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Advancing Liberty — From the Economy to Ecology

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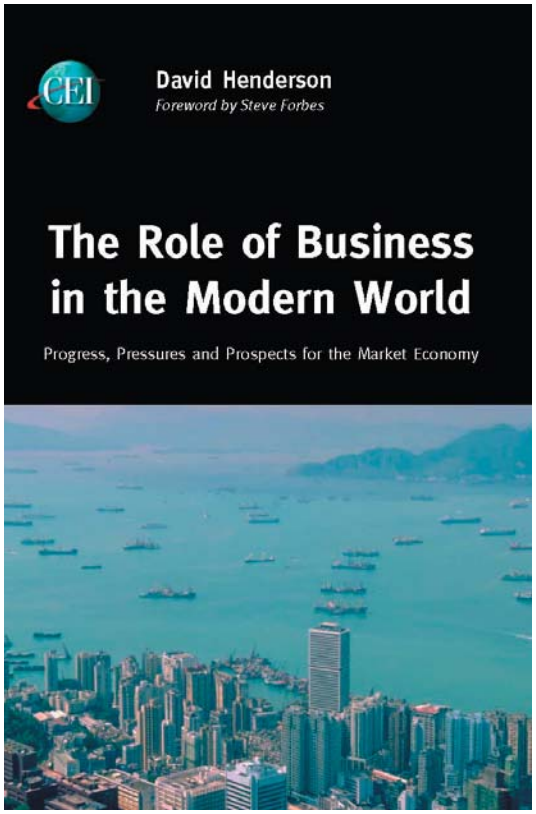
Improving Capitalism

The Respective Roles of Business and Government

by David Henderson

This is an excerpt from the American edition of The Role of Business in the Modern World: Progress, Pressures, and Prospects for the Market Economy *by David Henderson, published by CEI in November 2004 (originally published in the United Kingdom by the Institute of Economic Affairs, July 2004).*



The purpose of liberalization is to make capitalism function better, chiefly by harnessing profit-oriented businesses more closely to the general welfare. But in such a process the initiative does not rest with the business world. Enterprises themselves are not required to endorse or pursue the goal of improving capitalism along these lines, nor are they called on to act as partners in measures of programs of market-oriented reform. The extent to which liberalization is carried, and the directions that it takes, are determined by governments. Insofar as capitalism is to be improved, and the primary role of business reinforced, by extending the scope of competitive markets, neither a change of heart nor a redefinition of roles is demanded on the part of businesses.

What if other objectives of policy, and with them other proposals for improving capitalism, are taken into account? Do businesses in this connection have scope today for making a stronger contribution of their own, and should the role and mission of enterprises be redefined accordingly? The doctrine of corporate social responsibility (CSR) gives positive answers to these latter questions. Its advocates believe that businesses have acquired the capability, and with it the duty, to ensure that capitalism now serves the goal of sustainable development: hence the case for "corporate transformation." By taking the path of CSR, business, working in new creative partnerships with governments and "civil society," is seen as making capitalism anew.

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In This Issue

From the General Counsel

The Drug Reimportation Controversy

by Sam Kazman

As policy battles go, the drug reimportation debate is an unusual one. On its face, the federal ban on reimporting pharmaceuticals appears to violate the basic principle of free trade. After all, if a drug is available from abroad for less than in the United States, why should the government prevent Americans from obtaining the cheaper version? For that reason, a number of free market advocates have opposed the government ban on reimported drugs.

But there are several things that make this controversy different—not least is the fact that such free market stalwarts as Economics Nobel laureate Milton Friedman and University of Chicago legal scholar Richard Epstein favor the ban. To quote from a letter to Congress signed by Professor Friedman and over 100 other economists, under reimportation, "American consumers would get the short-term windfall of lower prices, but they would end up unnecessarily suffering and living shorter lives—because promising new therapies would be delayed or not even developed."

The reimportation controversy involves some rather unique facts. First, at issue here are patent rights—limited exceptions to free trade that are expressly provided for in the Constitution. Second, the ability of drug makers to protect their patents has been severely weakened both by foreign price controls on pharmaceuticals and by international agreements. In particular, under the World Trade Organization's 2001 Doha Declaration, any country may declare a health emergency and impose compulsory licensing on a firm it deems uncooperative. For this reason, pharmaceutical companies have little ability to contractually limit the reimportation of their products through their agreements with foreign buyers.

These problems might be alleviated if American drug makers could band together to collectively negotiate with foreign governments, but American antitrust laws bar them from doing so.

The pharmaceutical industry is thus severely restricted in its ability to control the fate of its foreign output. (In fact, its ability to restrict that output, in order to lower the amount of drugs available for reimportation, would be expressly prohibited by several bills aimed at facilitating reimportation.) Perhaps one can argue over whether reimported drugs are technically stolen property, but, to a large extent, they are clearly extorted property.

When drugs from abroad re-enter the U.S. market in this manner, they effectively bring with them foreign drug price controls. Price controls have largely disappeared in the U.S., but they remain in effect in many other countries, especially for pharmaceuticals. Once the scale of reimportation becomes large enough, the reimported drugs' artificially lower prices will become the going rate in this country.

For this reason, it's not surprising that the drug reimportation debate is similar to many other price control debates. Price controls offer the promise of bargains for consumers, while their cost is borne only by "bad guys"—greedy landlords in the case of rent control, price-gouging bakers in the case of bread, and profiteering drug companies in the case of medicines.

Yet price controls invariably fail; they may produce lower prices in the short term, but they also destroy the incentives to produce more goods. Under rent control, housing stocks deteriorate; under price controls, bread shortages proliferate; and under drug reimportation, development of new medicines stagnates. A survey of economists 20 years ago showed practically unanimous recognition of price controls' destructive effect. As the Swedish economist Asar Lindbeck long ago pointed out, "rent control appears to be the most efficient technique presently known to destroy a city—except for bombing."

