



**National Foreign Trade Council, Inc.**

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*'Enlightened' Environmentalism or  
Disguised Protectionism?*

**Assessing the Impact of EU Precaution-Based  
Standards on Developing Countries ©**

**EXECUTIVE SUMMARY**

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**The National Foreign Trade Council** advocates an open, rules-based world economy. Founded in 1914 by a group of American companies that supported an open world trading system, the NFTC now serves nearly 300 member companies through its offices in Washington and New York. The NFTC represents its member companies on trade and investment, export finance, economic sanctions and international tax policies that affect the competitiveness of U.S. companies overseas. It supports open markets, opposes unilateral sanction restrictions on trade, and assures U.S. business access to needed risk insurance and export and project finance.

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## I. INTRODUCTION:

### A. The Objective of the NFTC Studies

This is the third in a series of studies prepared by the National Foreign Trade Council as part of its Trade and Risk Regulation Project. The goal of the project has been to examine critically the growing use of disguised regulatory trade barriers that have the effect of denying market access to foreign products. In addition to discussing the impact of such measures on industrialized nations' technologically advanced and processed exports, these studies have also focused on lower priced, natural resource driven agricultural and industrial commodity exports of developing countries. These studies are intended to provoke discussion on a national and international level between industry and government about how to eliminate these unnecessary obstacles to trade. They are also intended to encourage serious global consideration of how best to reduce the impact of these measures on the developing and least developed countries for whose benefit the Doha Trade Round negotiations were largely begun. As the Doha Ministerial Declaration itself proclaims,

*“The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration...[W]e shall continue to make positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development...”*<sup>1</sup> (emphasis added).

### B. The Findings of the First Two NFTC Studies

The first NFTC study, entitled *Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science*<sup>2</sup>, identified and analyzed a number of national and/or regional technical regulations and standards whose stated objective is to promote human health and safety, animal welfare, environmental protection or consumer choice. The study found that most of these regulations and standards have been promulgated within the EU and justified on the basis of *precaution* to block trade in a wide variety of agricultural and industrial products. This study gathered evidence of the following circumstances: 1) where regulations and/or standards are not based on ‘sound science’ or subject to a rational and balanced risk assessment, but are instead grounded on the *Precautionary Principle*, an inherently nonscientific touchstone; 2) where regulations or standards are not based on or do not adhere to internationally agreed upon standards developed by international standardization bodies, or otherwise do not recognize equivalent U.S. national standards or regulations; and 3) where U.S.-based exporters are effectively prevented from participating fully in the regulatory drafting and review processes and do not receive adequate and timely notification of regulatory changes (i.e., the regulatory processes are not fully transparent and inclusive). The study concluded

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<sup>1</sup> Ministerial Declaration of the World Trade Organization (WT/MIN/(01)/DEC/W/1), Ministerial Conference Fourth Session, Doha, (Nov. 9-14, 2001), at par. 2.

<sup>2</sup> This study, in both its full and executive summary versions, is accessible on the NFTC website, at: (<http://www.nftc.org/default/white%20paper/TR2%20final.pdf>) for the full report, and at: (<http://www.nftc.org/default/white%20paper/Exec%20SummaryII.pdf>) for the Executive Summary.

that when regulations and standards are not based on ‘sound science’ they serve as *de facto* trade barriers and have a negative impact on a wide variety of U.S. export sectors, as well as those of developing and least developed countries.

The second NFTC study, entitled *EU Regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three Dimensional Trade Strategy that Ignores Sound Science*,<sup>3</sup> went a step further. It explained how the EU’s use of health and safety, animal welfare and environmental regulations and standards having an extra-territorial impact on the products of and production processes within other countries was not merely an unintended byproduct of the regional integration process. The evidence revealed, rather, that such measures were indicative of a deliberate and systematic campaign waged alongside environmental non-governmental organizations (‘ENGOs’) to export the *Precautionary Principle* globally, establish it as a norm of customary international law, and alter World Trade Organization (‘WTO’) rules. In particular, this study shows that the EU has sought to inject the *Precautionary Principle* within: 1) the WTO system through creative interpretation of the SPS and TBT Agreements and through obligations assumed under multilateral environmental agreements; 2) international standards through skilled participation in the international standards development process; and 3) EU free trade and aid agreements and capacity-building initiatives offered to developing countries. It also explains how such a strategy simultaneously protects ailing or lagging EU industries by imposing on foreign industries the same high cost of regulation to which EU industries are subject regionally.

