent such waves from eventually coming ashore thousands of miles away, there are no longer any constraints on foreign and international laws and economic policies to prevent them, especially those poorly conceived, from being (exported) by one country to another located continents away. Laws and policies can more easily than ever before, be introduced by one country, and then transposed and integrated into the legislative and judicial systems of another, including the United States. In other words, to the extent that there are internationalist-minded legislators and jurists who believe that, foreign laws, regulations and judicial decisions bear upon and are relevant to resolving purely U.S. legislative, regulatory and judicial disputes, there can be no assurance against such dissemination and assimilation.

C. Bad Laws and Policies From Abroad Threaten Our Private Property Rights:

As American citizens living and doing business in the United States, we have all learned that what is local is *most* important. In other words, we are only concerned about the impact of local, state and perhaps even U.S. federal government initiatives designed to diminish or otherwise qualify our business activities, private property rights and basic economic and political freedoms. Our 'think national, act local' approach is most clearly reflected in how strongly we support states' (10th Amendment) rights when it comes to disputes over private property, taxes, education and environmental and eminent domain regulation. Except for the past twenty or so years, we have largely not been interested in what occurs internationally, especially where it did not affect us, or our families directly, save for significant world events – wars, threats of war, and human atrocities. With the growing movement towards global governance/convergence, however, this is NO longer an option.

Bad laws and policies developed abroad that weaken private property rights and have a negative impact on our nation's economic performance, and scientific and technological advancement are capable of being exported to the United States more quickly than they had been in the past. Also, poorly conceived and drafted laws and policies developed here (domestically) that diminish private property rights and have a negative economic, scientific and technological impact can be observed from afar and rather quickly imported into other countries. This can just as easily undermine U.S. businesses and individuals operating both here and abroad. Encroaching foreign health and environmental over-regulation and commonly owned societal intellectual property rights administered by national government bureaucrats and civil society groups provide two glaring examples of how 'what goes around comes around'. What happens internationally can, and will affect us at the national, state and local levels in the U.S., unless we become more vigilant and attentive. Just as ***Paul Revere and the Minute Men of the American Revolution*** watched guard over Boston Harbor and the Massachusetts countryside to alert the Americans of the approaching British Navy and Calvary forces we, too, must change our outlook and approach so that we 'think global but act local' during the 21st century. This will enable us to monitor and warn our citizens and leaders about, and to defend our nation from, the invasion of bad international and foreign laws, regulations and standards now underway.

II. TWO EXAMPLES OF FOREIGN AND INTERNATIONAL LAWS THAT THREATEN THE AMERICAN FREE ENTERPRISE AND PRIVATE PROPERTY SYSTEMS:

A. Europe Seeks to Define How and When New and Existing Technologies Can Gain Access to and be Used in the Global Marketplace - Regulatory Precaution Facilitates 'Environmental 'Blight' Takings:

The ITSSD and I have emphasized during the past three years precisely how the European Union has become, by default, the new global regulator. This has occurred especially in the areas of health and the environment, which have been hijacked by socialist government ideologues and politically influential 'green' movements bent on subordinating European industry, and by extension, all of global commerce, to their preferences and demands. Notwithstanding the efforts of some within Brussels who understand the importance of free enterprise and the role that objective, balanced science and economics-based regulation serves in facilitating innovation and economic growth, they have been largely unsuccessful in limiting the extent and scope of such rules. Furthermore, as the US government will confirm, Brussels institutions continue to propose and adopt these rules, even though they materially affect international commerce, *without* the input and consent of foreign governments, including the US. For this reason, Americans are once again suffering from ***'regulation/taxation without representation'***, which is indisputably, an indirect form of private property 'takings'.

According to constitutional law and property rights scholar O. Lee Reed of the University of Georgia,

> "Historians of the colonial era are virtually unanimous in concluding that the American Revolution was fought over private property and the English refusal to apply to their own colonists the great constitutional principle of England: legitimate taxation of privately owned resources can derive only from the people's elected representatives. Said John Wilkes, Lord Mayor of London, during this time, 'If w e can tax the Americans without their consent, they have no property, nothing they can call their own." [1]

Unfortunately, what has resulted is the evolution of a controversial environmental legal concept having populist international appeal, known as the Precautionary Principle. The Precautionary Principle, when invoked in its broadest sense, totally disregards exclusive private rights in information, let alone in real and personal property, in favor of providing regulators with untold amounts of information, much of which is irrelevant, that is otherwise protected either by patents or has been never disclosed and is entitled to legal protection as a trade secret. However, the cost and effort of providing such information to regulators, and the risks of public disclosure incident thereto, in order to obtain pre-market authorization to manufacture, sell or distribute a product or substance in the marketplace does not necessarily lead to a safer and healthier population and/or environment. What it does lead to is a relative competitive disadvantage for those companies subject to the rule.

The Precautionary Principle is essentially a non-scientific, 'better safe than sorry' philosophy of regulation that has already assumed the status of regional environmental law within Europe.

