

APPENDIX IV: A TRANSNATIONAL, “PRECAUTIONARY” MOVEMENT: THOUGHTS FROM AN INTERNATIONAL TRADE LAWYER

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The global sustainability movement has gradually imposed its tenets and strictures upon, and steadily asserted greater control over the economic lives of, national citizenries directly and indirectly via enactment of governmental ‘hard law’ and social ‘soft law’ norms. This cross-border movement has successfully developed, prompted or otherwise triggered:

1. national governmental adoption of international treaties and public standards;
2. national and state governmental and environmental group legal actions commenced at international and/or national tribunals;
3. governmental promulgation of federal, state and municipal laws and ordinances, especially those public procurement-related;
4. industry adoption of corporate social responsibility and sustainability mandates and standards through reputation-harming public ‘naming and shaming’ campaigns and campaigns of physical intimidation; and
5. public shareholder and boardroom activism at the hands of environmental activist groups and state and local government pension and investment funds.

In addition, the global sustainability movement has employed non-legal means, including manipulation of language, media campaigns and moral suasion to forge a new social compact rooted in political consensus. The National Association of Scholars, in this well written and documented report, has discussed how the campus sustainability movement has emulated many of these strategies and tactics.

At the fulcrum of the sustainability movement is the “precautionary principle,” a well-recognized ostensibly common sense-based “better-safe-than-sorry” legal nostrum incorporated in European constitutional and civil law treaties and regional environmental, health and safety laws. European governments deem the preemptive features of the precautionary principle necessary to address what they consider the “unknown-unknowns.” The precautionary principle also is, perhaps, among the most subtle legal concepts associated with the global sustainability movement because it masks policy-based science as science-based policy, and enables governmental authorities to evade calls for regulatory transparency and accountability.

Regulation and Evidentiary Thresholds

Governments, in other words, have employed the precautionary principle politically in the name of science as a preemptive palliative to eliminate the perception of risks posed by the everyday use of

substances and products and the engaging in everyday activities. It has been effectively invoked *a priori* in the absence of quantifiable empirical causal lines of scientific evidence of observed or observable risks of harm posed by actual or historical use, dosage, and exposure to refocus attention on the intrinsic qualitative characteristics of a substance, product, or activity without regard to use, dosage, or exposure. To this end, global sustainability advocates employ the precautionary principle to emphasize, for regulatory purposes, mostly subjectively weighted correlative evidence of unknowable possible or potential future environmental health and safety hazards, rather than probable “known-known” or “known-unknown” environmental, health, and safety risks that substance and product uses and activities undertaken actually engender. And, they do so largely without regard to the economic costs and burdens imposed on domestic and foreign economic actors.

To better accommodate governments' desire for more frequent invocation of the precautionary principle, progressive European and American scientists have successfully reconstituted the international metrics of risk assessment so that they are expressed in qualitative as well as quantitative terms. As a result, application of the precautionary principle results not only in the lowering of scientific evidentiary thresholds for identifying the existence of health and environmental harm from causation to correlation, but also in the reduction of the legal evidentiary standards and a shifting of the burden of proof (from the government to economic actors) necessary for triggering *ex ante* as well as *post hoc* governmental regulatory actions.

Exporting Precaution

The European Union has long endeavored to export the precautionary principle to many of its international trading partners for purposes of establishing it as an absolute international legal norm from which no derogation of adherence would be tolerated, even among non-parties to international treaties that incorporate it. Industries within many nations, however, have criticized this effort as an extraterritorial imposition of cultural preferences or a form of cultural imperialism, and as disguised regulatory trade protectionism designed to level the economic playing field in favor of domestic European industries besieged with the costs and burdens of unilaterally imposed precautionary principle-based regional regulations. Although the United States joined this effort only recently because of the Obama administration's predisposition toward importing from Europe and developing its own precautionary principle-based regulations, it has since been similarly and justifiably criticized.

Media reporting surrounding recent United Nations climate change negotiations indicates that the EU and the U.S. have encountered stiff political resistance from emerging economies such as India and China. These countries have rejected as unreasonable the called upon forbearance of economic development “as we know it” that the execution and implementation of a proposed new post-Kyoto climate treaty premised on the precautionary principle would require. Perhaps, if these countries were reassured that the scientific assessments supporting the UN Intergovernmental Panel on Climate Change (“IPCC”)’s

Fourth and Fifth Assessment Reports upon which current climate change treaty negotiations are premised had been properly peer reviewed and scientifically validated pursuant to the provisions of an enforceable government transparency and accountability mechanism, such as the U.S. Information Quality Act (“IQA”), they would be more inclined to seriously consider such a treaty. However, such a result would depend on the U.S. government, itself, conforming to IQA statutory and administrative standards in connection with federal agency use of nationally-developed climate assessments as support for environmental regulations – which the U.S. government is neither willing nor able to do.