### C. The Third NFTC Study

The purpose behind this third NFTC study is to identify and explain how the EU strategy for employing the *Precautionary Principle* adversely affects developing country prospects for economic growth, poverty alleviation, social advancement and environmental protection.

It is generally agreed that developing country government institutions and industries generally lack the experience and financial resources necessary to comply with overly stringent health and safety and environmental regulations and standards that serve as *de facto* barriers to trade.<sup>4</sup>

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<sup>3</sup> This study, in both its full and executive summary versions, is also available on the NFTC website, at: (<http://www.nftc.org/default/white%20paper/WLFfinaldocumentIII.pdf>) for the full report, and (<http://www.nftc.org/default/white%20paper/precprin2EXECsum803.pdf>) for the Executive Summary. The Full Report was also published by the Washington Legal Foundation as a separate Working Paper entitled, Unscientific ‘Precaution’: Europe’s Campaign to Erect New Foreign Trade Barriers”. It is accessible on the WLF website, at: (<http://www.wlf.org/upload/kogan.pdf>).

<sup>4</sup> See, e.g.,: John S. Wilson and Tsunehiro Otsuki, “Food Safety and Trade: Winners and Losers in a Non-Harmonized World”, World Bank Development Research Group – Trade, (2001); H. Newing and S. Harrop, “European Health Regulations and Brazil Nuts: Implications for Biodiversity, Conservation and Sustainable Rural Livelihoods in the Amazon”, *Journal of International Wildlife and Policy* 3(2), pp. 109-124, at p. 10 (2000), citing “Summary of SPS Committee of 12-13 March 1998, G/SPS/R/10; John Wilson, Tsunehiro Otsuki, Baishali Majumdar, “Balancing Food Safety and Risk: Do Drug Residue Limits Affect International Trade in Beef?”, World Bank Development Research Group – Trade (2002); John S. Wilson and Tsunehiro Otsuki, “To Spray or Not to Spray? – Pesticides, Banana Exports and Food Safety”, World

“Developing countries in particular find the EU’s strict food safety requirements disruptive to trade...*In addition to sanitary and phytosanitary standards, new technical product specifications and industrial norms may, in certain cases, impede the exports of developing countries...*The EU has introduced a series of directives in this regard, varying from technical specifications for cars, weighing machines and toys, to the compulsory labeling of genetically modified organisms (GMOs), eggs and voluntary eco-labels. In addition to Community standards, there are regulations at the member-state level.

*...The degree to which this continual flow of new standards helps to restrict imports from developing countries is not properly known. It is clear, however, that WTO notification leads to protests by developing countries...*Some of them expressed their concern...regarding new EU directives on discarded electronic apparatuses proposed by the Commission in 2000. ASEAN countries, Egypt, India and Brazil feared that the export market that they had built up within the EU would be lost if their industries – *usually small or medium-sized firms* – *were charged with the onus* of recovery and recycling. The Netherlands has raised this question in Brussels, but a definite decision has not yet been reached” (emphasis added).<sup>5</sup>

It is also known that these countries often experience difficulties implementing internationally recognized SPS and TBT standards.<sup>6</sup> Furthermore, it is commonly recognized that the technical assistance and funding provisions contained within the several multilateral environmental agreements in force today are inadequate to satisfy the administrative and financial obligations such conventions impose on developing countries.

Notwithstanding these limitations, the EU continues to try to convince individual developing countries that it is in their best interest to develop EU-compatible health and safety and environmental standards. As an inducement, the EU has entered into bilateral and regional trade and aid agreements and capacity building initiatives in Asia, Latin America, and Africa that provide funding and technical assistance to developing countries for purposes of establishing national standards bodies and technical product

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Bank Development Research Group - Trade, Policy Research Working Paper 2805 (March 2002); John S. Wilson, Tsunehiro Otsuki, and Mirvat Sewadeh, “Dirty Exports & Environmental Regulation: Do Standards Matter to Trade”, World Bank Development Research Group, Trade (March 2002); T. Ademola-Oyejide, E. Olawale Ogunkola, s. Abiodun Bankole, “Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What is the Known and Issues of Importance”, University of Ibadan, Paper prepared for the Workshop on Quantifying the Trade Effects of Standards and Regulatory Barriers, Is it Possible?, Held at the World Bank (April 27, 2000); David Wheeler, “Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries”, World Bank Development Research Group, (2000), wherein the World Bank concluded that the ‘race-to-the-bottom’ scenario of environmental regulation is flawed. The theory’s underlying premise has been that free trade will precipitate a collapse in environmental standards, such that polluters would threaten to relocate to pollution havens in the developing world in the face of stringent national environmental regulations. The World Bank’s study found that such model misrepresents the political economy of pollution control in developing countries.<sup>5</sup> “European Trade Barriers and Developing Countries”, Ministry of Foreign Affairs, Sustainable Development Economic Department, Netherlands Embassy (Aug./Sept. 2003), at pp. 65, 67-68.