European regulators and environmental groups are eager to establish it as an absolute international and U.S. legal standard.

It generally means, "I fear, therefore, I shall ban". The Precautionary Principle favors banning or severely restricting whole classes of products, substances and activities from entering the marketplace if is merely *possible* that they or the processes used for their manufacture, formulation or assembly might cause uncertain health or environmental harm sometime in the distant future. Pursuant to the Precautionary Principle, government regulators need not prove objectively, through empirical science, actual exposure data, and probabilistic computations (extrapolated safety factors) that a particular product or substance is likely to cause actual harm within a foreseeable period of time to a specifically identifiable population or ecosystem. Rather than focus on probable occurrence of actual risks under real life circumstances (i.e., with reference to use and exposure), the EU Parliament and Commission and Euro-environmentalists have promoted a new global framework that effectively shifts the subject of evaluation from actual risks to hypothetical hazards. Pursuant to this new paradigm, which arguably shortcuts the scientific process, regulators need simply to identify a product's or substance's inherently dangerous characteristics or intrinsically harmful qualities and to rely upon an administratively created legal presumption of possible harm. That presumption is itself based on abstract categorizations of broad classes of products or substances with similar hazard profiles – not upon empirically based scientific risk assessment.

Risk aversion *is* the foundation underlying the Precautionary Principle, which "asks how much harm can be avoided rather than how much is acceptable. The Precautionary Principle requires that industry demonstrate to government and civil society's satisfaction that a product, substance or activity deemed inherently hazardous (harmful) is 'safe' or 'harmless' before it can be authorized for sale, distribution or marketing. This is equivalent to imposing a negative burden of proof or a zero-risk threshold, which will severely curtail economic growth, technological innovation and societal well being and quality of life. It is also arguably equivalent to a disguised taking of private property for public use, without payment of just compensation, given the onerous burdens and high costs different companies would be forced to bear.

B. Environmental 'Blight' Regulations Based on the Precautionary Principle Are Disguised Takings:

U.S. industry, including small and medium-sized businesses *and individual property holders*, would be subject to a broad affirmative duty of care 'to do no harm' – i.e., not to undertake *any* activities that could potentially trigger unascertainable but serious risks of environmental or health harm in the future. However, companies would not be considered to have satisfied this duty of care *even if* they followed "best practice and appropriate regulatory rules". In essence, the Precautionary Principle would usher in a new era of strict liability. It would shift the regulatory burden of proof, consisting of both the burden of producing evidence and the burden of persuasion from the government concerned about the possible occurrence of serious harm to the manufacturer or operator whose activity might potentially give rise to it. "Precaution means, in effect…that one is guilty until proven innocent with tampering with the environment in [potentially] risky ways." In addition, the Precautionary Principle would require that industry substitute many different products and substances with 'safer' products

and substances even though they do not yet exist and the costs of doing so may be prohibitive. In effect, the Precautionary Principle may inadvertently impose even greater risks and societal costs than the risks it seeks to eliminate. This is likely to occur if industry, *and by extension, individual property holders,* are required to focus on the unknowables in life rather than upon the knowables.

Companies' *fear of legal prosecution* for being unable to meet such a standard, and *fear of lost profitability* due to their inability to absorb the higher manufacturing, processing and distribution costs that would result from such regulations, will have a profoundly negative impact on company product design, manufacture and distribution capabilities. In addition, the greater likely tort liability, insurance fees, and financial and non-financial disclosure costs and obligations will certainly trigger another type of risk aversion – *fear of experimentation*. Also, there is the *fear of lost business and lost business reputation* that follows from the public disparagement campaigns and product boycotts systematically launched against public companies by health, environmental and animal rights zealots should the companies refuse to abide by their demands. Sadly, the Chief of the UN Treaty Section and the former UN Secretary General himself, have applauded the use of public disparagement campaigns. These campaigns, in turn, draw strength from several UN sustainable development programs focused on making international businesses accountable to environmental and health activists and government regulators. For example, the UN Environment Program and the Secretary General's Global Compact Office, endeavor to keep companies, especially U.S. businesses and their global suppliers, in line with 'international' (European) expectations. And, some of these activities continue to be financed with U.S. taxpayer dollars! The ITSSD has studied and written about this in great depth in several of its reports.

As a result, many companies, especially those in Europe, have had *less* of an economic incentive to undertake breakthrough research and development and to invest in financially risky innovations. A review of European industries' adverse experience with the broad legal obligation 'to do no harm' reveals how such regulations have had a 'chilling effect' upon European research and development, capital investment and scientific and technological innovation. This has made European companies less globally competitive, and has caused them to shift significant amounts of their research and development activities to the US. Consequently, European companies have lobbied their governments to work with global civil society to export the Precautionary Principle to America. It is what American companies can expect to face should the Precautionary Principle ever become U.S. law.