ITSSD

The Institute for Trade, Standards and Sustainable Development (ITSSD) is a nonprofit legal research and analytics organization that promotes a positive paradigm of sustainable development that affords future generations from all sovereign nations greater opportunities for a higher quality of life. To achieve this positive paradigm we emphasize the importance of free markets, free trade, economic growth, the rule of law, strong tangible and intangible private property rights, scientific discovery, and technological innovation. We also emphasize the need to ensure governments’ open and transparent establishment, maintenance, and oversight of balanced, risk-based science, and economic cost-benefit analysis-driven national regulatory and standards schemes, and the quality and integrity of scientific & technical data/information that government entities rely upon, adopt as their own and disseminate to the public as a basis for agency actions, including rulemakings.

During the past decade, ITSSD has endeavored in the public interest to identify, examine, and report the emergence of a global sustainability movement that has developed considerably since the choreographed World Trade Organization—Seattle protests of 1999, when pro-labor, anti-globalist protesters blockaded intersections and prevented international delegates from arriving at the conference. This sustainability movement has been advanced by foreign and domestic environmental groups, European national and regional governments, and more recently, by U.S. federal, state, and local government officials. The sustainability movement’s objective is to forge a radically new global social, political, economic, legal and ethical order and consciousness—a paradigm-shift of transformational proportions—focused on the alleged collective need and urgency to modify present individual human behaviors for the putative benefit of future generations.

At its core, this new paradigm is ‘post-modern.’ This means it is fundamentally antithetical to Enlightenment-era humanism and its societal, scientific, economic, legal and political institutions and ideals. Sustainable development is a progressive, “social democratic” framework connected to European social norms that are, in their most extreme form, anti-anthropogenic. They veer towards and sometimes cross the line between advocating reform of modern society and calling for its uprooting and destruction.

Indeed, ITSSD's work has focused on identifying and assessing the systemic risks that the concept of "negative" sustainable development and a borderless global sustainability movement pose to national sovereignty, common law notions of private property ownership, individual economic and political freedom, and the rule of law. These are indispensable Enlightenment era natural rights-based principles that undergird this nation's founding which are embedded in the U.S. Federalist Constitution, Bill of Rights, and Declaration of Independence.

ITSSD, the EPA and NOAA

ITSSD has recently focused its research and reporting efforts to identify and highlight the extent of U.S. federal agency compliance with the Information Quality Act in connection with the publicly disseminated scientific assessments underlying new and recently proposed environmental regulations implementing inter alia the U.S. Clean Air Act. In May 2013, ITSSD filed an *amicus curiae* brief in the United States Supreme Court in the case of Coalition for Responsible Regulation vs. EPA which requested judicial review on such grounds. If ITSSD's request had been granted, the Court would likely have required the reexamination of EPA's prior peer reviews of the third-party climate assessments supporting its 2009 Clean Air Act GHG Endangerment Findings.

Since the Court did not grant judicial review of the case on this issue (because it had not been adequately raised by the litigants in the lower court), ITSSD filed, in March and April 2014, detailed and annotated Freedom of Information Act ("FOIA") requests with the U.S. Environmental Protection Agency ("EPA") and the National Oceanic and Atmospheric Administration ("NOAA"). In particular, these FOIA requests sought public disclosure of agency records substantiating that the many third-party-developed climate assessments EPA had adopted, used and publicly disseminated as the scientific foundation for the EPA Administrator's 2009 Clean Air Act Section 202(a) Greenhouse Gas Endangerment Findings, including numerous NOAA-developed climate assessments, had been peer reviewed in conformance with the IQA's most rigorous and least discretionary peer review, transparency, objectivity, independence, and conflicts-of-interest standards applicable to "highly influential scientific assessments" ("HISAs").

To date, neither agency has substantively responded to these FOIA requests, other than to request, in return, that ITSSD redraft them more narrowly. In June 2014, ITSSD filed with EPA a more detailed and annotated FOIA request. In July, it received in response a request for payment assurance in the amount of \$27,000 evidencing EPA's prospective assessment of search fees for processing ITSSD's FOIA request "as-is", along with a rejection of ITSSD's request for a statutory fee waiver. In August, ITSSD filed its Appeal of that rejection with the EPA's Office of General Counsel. Those interested in following ITSSD's IQA-focused FOIA activities and the institutional and media reporting and editorials discussing them may access the ITSSD website at: www.itssd.org.

Support for NAS

ITSSD clearly has been developing a critique of the sustainability movement that differs in important ways from the National Association of Scholars' critique. ITSSD focuses on the governmental and regulatory side of things; NAS on higher education. Independently of one another, however, ITSSD and NAS have come to many of the same conclusions about the illiberal and ideological character of this movement, and its determination to by-pass standards of transparency and public accountability. I am very pleased to partner with NAS in the effort to document and analyze the sustainability movement and to bring it to a higher level of public scrutiny.

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