<sup>6</sup> See, e.g., “WTO Agreements & Public Health, A Joint Study by the WHO Secretariat” (2002), at par. 119. See, also; Standards & Global Trade – A Voice for Africa, John S. Wilson and Victor O. Abiola (editors) The International Bank for Reconstruction and Development (The World Bank) (2003); Gary Hufbauer, Barbara Kotschwar and John Wilson, “Trade Policy, Standards and Development in Central America” (2000), at p. 12; Keith E. Maskus, John S. Wilson and Tsunehiro Otsuki, “Quantifying the Impact of Technical Barriers to Trade” (Dec. 2000), at p. 2..

standards that employ the *Precautionary Principle*.<sup>7</sup> Until the EU has fully secured these arrangements, however, it unilaterally imposes its own stringent regional regulations and standards and/or liberally interprets international environmental agreements in a manner adverse to developing country interests.<sup>8</sup>

This third NFTC study is comprised of three essays. The first essay discusses how the Stockholm Convention on Persistent Organic Pollutants (POPs), stringent EU regulations proposed to implement that Treaty and narrowly drawn international donor programs adversely impact developing and least developed country economic and social welfare. In particular, it describes how the POPs Treaty, which is largely based on the *Precautionary Principle*, essentially bans the use of DDT as one of several possible effective malaria-prevention options in besieged African nations. The second essay discusses how the Basel Convention's broad definition of 'hazardous waste', the Convention's Ban Amendment prohibition against shipments of waste intended for recovery and recycling, and the proposed revision of the EU Waste Shipment Regulation adversely affect a number of vital developing country industries and related technologies. It points out how this EU regulation invokes the *Precautionary Principle* and implements the Ban Amendment unilaterally without developing country consent. The third essay discusses how the extra-territorial scope of the proposed EU REACH Regulation, relating to chemicals, even in its revised form, would adversely impact developing country economic growth prospects, labor market stability and social welfare. In particular, it addresses how REACH, which is premised on the *Precautionary Principle*, would threaten the local and global competitiveness of the industrial sectors that produce or use chemicals in manufacturing or in finished products within a number of Asian and Latin American countries.

One developing country commentator from Kenya has passionately described the social and economic plight of developing countries amid this largely unilateral effort<sup>9</sup> to employ the *Precautionary Principle* globally.

*“Why do developed countries impose their environmental ethics on poor countries that are simply trying to pass through a stage they themselves went through? After taking numerous risks to reach their current economic and technological status, why do they tell poor countries to use no energy, agricultural or pest control technologies that might pose some conceivable risk of environmental harm? Why do they tell poor countries to follow sustainable development doctrines that really mean little or no energy or economic development?”*

If only people in developed countries [who] are ‘passionate about environmental causes’...could see...the millions who are poverty stricken, sick, starving and even dying because of misguided

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<sup>7</sup> “...Europe has tended to apply [new] SPS norms more stringent than those that previously applied and stricter than those accepted internationally. This change can have disadvantageous consequences for developing countries. *Technical assistance is thus essential to help them satisfy such standards and set them themselves*” (emphasis added). “European Trade Barriers and Developing Countries”, at p. 67.

<sup>8</sup> See, e.g., Stephen Pollard, Alberto Mingardi, Cecile Philippe and Dr. Sean Gabb, “EU Trade Barriers Kill”, Centre for New Europe (Sept. 2003).

<sup>9</sup> See, e.g., Alan Oxley, Kristen Osborne and Lisa Marty, “European Unilateralism – Environmental Trade Barriers and the Rising Threat to Prosperity Through Trade”, Australian APEC Study Centre, Monash University (Aug. 2003).

environmental policies...[B]ut they ignore [them]...*They send us aid, but it would be far better if they let us trade with them, develop our resources, set our own policies and determine our own destinies. People in developed countries can afford to worry about climate change, endangered bugs and a few hundred more dying of cancer before they are 70. We have to worry about millions of people dying of malaria, typhoid, dysentery and starvation. Millions of parents in sub-Saharan Africa must worry about where they will get their next meal, whether the water they drink will kill them and whether their babies will live beyond age five...*