The main problem with the Precautionary Principle, therefore, is that it is being invoked very broadly in a host of different regulations that apply to numerous industry sectors, without regard to the economic costs imposed incident to its implementation. As a matter of law, the Precautionary Principle eschews the type of economic cost-benefit analysis required by US law for many types of regulations, namely those, which, if adopted, would have a significant and material impact on society, including industry. While there is no provision within European Community law requiring regulators to evaluate the economic impact or costs of assessing and managing public health and environmental risks in a systematic manner, this glaring omission has been opportunistically exploited by paternalistic socialist governments, environmental ideologues and public health advocates as a justification for pursuing the highest public safety standards possible pursuant to the Precautionary

Principle, even though they don't know what the highest such level entails. After all, this has a very politically favorable ring to it. How can politicians tell the public that it is not government's primary task to keep them safe? Arguably, the Precautionary Principle provides the government with the perfect 'cover' to serve the 'public good' by more imposing more regulation that can substantially diminish the economic value and beneficial use of private property.

C. The Precautionary Principle at the U.S. State and Local Levels:

Since at least 2004, there have been growing collaborations between the American and European environmental and social responsibility movements. The American media even reported how American environmental and health activist groups were devoting substantial financial and human resources to European-based fear campaigns that intimidate Brussels Commissioners and Parliamentarians, sway European public opinion, and threaten the reputations of non-environmentally or socially conscious businesses to ensure the enactment of legislation based on the Precautionary Principle. According to the press, these same groups are now using the stricter precaution-based European regulations as a level/platform to promote similar regulatory change in the U.S.

The ITSSD and I have written extensively about how and why Europe has chosen to export the Precautionary Principle around the world, including to the United States. Apparently, European industries, health and environmental activists, academics and bureaucrats have found common cause to band together to do so. Their hope is to impose on U.S. businesses and citizens the same costs and administrative burdens to which European businesses and consumers are subject under the Precautionary Principle-based regulations. This, in effect, levels the global economic playing field for European industries that have, since being subject to such rules, lost their global competitiveness. It also helps to establish the Precautionary Principle as both WTO treaty law *and* as customary international law (CIL). CIL has two requirements: 1) *opinion juris* – there must be a general legal obligation to follow a rule because it is there; and 2) *state practice* – there must be actual legal practice of the rule at the national, federal and/or local levels.

The ITSSD has accumulated substantial documentary evidence showing the true rationale behind Precautionary Principle-based regulations in the areas of climate change/carbon dioxide emissions, biotech food and feed, high volume toxic chemicals, phthalate-based cosmetics, brominated flame retardants, metals-based electrical and electronic equipment, biocides, hormone-injected and anti-biotic fed beef, poultry and/or fish, pesticides, including DDT, and now pharmaceuticals. It is economics-based – i.e., *disguised trade protectionism*. If the Precautionary Principle were adopted as U.S. law, and its requirement that all potentially harmful products must be substituted, is applied, we may no longer be able to eat, drive other than subcompact autos, wear cosmetics, or secure needed drugs to make us healthy or improve our comfort and quality of life.

While these findings show that the U.S. could conceivably win one or more cases at the WTO should it decide to challenge particular EU regulations and directives on science and economic grounds, the US government, to date, has initiated only one such suit, with mixed results. As an upcoming article that I have co-authored with a known US biotech policy expert will show, the US has won on the scientific arguments in the recent WTO GMO case precisely because the EU once again failed to

perform an adequate science-based risk assessment that identified specific risks posed by the specific GMO products in question. Thus, there is no logical reason why more WTO challenges should not follow if the EU continues to avoid scientifically assessing the health and environmental risks it claims to have identified. In fact, I can provide one very good reason – it is spelled R-E-A-C-H. This stands for Registration, Evaluation and Authorization of Chemicals, the 'mother' of all European regulations that itself has global 'reach' and applies to virtually any industry sector you can think of including pharmaceuticals.

REACH proponents have heralded it as a vehicle to hold companies accountable for the thousands of high volume chemicals that they produce, formulate and incorporate into manufactured products subsequently traded both within the EU and internationally. REACH has applied extraterritorially by the EU so that all companies throughout the global supply chains now fall within its grasp. In general, REACH imposes three obligations on industry: 1) industry registration of all chemicals based on the volume produced or imported; 2) industry evaluation of substances that give rise to particular regulator concern; and 3) government authorization of substances considered of 'high concern'. It is only with respect to this last grouping that actual risk-based health and environmental toxicity testing is performed. Until then REACH simply presumes that such chemicals are potentially harmful to human health and the environment – though the EU Commission has not performed a science-based risk assessment on any specific substance or product, and thus lacks the empirical evidence to substantiate its presumption. A risk-based approach would take into account exposure data as early as possible and would use that information primarily to determine the extent of risk and how best to manage it. It would not make industry jump through needless hoops.