...[S]ome companies have been forced by lobbyists to engage in activities that make the predicament of people in poor countries even worse...[They]...support organizations and governments that oppose energy and economic development, international trade and the use of DDT. These groups say Africa and India should rely on expensive make-believe energy options, like wind and solar, *that further delays our economic, health and environmental progress...*

To think long term does not give rich countries a license to restrict poor nations from making use of their resources. *People need access to health care, they need to trade and they cannot do this when science is turned into a political tool to harass the poor.*

African countries face other tough battles, too. *Europe in particular has confined their exports largely to primary products and imposed high tariffs on processed commodities. Many agricultural products from poor countries face quarantine rules that act as trade barriers, if Africans do not follow strict environmental standards.*

*Even if they use DDT to stop terrible malaria epidemics or plant genetically modified bananas or sweet potatoes to prevent famines, these standards block our produce out of the richer markets. Along with price-distorting domestic subsidies, these policies have severely impacted economic growth in poor countries” (emphasis added).<sup>10</sup>*

These criticisms of European standards and regulations are also expressed by commentators and government officials from Asian and Latin American countries. If WTO member governments are to pay anything more than lip service to the Doha Ministerial Declaration, then they must address these concerns. To that end, this third NFTC study shows how the imposition of *precaution-based*, rather than risk-based health and safety and environmental standards and regulations,<sup>11</sup> further *precludes* developing and least developed countries from participating fully in the international trading system. It is only after considering the impact of these measures on developing and least developed country economic and social advancement that one may ask the question: do such measures reflect ‘enlightened environmentalism or disguised protectionism?’<sup>12\*</sup>

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<sup>10</sup> James S. Shikwati, “Lethal Environmental Ethics” (Jan. 24, 2003), Inter Region Economic Network ([http://www.irenkenya.org/articles/shikwati\\_january242003.htm](http://www.irenkenya.org/articles/shikwati_january242003.htm)).

<sup>11</sup> See: Lawrence Kogan, “The Precautionary Principle and WTO Law: Divergent Views Towards the Role of Science in Managing Risk,” a forthcoming research paper that will appear in the Spring 2004 issue of the *Seton Hall Journal of Diplomacy and International Relations*.

<sup>12\*</sup> The title of this study was inspired by a paper prepared by authors Andrew Jordan and Timothy O’Riordan entitled, “The Precautionary Principle in Contemporary Environmental Policy and Politics”. That paper, in part, explained the context in which the Precautionary Principle evolved in Germany. It arguably elucidates the motivations underlying the current EU campaign to export the Precautionary Principle globally. According to these authors, “Initially, precaution was by German authorities used in the early 1980’s to justify unilateral application of technology based standards to reduce acid rain. But once in place, the Germans pressed the EU to adopt similar standards across the rest of Europe, to prevent its own industries being placed at a competitive disadvantage. *This was not enlightened environmentalism at work but the dictates of a competitive market of member states...* According to Weale (1998), ‘The policy debate

## II. The Stockholm Convention on Persistent Organic Pollutants (POPs), Stringent EU Regulations Proposed to Implement that Treaty and Narrowly Drawn International Donor Programs Adversely Impact Developing and Least Developed Country Economic and Social Welfare

The WHO Commission on Macroeconomics and Health has eloquently summarized how indispensable good public health is to individual prosperity and quality of life.

“The importance of health in its own right cannot be overstressed. In the words of Nobel Laureate Amartya Sen, health (like education) is among the basic capabilities that gives value to human life... The anguish of disease and premature death makes disease control a central preoccupation of all societies, and motivates the inclusion of health among the basic human rights enshrined in international law. The wisdom of every culture also teaches that “health is wealth” in a more instrumental sense as well. For individuals and families, health brings the capacity for personal development and economic security in the future. Health is the basis for job productivity, the capacity to learn in school, and the capability to grow intellectually, physically, and emotionally. In economic terms, health and education are the two cornerstones of human capital, which Nobel Laureates Theodore Schultz and Gary Becker have demonstrated to be the basis of an individual’s economic productivity. As with the economic well-being of individual households, good population health is a critical input into poverty reduction, economic growth, and long-term economic development at the scale of whole societies.”<sup>13</sup>

But, it is precisely these entitlements that the EU, the UN and environmental movements overlook as they endeavor to impose a DDT ban upon the developing world. These campaigners have utilized instruments such as the Stockholm Convention, regional EU regulations and international donor programs orientated against DDT to prevent developing countries, especially those located in sub-Saharan Africa, from addressing malaria, a pandemic disease, in a manner appropriate for *their* societies. Contrary to the *spirit* of the Doha Ministerial Declaration, both developing and least developed countries are being effectively denied the tools necessary to “share in the growth of world trade commensurate with the needs of their economic development”.<sup>14</sup> DDT constitutes one such tool which, if used along with other treatments as part of a holistic approach to malaria control, could successfully control this ongoing public health nemesis and open the door to social and economic development within these countries.

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was more dominated by competitive considerations rather than environmental concerns, as much of the delay [in adopting measures] was due to fears about comparative costs and benefits of individual states’...As Boehmer-Christiansen (1994:30) notes in a comprehensive review of the German experience: *‘The precautionary principle therefore helped to lay the conceptual and legal basis for a proactive environmental policy, which once spread into Europe, was also directed at ensuring ‘burden sharing’ in order that German industry would not lose its competitive edge, but rather gain new markets for its environment-friendly technology and products’* (italicized emphasis added). Andrew Jordan and Timothy O’Riordan, “The Precautionary Principle in Contemporary Environmental Policy and Politics”, Paper prepared for the Wingspread Conference on ‘Implementing the Precautionary Principle’, 23-25 January 1998, Racine, Wisconsin, at pp., 2-3, at: (<http://www.johnsonfdn.org/conferences/precautionary/jord.html> ).

<sup>13</sup> Macroeconomics and Health: Investing in Health for Economic Development”,

Report of the Commission on Macroeconomics and Health, World Health Organization, at p. 31.

<sup>14</sup> The Ministerial Declaration issued at the WTO Ministerial Conference at Doha, Qatar, Nov. 9-14, 2001, WT/MIN(01)/DEC/W/1, at par. 2, citing the Preamble to the Marrakesh Agreement Establishing the World Trade Organization.

In addition, the policy advocated by these parties is likely fashioned around selected interpretations of the economic and public health reports discussed in this study, the outdated U.S. DDT policy of thirty years ago and the consumer fears that both the studies and the campaigns have engendered. Apparently, these organizations have sought to establish that insecticide treated bed nets (ITNs) are just as medically effective as and a more cost-efficient *treatment method* than indoor residual spraying (IRS), which happens to be the only method by which DDT can be administered pursuant to the POPs Treaty. They have also sought to establish that DDT is a less cost-effective and potentially more environmentally harmful *treatment substance* than pyrethroids. That they remain unable to produce scientific or other evidence of the health or environmental *benefits* that are likely to materialize from such a ban and the use of DDT alternatives in malaria control arguably reflects the intellectual and empirical weakness of their claims.

It must be emphasized, furthermore, that in pursuing their anti-DDT policies these groups have failed to answer several important questions. First, can basing an anti-malaria policy almost entirely on an environmental concept such as the precautionary principle realistically protect the public health interests of developing countries and avoid a health-environment trade-off? Second, couldn't justifying an anti-DDT malaria control policy by reference to the cost savings that DDT alternatives are believed to generate without proof of their corresponding environmental, social and health benefits likely result in a risk/risk scenario in which one uncertain risk is traded for another? Should not the risks associated with using DDT be *objectively* weighed against the risks of not having it?<sup>15</sup> Third, how do international environmental policies that dictate to developing and least developed countries without their informed consent the manner in which they must address national public health crises, such as malaria, uphold their guaranteed rights to national sovereignty, economic development and quality of life? Hopefully, after seriously reflecting upon these questions, anti-DDT advocates may realize that there "comes a point where the environment will not have any use if everyone living there ha[s] died of malaria."<sup>16</sup>

### III. The Basel Convention's Broad Definition of 'Hazardous Waste', the Convention's Ban Amendment Prohibition Against Shipments of Waste Intended for Recovery and Recycling, and the Proposed Revision of the EU Waste Shipment Regulation Adversely Affect a Number of Vital Developing Country Industries and Related Technologies

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<sup>15</sup> "Replacing DDT with other pesticides for indoor residual treatments may, for example, also require operational changes. More frequent treatments need to be made with some alternative pesticides, while others, such as the modern synthetic pyrethroids, have a residual activity comparable to that of DDT. As they are less bulky, operational problems may be even smaller. A thorough analysis of each situation is always required. Johan Morner, Robert Bos and Marjon Fredrix, "Reducing and Eliminating the Use of Persistent Organic Pesticides – Guidance on Alternative Strategies for Sustainable Pest and Vector Management", at p. 21.