The danger here is that, many American politicians, for obvious reasons, have embraced this approach to regulation and have called for its adoption as a matter of federal, state and local law, and as a matter of moral necessity. Exactly who they are will become more apparent following November's congressional elections. Until that time, a number of them will not raise these issues for fear that they may jeopardize their party's opportunity to win needed seats to obtain a majority. Others will simply assume their executive positions or otherwise consider pursing their run for the presidency.

Indeed, last year, the ITSSD published a study that documented, as of mid-2005, how far the Precautionary Principle had progressed in the US - looking where such EU-style regulations were being proposed and/or adopted in federal, state and local legislatures throughout our nation. At that time, there were a number of initiatives proposed and adopted at the federal, state and local levels dealing with biotech foods, hazardous chemicals, cosmetics, flame-retardants, electrical appliances, electronic devices and computers, and carbon dioxide emissions. We found that they collectively applied to almost every product sector in US industry.

Considering their rapid introduction and growing adverse impact, the ITSSD recently prepared an updated study as a pocket guide for state and local legislators, which will be available sometime during November. It tracks the advance and progression of the Precautionary Principle at the state and local levels since that time. While we have found increased activity in most of these areas, it appears that the issues of global warming and carbon dioxide emissions and hazardous metals-

containing appliances and electronics have most galvanized the Precautionary Principle movement against US industry within the last twelve months. It has resulted in a number of individual state initiatives as well as in several 'eye-opening' regional interstate compacts. With respect to the issue of global warming, it has also coincided with the EU's push internationally for other countries to cap carbon dioxide emissions in compliance with the efforts of UN Kyoto Protocol, and British, German, Dutch and Brussels officials traveling within the United States to speak and coordinate with state and local officials. In fact, several U.S. States Attorneys General have initiated lawsuits on this subject matter.

This leaves us all to ask several very important questions: Where has the federal government been while all this has been occurring? Has the Precautionary Principle movement learned from the effective private property states rights movement how to use the 10th Amendment of the U.S. Constitution in such a way as to turn it against them? How can private property owners prevent state and local governments from indirectly 'taking' their private property for public or private use, without paying just compensation? The answer: By providing their state and local executives with the tools to forbid their own administrative agencies from imposing overly burdensome and costly economic redevelopment or environmental regulations issued pursuant to the state's 'police powers', without first conducting an economic cost benefit analysis and undertaking a separate 'takings' impact assessment! The federal Office of Management and Budget (OMB), an arm of the Executive Office of the President, has such tools at its disposal. For this purpose, I invite you to look at two presidential executive orders: Reagan E.O. 12630 (March 1988) and Clinton E.O. 12866 (January 11, 1996), which extends and enhances it. One might also review the President's recent (June 2006) executive order on eminent domain takings ("Executive Order: Protecting the Property Rights of the American People"), though arguably it is flawed and needs to be reworked.

To the extent that your state is considering entering into a regional pact with other states, or even with a foreign country, concerning such regulations and/or related initiatives, as many states are now doing, I also suggest that you look at Federal Register: September 8, 2006 (Volume 71, Number 174)], cited as 22 CFR Part 181. This is a prime example of what creative 'lawyering' could produce. In addition, I suggest that you reacquaint yourself with the U.S. Constitution. In this regard, please review Article I, Section 8, Clause 3 (the Interstate and Foreign Commerce Clauses), Article I, Section 10 (Powers Denied to the States), Article VI, Section 2 (the Supremacy Clause), and Article II, Sections 1 and 2 (Power of the President to Conduct Foreign Affairs), in considering the boundaries of State action.

III. THE NEW PARADIGM OF 'TAKING' U.S. PRIVATE INTELLECTUAL PROPERTY FOR BRAZILIAN AND DEVELOPING COUNTRY 'PUBLIC/ PRIVATE USE' WITHOUT PAYMENT OF JUST COMPENSATION:

This brings me to my second topic for this afternoon: How the Government of Brazil, an emerging economy with great innovative and creative potential, is working with less fortunate developing nation governments and health and 'open source' information technology activists and left-leaning

politicians to change the international legal rules protecting intellectual property rights globally. This should be of concern to all of you here today because it involves foreign governments *indirectly* 'taking' (through issuance of compulsory licenses, imposition of anti-trust regulation or patent and trade secret abrogation) U.S. private property rights (i.e., drug patents, trade secrets and computer software copyrights) for an ostensibly public use (and a partial private use) without paying the holder of such rights just/fair compensation.

A. Intangible Intellectual Property is Exclusive Private Property Too:

At first glance, you might ask why is this important to me, especially if I am not in the IP or a related business, and am not doing business abroad? And, I would answer, first of all, because all intellectual property such as patents, trade secrets and copyrights, are forms of personal private property recognized as such not only by state laws and court decisions, but also by the U.S. Constitution as interpreted by several distinguished U.S. Supreme Court decisions rendered during the past two centuries. Second, I would say that, while intangible personal property is different from other property insofar as it is a non-rival good (i.e., more than one person can own or hold an idea at the same time, unlike a physical asset), it still shares an essential component of ALL private property, namely that of exclusion.