<sup>16</sup> See: "DDT Takes a Bite Out of KZN's Malaria Rate", quoting Andreas Malwane, Sapa-AFP (2000), at: (<http://www.btrust.org.za/newsroom/237242.htm>).

The Basel Convention's broad definition of 'hazardous waste', the Ban Amendment's prohibition against shipments of waste intended for recovery and recycling, and the proposed revision of the EU Waste Shipment Regulation, which invokes the *Precautionary Principle* and unilaterally implements the Ban Amendment, collectively impose EU environmental preferences on developing countries. These EU-centric standards are largely promoted by ENGOs, such as Greenpeace, BAN, the Sierra Club and Friends of the Earth, which claim the moral high ground on matters of environmental protection and public health while disregarding market principles and the social and economic realities of developing countries.

Ship-breaking and e-waste recovery activities provide important scrap metal and other throughputs to the steel and reclamation industries within India and Pakistan and the countries of East and Southeast Asia. Materials recovered from these activities are also utilized to develop indigenous cutting-edge recycling technologies upon which local industries rely to remain environmentally efficient. This innovation cannot take place, however, unless sufficient volumes of developed country waste continue to be transported to these countries. These activities play an important social and economic role within such societies. To prohibit them would deny such countries and their industries the ability to exploit what is arguably a comparative advantage in terms of international trade.

#### IV. The Extra-territorial Scope of the Proposed EU REACH Regulation, Even in its Revised Form, Would Adversely Impact Developing Country Economic Growth Prospects, Labor Market Stability and Social Welfare

The REACH regulation proposed by the EU as a template for global chemicals management fails to take into account the economic and social well-being of other WTO members, particularly developing and least developed countries. Even in its current iteration, REACH will likely have a significant adverse impact on developing country trade and threaten the continued economic growth and stability of developing country societies, particularly those that have not yet fully emerged from the Asian financial crisis of the late 1990s.

Beyond impacting the profitability of multinational chemical companies, the costly REACH requirements will seriously undermine the competitiveness and vitality of the thousands of small and medium-sized enterprises (SMEs) operating within developing countries along the chemical products supply chain. The costs and burdens imposed by REACH, in many cases, far exceed the revenues derived by SMEs from chemical sales to the EU. Also, the EU's rejection of large numbers of existing chemicals integral to EU trade without ensuring the existence of suitable and affordable substitutes will deny local developing country SMEs that rely on such substances as product inputs the ability to use them for their local or regional businesses. As a result, SMEs would be compelled to switch to more expensive but unproven chemical alternatives, which will make their products less competitive in regional and global markets and perhaps even pose other uncertain health and environmental risks. In addition, most SMEs lack the technical and scientific capacity and the laboratory facilities needed to satisfy the onerous information

gathering and testing requirements imposed by REACH. Considering these limitations, it is thus fundamentally unfair to expect developing country SMEs to satisfy the broad duty of care that is called for (e.g., to identify/anticipate all of the intended uses of a chemical or substance).

Furthermore, by unilaterally imposing upon the developing world the REACH regime, which, in large part, is justified by reference to the *Precautionary Principle*, a non-WTO legal norm, the EU is proceeding without both scientific foundation and foundation in international law. The extraterritorial and trade restrictive REACH regulation is based on neither international standards nor equivalent national standards of other WTO members. The EU has failed to adduce through a science-based risk assessment any evidence of specific hazards posed by the thousands of chemicals it intends to ban, and has also failed to employ a cost-benefit analysis to evaluate other potential risks or suitable options, as required by the TBT Agreement. As reflected in the many comments submitted by developing country governments, industry associations and SMEs, the EU has been admonished not to incorporate the *Precautionary Principle* into the REACH regulations until it has first been taken up and resolved by the WTO<sup>17</sup>.

## V. CONCLUSION

This study reveals how certain health and safety and environmental standards and regulations implemented unilaterally by the EU impede economic growth, social welfare and public health maintenance in developing countries.

In addition, all three NFTC studies confirm that politically influential European-based ENGOs are often behind the EU's promulgation and adoption of *precaution-based* regulations and product standards, as well as its drafting of *precaution-based* provisions within multilateral environmental agreements ('MEAs') that bind developing countries to EU societal preferences. Furthermore, they find that ENGO campaigns launched in developing countries (e.g., concerning Biosafety (GMOs), REACH, Basel and POPs) seek to alter consumer perceptions and generate public fears about uncertain risks associated with potentially dangerous substances, industrial processes and novel technologies, without resort to objective and scientifically relevant fact-finding. These campaigns, moreover, ignore the social, economic and health benefits that would

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<sup>17</sup> For Thailand, See: Ambassador Piamsak Milintachinda, Executive Director, Asia-Pacific Economic Cooperation Secretariat, REACH Comment Letter. "Regarding [the] *Precautionary Principle*, the European Union should not proceed, until these issues are taken up and resolved by appropriate international bodies such as the WTO..." (emphasis added). See, also: "Thai Private Sector's Positions Regarding the European White Paper on Chemicals" (2003). For Singapore, See: "Government of Singapore's Comments on the EU REACH Regulation", Ministry of Trade and Industry, Government of Singapore, APEC Chemical Dialogue Steering Group, Phuket Thailand, 2003/SOM/III/CDSG/007, at pp. 5-6 (Aug. 16-17, 2003). "The EU purports to use the *precautionary principle* to justify the taking of such measures; *However, the precautionary principle is not an accepted principle at the World Trade Organization...REACH, which is based on the precautionary principle, seems excessively onerous and unnecessarily trade restrictive...* It thus seems to be in contravention of the TBT Agreement provisions of Articles 2.2 and 2.5...*This could be an infringement of the EU's obligations towards Singapore at the WTO*" (emphasis added).

otherwise be realized by developing countries had they been granted access to such substances, processes, or technologies in the first place.

## VI. Looking Toward the Future

Although the essays within this study focus exclusively on health and safety and environmental measures targeting industrial product exports, EU environmental protectionism extends also to the natural resource-intensive and agricultural commodity-driven exports of developing countries. In the case of agricultural products, a number of EU measures have imposed very low tolerance levels for toxicity and residues of natural as well as proscribed substances (e.g., pesticides, herbicides, aflatoxins, hormones, antibiotics, GMOs, minerals, etc.). “Europe... wants to raise food safety standards. European countries import many foodstuffs and raw materials, which are thus required to meet safety standards. This can cause problems for developing countries in particular, as they have difficulty in meeting these stricter conditions.”<sup>18</sup> And, in the case of product inputs and exports derived from natural resource extraction (e.g., forest products, etc.), other EU measures besides stringent maximum residue limits apply. These include standards for product harvesting (certification), packaging, labeling and traceability.<sup>19</sup>

Of course, the EU and its Member States are not the only WTO members to impose stringent health and environmental standards that may actually constitute disguised restrictions on international trade. The U.S.<sup>20</sup>, Canada<sup>21</sup> and Japan<sup>22</sup> are also guilty, from

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<sup>18</sup> “European Trade Barriers and Developing Countries”, Op. Cit. at p. 65.

<sup>19</sup> See: “European Unilateralism – Environmental Trade Barriers and the Rising Threat to Prosperity Through Trade”, Op. Cit., at p. 7.

<sup>20</sup> For example, the U.S. government previously imposed market access restrictions (via environmental conservation measures enacted pursuant to the U.S. Marine Mammal Protection Act) upon tuna imported from Mexico. The regulations distinguished between tuna products based on the manner in which they were processed, and were thus alleged by Brazilian and Venezuelan exporters to be discriminatory. The measures required Mexican fisherman to use more expensive and perhaps less efficient dolphin-safe fishing net technology that did not threaten the lives of dolphins. A GATT panel ruled that such measures constituted an illegal restriction on international trade, even though the restrictions applied to American tuna as well. The panel reasoned that the restrictions were, in essence, an illegal attempt to induce Mexico to change its environmental policies, as they conditioned access to U.S. markets upon either Mexico’s adoption of a similar regulatory scheme or Mexican fishermen’s adoption of such technology. In addition, it reasoned that the U.S. had failed to exhaust other less trade-restrictive alternatives, including diplomatic cooperation. See: United States – Restrictions on Imports of Tuna (1991) 30 I.L.M. 1594 (‘Tuna-Dolphin I’), at pp. 1622-23; See: Michael J. Trebilcock and Robert Howse, The Regulation of International Trade, 2d ed. (Routledge © 1999), at pp. 406-409. In another example, a U.S. environmental regulation (under the Clean Air Act) previously required that conventional and reformulated gasoline sold in the U.S. conform to a minimum level of ‘cleanness’ established pursuant to an emissions baseline that was computed differently for domestic and foreign refiners and importers. The measure effectively imposed higher costs on foreign refiners without proof that it could achieve U.S. ‘clean’ air objectives. A GATT panel found that such measure did not constitute the least-trade-restrictive means of achieving U.S. environmental objectives of protecting life and health. It also found that the measure was not primarily aimed at conservation of exhaustible natural resources (‘clean air’) because other less trade restrictive alternatives could have been pursued (but were not) to attain the desired air quality without discriminating against imported gasoline. See: United States – Standards for Reformulated and Conventional Gasoline, Report of the Panel, WT/DS2/R (29 January 1996). The Appellate Body subsequently concluded that U.S. failure to seek cooperation with Brazilian and Venezuelan authorities on this matter revealed that the measure was