One of the key features of private property is its *exclusive* nature.

> "A property right is the *exclusive* authority to determine how a resource is used, whether that resource is owned by government or by individuals…Private property rights have two other attributes in addition to determining the use of a resource. One is the *exclusive* right to the services of the resource…That is the right to the services of the resources (the rent)...Finally, a private property right includes the right to delegate, rent, or sell any portion of the rights by exchange or gift *at whatever price the owner determines* (provided someone is willing to pay that price)…Thus, the three basic elements of private property are (1) *exclusivity* of rights to the choice of use of a resource, (2) *exclusivity* of rights to the services of a resource, and (3) rights to exchange the resource at mutually agreeable terms" (emphasis added).[2]

In addition to tangible real and personal property, property also has increasingly encompassed intangible human know-how and creativity that can and inevitably do lead to inventions and incremental *and* breakthrough innovations that benefit both individuals AND society.

> "There are two basic underlying policies of intellectual property law. The first is to secure for the public the benefits of intellectual property. *Granting property status to ideas provides an incentive for innovators to develop new ideas by giving the innovator the right to control use of the idea. As a result, the public will gain the benefit of the idea because economic motives will spur the innovator to share it with the public*. The second policy underlying intellectual property law is to regulate and manage competition. Innovators should be entitled to monetary gain from their ideas. Nevertheless, the control of ideas is inimical to a free society because it may allow monopolization of ideas. Therefore, *intellectual property law attempts to regulate or manage competition by granting or withholding property status*. Thus regulation strikes a balance between rewarding a person for intellectual achievement and the

> societal importance of maintaining marketplace competition. ***The granting of property status to ideas is consistent with the basic definition of property***" (emphasis added).[3]

In effect, patents can be described as temporary personal property that has been afforded a limited monopoly to exclude others from its use or exploitation in the marketplace for a fixed, limited time, as a quid pro quo for expending the time, effort and financial and human resources necessary to invent and/or innovate for the betterment of society. In this regard, patents are no different from physical property that took considerable time, money and labor ('sweat equity') to build, plant or acquire. Furthermore, in exchange for the grant of exclusive property right in the idea and its particular use, society is benefited via publication of the patent. This imbues patents with substantial economic value.

Trade secrets, as well, are recognized as a form of personal property due to their exclusive nature. A trade secret is legally "anything that gives a competitor an advantage [,edge] or head-start" that is not in the public domain. Trade secrets include various opportunities that present themselves to a business, is generally developed through substantial time, cost, and effort and often consists of the knowledge possessed by company executives and key employees. In other words, the economic value of a trade secret resides in the pecuniary and human outlays (costs) associated with its development, along with the effort expended to prevent its disclosure to others – i.e., to maintain its *exclusivity*. The nondisclosure of a trade secret is protected for a temporary period against both the acts of commercial competitors AND the acts of government officials if properly designated as such.

The character and nature of the affirmative right to maintaining trade secrets, including pre-clinical testing data, is also shaped, in part, by the common law of torts ('unlawful wrongs'). And, this definition can be traced back to the common law 'right of prospective economic advantage'. In the environment of free and fair competition evolving during the early twentieth century, the unlawful and willful interference with this right gave rise to an action in tort. The right of prospective advantage is based partly on the right to pursue probable opportunities (expectancies) for economic reward without undue interference from others. It is arguable that the ability of an actor to pursue this right to its logical end implies excluding any other actor that might be inclined to interfere with its exercise.

In addition, this right is partly based on the privilege of individuals to engage in free competition by 'all fair and reasonable means' in pursuit of that reward. The conduct of 'unfair competition' refers generally to "all dishonest or fraudulent rivalry in trade and commerce, but is particularly applied to the practice of endeavoring to substitute one's own goods or products in the markets for those of another." It also encompasses 'unfair *methods* of competition'.

The tort of unfair competition now includes the tort of 'misappropriation', which "consists of three basic elements: 1) the plaintiff has made a substantial investment of time, effort, and money to create a thing misappropriated; 2) the defendant has appropriated the thing at little or no cost; [and] 3) The defendant has injured the plaintiff by the misappropriation." In effect, "any *improper* method used to

obtain [misappropriate] a competitor's trade secret is an infringement [of the right of prospective economic advantage].

B. Brazil and Company Do Not Wish to Acknowledge for International or National Law Purposes That IP is Exclusive Private Property Worthy of Just Compensation if Taken:

Perhaps this is the greatest flaw in their argument. The right to own and enjoy real and personal property, including IP, and the inventions and innovations derived from it, has historical significance beyond 18th century English common law. It has since been recognized as being among the inalienable, fundamental and most liberating of all natural and civil rights guaranteed to U.S. citizens by the U.S. Constitution, and its accompanying Bill of Rights. Since 1948, the right to private property has also been recognized as a fundamental and inalienable human right. And, since 1992, the Constitution of the independent and sovereign Republic of Mongolia, within its Chapter 2 entitled "Human Rights and Freedoms" and Article 16 entitled "Citizens' Rights", expressly provides for the protection of exclusive private property rights, including patents and copyrights. To the contrary, these governments and health activists have argued that human economic property rights are in irreconcilable conflict with human health rights, which are of a higher order than the former. It does not seem to register with these governments and activists that there is NO hierarchy of human rights set forth within these international agreements.