time to time, of imposing such protectionist regulatory barriers. What is different about EU-based health and environmental restrictions, however, is that they reflect a systematic attempt to employ on a global basis a *precaution-based* rather than a risk-based regulatory approach that is WTO-inconsistent. The NFTC studies are intended to scrutinize these measures and to unmask their use as disguised barriers to trade in order to promote meaningful dialogue about how to eliminate them. Undoubtedly, the ability of all developed nations to reduce the use and impact of restrictive national measures and related MEA provisions on developing country exports will go a long way towards facilitating the full participation of such countries within the WTO rules-based trading system, consistent with the Doha mandate.

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unjustifiably discriminating in effect. It also concluded that the measure was a disguised restriction on international trade because the U.S. failed to eliminate costs for foreign refiners that it had apparently eliminated for domestic refiners. See: Michael J. Trebilcock and Robert Howse, at pp. 414-15.

<sup>21</sup> For example, the Canadian government previously imposed environmental restrictions requiring that all salmon and herring caught in Canadian waters by American fisherman were to be processed in Canadian fish plants and subject to rigorous statistical reporting requirements before export. Canada had alleged that such measures were enacted as part of its West Coast fisheries resource management scheme to conserve exhaustible natural resources. A GATT panel found this to be a disguised restriction on international trade because conservation was not the primary aim of the regulation and other less restrictive means could have been used to compile statistical data without the need of imposing such an ‘export ban’. Apparently, evidence revealed that less restrictive alternatives had already been used by Canada to gather information about other fish species, and official Canadian government literature had indicated that the export restriction was being utilized as a means to protect Canadian jobs. See: Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, BISD 35S (1988) 98. A subsequent Canada-U.S. Free Trade Agreement dispute settlement panel found that Canadian ‘landing and unloading’ regulations that did not explicitly prohibit or restrict herring and salmon exports (to the U.S.) before processing also constituted an illegal restriction on trade. It reasoned that such measures disadvantaged American processors by requiring fish to be landed and unloaded in Canada and then repacked and unloaded again in the U.S. before processing. It also reasoned that other less restrictive means were available to achieve Canada’s conservation objectives. See: In the Matter of Canada’s Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the Panel, 16 October 1989. See, also: Michael J. Trebilcock and Robert Howse, at pp.399-401.

<sup>22</sup> For example, Japan previously imposed costly and time-consuming quarantine and testing restrictions on U.S. (and Brazilian) exports of various fruit products (e.g., apples, cherries, peaches, apricots, plums, pears, nectarines, walnuts, etc.) pursuant to Japan’s Plant Protection Law. The apparent aim of the measure was to protect plant health by preventing the potential introduction of the codling moth. In order to lift the prohibition, the U.S. (and other exporters) were required to demonstrate that an alternative quarantine treatment (e.g., fumigation with methyl bromide) achieved the same level of protection. However, to do so required testing and verifying the effectiveness of the quarantine treatment for *each* variety of the product, which took as long as several years to accomplish (evidence showed that a number of varieties’ applications had been pending for over ten years). A WTO panel concluded that there were other less trade restrictive alternative measures (e.g., the determination of sorption levels) that would have been equally effective without imposing similar costs and burdens. The Panel also concluded that Japan had failed to maintain the measure with sufficient scientific evidence, because it failed to adequately demonstrate that there was a rational or objective relationship between the varietal testing requirement with respect to apples, cherries, nectarines and walnuts, and the scientific evidence it submitted. While acknowledging that WTO members may impose provisional phytosanitary measures under certain strict conditions, the Panel, furthermore, concluded that Japan was unable to satisfy those requirements. See: Oliver Landwehr, “Decisions of the Appellate Body of the World Trade Organization, Japan – Measures Affecting Agricultural Products”, WTO Panel Report and Appellate Body Report, adopted by Dispute Settlement Body, 19 March 1999, WT/DS76/R and WT/DS/AB/R, at: (<http://www.ejil.org/journal/Vol10/No2/sr2.rtf>).