Nevertheless, this has not prevented them from trying to reinterpret the WTO Trade Related Aspects of Intellectual Property ('TRIPS') Agreement, and from trying to 'shift' legal notions from one international legal regime (e.g., human rights) into another regime (e.g., trade and/or intellectual property) where they can better serve them. After all, this helps to promote freer and less costly technology transfers based on their development needs. This is better known as 'forum shopping' and these groups, like their environmentalist cousins, are known to embrace it with abandon.

These protagonists hope to reform WTO law from within *and* to develop simultaneously new customary international law norms beyond the WTO regime that can eventually swallow up the general principles, norms, and rules that comprise the corpus of WTO IP law. In other words, if the international community of nations permits regime shifting to occur, the temporary and provisional exceptions and derogations (e.g., compulsory licensing) to the general rule of strong intellectual property right protection made expressly available in the TRIPS Agreement will ultimately overtake and subsume the general rule.

This would result in the establishment of a new treaty-based presumption *against* the adoption of strong international IP protections, along with a reversal of the burden of proof to show harm – from the party challenging IP protections to the party defending them. Thus, "higher standards of [IP] protection…[would] only [be allowed] when it is clearly necessary…and where the benefits outweigh the costs of protection."

This has served as the primary source of an international dispute between the U.S. and Brazilian governments that has continued since the late 1990's. In the first instance, this debate concerns the ability of emerging economies, such as Brazil, Russia, India and China ('BRICS'), and of developing

countries, to issue a compulsory license (the eminent domain of intellectual property) on U.S. and other foreign-patented drugs and trade secrets. In addition, it also concerns the government's obligation to ensure that the original patent holder is compensated fairly for the use of its patent. Through issuance of a compulsory license to satisfy a public health need, governments continue to recognize the patent but reassign its use to third parties willing and capable of exhausting/exercising it in the marketplace. In other words, compulsory licenses retract the original patent holder's temporary grant of exclusivity (i.e., the property right to exclude others from using the idea reflected in the patent in the marketplace).

According to health activists, and even WTO Director Pascal Lamy, emerging and developing economies would be justified in 'taking', and remiss if they did NOT 'take', private drug patents for an ostensible 'public use' in order to address what *they* consider to be a 'national health emergency'. Other justifications for issuing a compulsory license are also available: to exhaust a necessary patent coveted by a monopoly-minded company that has decided not to exploit it in the marketplace except for considerable remuneration, and to prevent a potentially harmful product from ever entering the marketplace. Putting aside the difficulties of determining what constitutes a national emergency, whether a monopoly condition exists and the extent to which the product is actually harmful, there is also the difficulty of ascertaining the extent of compensation to be afforded the rights holders. In other words, how much compensation should be paid to patent, trade secret and/or copyright holders (as in the case of computer software) once a compulsory license has been issued?

Many activists and governments appear to take the position that little compensation, *if any*, is due once a compulsory license to use a patent has been issued to a host country domestic competitor, or to a reliable source from a third country that possesses manufacturing capabilities. They argue that what is 'just compensation' in America or other countries is not 'just compensation in their countries, due to affordability and other 'cultural preference' issues. As a result, U.S. and foreign drug, biotech and computer software companies might as well get used to being paid pennies on the dollar in exchange for the right to serve these national markets. Indeed, some in the Brazilian government and many such activists, however, believe that these forms of property should never be proprietary because they incorporate health and information technology knowledge that is better treated, for legal purposes as shared 'public goods'. They seek never to accord ideas and expressions, which we consider private intellectual property, proprietary status at all, if *any* public interest at all is at stake.

C. <u>The Negative Impact of Such a Movement on U.S. Private Property Policy – Including Intellectual Property</u>:

Though we at the ITSSD have only begun to look closely at this subject area, we have found that misguided or ideological politicians have again been influenced by new internationalist thinking and evolving international and foreign laws and practice. For example, there are some on Capitol Hill, in both the House and the Senate, who believe that the scope and duration of U.S. patents and trade secrets should be diminished so that more knowledge flows into the public domain. This, they believe, is better for society in terms of innovation and discovery, and reduces the burden placed upon the government agencies and the courts to adjudicate individual rights in intellectual property

disputes. In addition, these politicians are far from unwilling to subject U.S. drug, biotech and information technology companies to compulsory licenses if the need, in their view, should arise.

One question you should ask yourself is how contagious is such thinking among members of Congress? Second, you should ask yourself whether your state and local legislators hold similar views toward private tangible and intangible property. Third, you should ask yourself, how truly distinct is real property eminent domain proceedings from intellectual property compulsory licenses? After asking these questions, you are bound to want to know more.

D. Analyzing the New 'Takings' Theories By Way Of The 7 'Cs':

Perhaps the simplest way to appreciate the enormity of the problem before us is to conceive of the private property 'takings' theories now being promoted in the U.S. and abroad, using the letter 'C':

- **C**onvergence, as in the unstoppable ongoing global harmonization of national systems - legal, regulatory, technical standards and financial;
- **C**entralization, as in the case of the former failed Soviet bloc's centralized and planned economies; alternatively, it refers to the idyllic United Nations supranational global governance model now being promoted by some European Union and American 'internationalists';
- **C**ommon / **C**ommunal, as in pursuit of the 'common good', promoting public openness and the sharing of a 'clean', healthy environment and scientific and technological knowledge 'for the betterment of humankind' at the expense of exclusive proprietary property rights;
- **C**ontrol, as in the case of welfare-based paternalistic socialism – 'We know better than you what is best for you'; 'Leave it to us, we'll take care of and provide for you and yours;
- **C**ircumvention of the Fifth Amendment of the Bill of Rights to the U.S. Constitution, as in the case of 'indirect' takings – new exercises of governmental regulatory 'police powers' to protect the environment and human health for the public 'common' good that would rationalize Precautionary Principle-based private property takings *without* the need to pay 'just' compensation;
- **C**ompulsory licensing of intellectual property is the eminent domain of real property;

- **C**ompetitiveness concerns, at the international level, mask a new breed of disguised regulatory trade barriers (protectionism) that ignore(s) sound science.

IV. CONCLUSION:

This brings me to my conclusion.

A. Recap:

I have outlined during the course of my discussion the seriousness of the threats facing the American free enterprise and legal systems. While these threats originate from abroad within countries and regions that are unable to compete with the United States on a level global playing field in an economic, scientific and technological sense, they are now being imported into our country at a rapid pace and disseminated within our borders by a number of misguided or opportunistic Americans. These Americans claim to be 'internationalists', global 'harmonizers' and advocates of 'fair' rather than 'free' trade. They seem more interested in promoting social parity than social progress, and they seek to achieve this illusory goal by redistributing private wealth without payment of just compensation for ill-defined public social and moral purposes, or disguised private economic causes, both domestically and internationally.

In other words, they seek to achieve their goal through imposition of onerous environmental or eminent domain /economic redevelopment regulations or by diminishing outright through legislation the scope and value of exclusive individual private property rights held by some Americans at the expense of others. However, by pursuing these endeavors, they are actually exposing the American institution of *exclusive* private property rights, particularly, *your* property, to foreign assault. Simultaneously, by weakening one of the most important and sacred principles upon which this great nation was founded – private property - they are also endangering U.S. national scientific, technological, and economic progress and security, and thus the future of our children.

In doing so, they ignore the wisdom of our founding fathers. Constitutional law and property rights scholars, such as O. Lee Reed, agrees that, "Thomas Jefferson's 'pursuit of happiness' phrase from the Declaration of Independence is property based, deriving from John Locke's belief that one's privately directed acquisition of the means of life is the highest political happiness." Dr. Reed also agrees that the notion of 'sacred property' is firmly entrenched within the U.S. Constitution.

> "Without any opposition whatsoever, no fewer than five members of the Constitutional Convention observed that the purpose for which the political state comes into being is the protection of property. James Madison, who recorded these statements in his minutes of the Convention, himself held this belief, and in 1792 wrote a famous essay in which he extended the established constitutional cachet of private property to such objects as speech and the practice of religion. Madison said that even as people have a 'right to property' so also do they have a 'property in their rights,' thus representing individual liberty as nothing less than self-ownership." [4]

In effect, these new international thinkers wish to ignore the genius of these forbearers and the unique system that they and their colleagues bequeathed to us, which offers to us all the opportunity of a lifetime to work, invent and prosper for our own individual benefit using both our innate and acquired skills and knowledge, while collectively benefiting society as a whole.

B. What We Can Do to Ensure Protection of Private Property Rights – Generally:

To borrow a time-tested adage from the sport of American football, the best offense is always a strong defense. In addition to playing defense, however, we must also work proactively to ensure the protection of our cherished property rights, both here and abroad.

Many businesses, homeowners and private and institutional investors already employ this offensive-defensive strategy in the markets. They do so to reduce and manage known or probable risks to their assets and investments, and/or to preserve or hedge the economic value of important capital assets such as, real estate, plant and equipment, portfolio investments and intellectual property assets such as patents, trade secrets and copyrights- i.e., tangible as well as intangible private property.

We need to employ this dual-pronged strategy to address the formidable challenge before us, namely, the protection of our private property rights from international assault. The strategy will be defensive to the extent that we can prevent our legislatures and courts from ever considering these rules, and hence, prevent them from adopting and incorporating them into U.S. federal, state and local laws. This will require coordination among individual citizens and businesses within and among different contiguous states or within a region. This is precisely how the opposition is mounting its challenge through use of the Precautionary Principle, eminent domain proceedings, the threat of compulsory licensing, and the proposed narrowing of intellectual property rights here at home. With the fall elections quickly approaching and the presidential elections only two years away, you are certain to see a number of initiatives, at each of these levels of government, that are intended to diminish the scope of your private property rights in one way or another.

The strategy will be proactive and offensive, to the extent that ordinary citizens, small and medium-sized business owners, large multinational corporations and the U.S. federal government can work collaboratively together to promote internationally the adoption of 'rule of law' and 'free market principles' –economic freedom - in order to preserve them here at home. These concepts are generally agreed upon and embraced by all OECD nations.

We can also help to employ this strategy at the bilateral level, with other developing and emerging economies, as part of our federal governments' trade capacity building, science and technology cooperation, export and development financing, technical standards development and general system of preferences programs. In addition, it can take place at the state government level, consistent with our federal government's policy of encouraging university and commercial-led, compensation-based science and technology cooperation. Furthermore, such a proactive strategy may be used at the multilateral level as part of U.S. government negotiations in international fora such as, the World Trade Organization, the World Health Organization, the World Intellectual Property Organization,

the United Nations Commission on Human Rights, the United Nations Environment Program, the United Nations Science Education and Cultural Organization, the International Standards Organization, and the many other international standards bodies that advise and inform them.

C. What You Can Do Specifically:

- Work to ensure that our federal government minds the constitutional limitations on the federal treaty power – they cannot give away our hard-earned private property to foreign governments, or permit such governments to take our property from us, without paying just compensation;
- Work to ensure that our federal, state and local governments mind the 5th and 14th Amendment takings and due process clauses, which require that direct and indirect (e.g., regulatory) private tangible and intangible property takings for public use must be justly compensated for;
- Work to ensure that the Governors in your states read and enact executive orders that ensure that state agencies assess the economics and 'takings' impact of any proposed regulations before they are enacted in order to protect your private property rights from direct eminent domain and indirect environmental regulatory takings, much like the Reagan and Bush executive orders were designed to do;
- Raise these issues with your local, state and federal representatives and prepare to debate them publicly;
- Monitor your state legislature websites which contain information about proposed bills and their status;
- Organize and communicate within your industry associations and community groups;
- Monitor international legal disputes because they can come back here to haunt you;
- Monitor proposed foreign laws and regulations that might affect private property rights;
- Monitor news about international governmental meetings that could affect business and property interests abroad b/c they can be exported here in a heartbeat;
- Monitor news about proposed laws and regulations within your state legislatures and the US Congress to ensure that your property rights are not being directly or indirectly threatened;
- Monitor US Congressional international and foreign relations hearings and legislative calendars to ensure that your private property rights will not be sacrificed for the sake of foreign affairs through ratification and implementation of international treaties and harmonization of international regulations;
- Reach out to and work with other afflicted business and property owners located in different cities and states;
- Reach out to and work with property rights and free enterprise think-tanks if you encounter any problems, and as a preemptive measure subscribe to think tank newsletters;

I appreciate your time and your patience, as well as, your willingness to consider other options that I have not raised here, to protect your economically valuable exclusive private property rights from international assault. Thank you.

[1] *See* O. Lee Reed, "Exclusive Private Property is Indispensable to Brazil's Economic Development", *International Journal of Economic Development* Volume Eight, Numbers 1-2 (Sept. 2006) at pp. 5-10 at p. 7 (2006), at: (http://www.itssd.org/White%20Papers/ijed-8-1-2-reed.pdf), Introduction to, Lawrence A. Kogan, "Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth", *International Journal of Economic Development* Volume Eight, Numbers 1-2 (Sept. 2006) at: (http://www.itssd.org/White%20Papers/ijed-8-1-2-kogan.pdf); *See also* Lawrence A. Kogan, "Terminating Global Warming, Energy Dependence or Private Property Rights", Institute for Trade, Standards and Sustainable Development (6/30/06), at: (http://www.itssd.org/Publications/Terminating-Global-Warming.pdf).

[2] *See* Armen A. Alchian "Property Rights - A Concise Encyclopedia of Economics", The Library of Economics and Liberty, *supra*.

[3] *See* Andrew Beckerman-Rodau, "Are Ideas Within The Traditional Definition of Property? A Jurisprudential Analysis", Suffolk University Law School Intellectual Property Paper No. 5 (Berkeley Electronic Press 1994), at pp. 25-26, at: (http://lsr.nellco.org/cgi/viewcontent.cgi?article=1005&context=suffolk/ip); (http://www.law.suffolk.edu/arodau/site.asp?page=publications&id=articles/ideasjuris).

[4] *See* O. Lee Reed, "Exclusive Private Property is Indispensable to Brazil's Economic Development", Introduction to, Lawrence A. Kogan, "Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth", *supra*, at p. 8.