When individual cities impose rent control, their residents at least have the option of moving elsewhere. If price controls are imposed on the nation's entire pharmaceutical industry, where ya gonna move?

Dear Readers: As you may have noticed, for years, the *Monthly Planet* has been the Monthly Behind. Facing up to reality, and admiting defeat before Father Time, we have re-dated the current issue to bring us up to date. Thank you for your patience. — The Editors

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Improving Capitalism

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This notion is based on a misreading of events and relationships. It attributes to businesses new powers to influence outcomes which they have not in fact acquired. Thus, when the authors of *Walking the Talk* refer to such issues as "the developmental needs of the South" and "the gap between the 'haves' and the 'have-nots'" as now being on the agenda of businesses, they give a wholly unrealistic impression of what enterprises can achieve on their own account, even collectively. Now as in the past, the economic progress of poor countries does not depend on a commitment by companies to further it. As for the gap between "the 'haves' and the 'have-nots,'" it is governments alone which both retain the prime responsibility to decide whether and in what ways this is a problem and have the overwhelmingly greater capacity to address it. Now as in the past, it is governments, not businesses, which can influence the distribution of income through their power to regulate, to levy taxes, to pass social legislation, and to determine the level and composition of public expenditures. The same is true in relation to environmental issues and policies: it is for governments to assess situations and decide on action, and they alone have the power to give economy-wide effect, or even worldwide effect, to what they decide.

The advocates of CSR therefore greatly overstate the extent to which events and outcomes, and the degree to which objectives are realized, are influenced by what businesses decide.

David Henderson was formerly (1984–92) head of the Economics and Statistics Department of the Organization for Economic Cooperation and Development in Paris. He is currently a Visiting Professor at the Westminster Business School in London. He is an Honorary Fellow of Lincoln College, Oxford, and in 1992 he was made Commander of the Order of St. Michael and St. George.

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- *Monthly Planet* newsletter

COP-10: Green Gimmicks, Lawsuits, and "Climate Witnesses"

by Ivan G. Osorio

The 10th Conference of the Parties (COP-10) to the United Nations Framework Convention on Climate Change met in Buenos Aires, Argentina in December, with what would seem to be reason to celebrate. The Kyoto Protocol was finally going to go into force on February 16. But the mood among the thousands of environmental NGO participants was neither happy nor hopeful.

Ironically, the COP-10 meeting was held at the Argentine Rural Society (La Rural, for short), an agricultural promotion body. Next to the convention hall is an amphitheater for equestrian and cattle shows.

As always, the major environmental pressure groups made their presence felt. Indeed, the first thing visible upon arrival at the convention center was a large ark placed in front of the entrance by Greenpeace. Allegedly powered by solar panels, the inside of the ark seemed to house Greenpeace office facilities—but early in the conference, it had a line leading into it from a gasoline generator, which was later removed.

The Greenpeace ark, with solar panels...

...and with gasoline generator (photo courtesy of Bureaucrash)

Inside the conference, some delegates sported nametag neckbands that read "No to Bush, Yes to Kyoto," courtesy of Greenpeace. The National Environmental Trust gave out plastic buttons featuring different high-ranking U.S. officials—including President Bush, Vice President Cheney, and Undersecretary of State for Global Affairs Paula Dobriansky—with the caption, "Sorry, everybody! Good luck dealing with global warming without us," and plastic hula dancer figurines with the inscription "Visit the Arctic in 2050! Global Warming Tours, Inc." But Greenpeace and other green activist groups did more at COP-10 than engage in the publicity stunts for which they've become famous.

Friends of the Earth International (FoE) pushed bans on genetically modified trees, promotion of hydroelectric projects by international bodies like the U.N., and—especially significant for the United States—climate change litigation against businesses and governments. The premise: American industries, by contributing to global warming, are destroying native peoples' traditional livelihoods, and should therefore pay.

FoE has teamed up with fellow environmentalist giants Worldwide Fund for Nature (WWF) and Greenpeace to promote climate change litigation. The three groups sponsored an event, featuring Ken Alex from the California State Attorney General's office, to "explain the recent legal actions around the world against governments and companies, highlighting their scientific backing, and warning that there will be more to come unless deep cuts are made in emissions and victims are compensated."

A possible preview of courtroom strategy could be a December 16 event co-hosted by WWF, "Bringing Climate Change Home—How People Witness Climate Change." At the event, WWF thanked "climate Witnesses from Nepal, India, Fiji, and Argentina for their willingness to come to COP-10 and for their hard work in testifying about the impacts of climate change on their communities." Never mind the possibility of individuals being able to actually witness climate change—rather than mere weather. Such emotional appeals are often good at swaying juries.

This all obscures the fact that for many native peoples, traditional livelihoods, which often means subsistence, are not something to preserve but overcome. Thankfully, outside the climate-alarmism-as-an-article-of-faith unreality prevalent at the COP, people were more receptive to this basic commonsensical notion.

At two events sponsored by the Argentine free-market institute, Fundación Atlas, CEI Director of Global Warming Policy Myron Ebell laid out the scientific case against Kyoto. The historical evidence from the 20th century suggests that the rate of global warming will be modest. Computer models that predict more rapid warming in the future get their

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COP 10: The Green Litigation Tango

by Christopher C. Horner

The greens are coming—they're lawyered up and ready for a fight. And the recent United Nations Framework Convention on Climate Change (UNFCCC) 10th Conference of the Parties (COP-10) in Buenos Aires provided a glimpse of what they've got in store.

At COP-10 on December 13, representatives from Iceland held a prime-time event announcing a study on Arctic warming. Featuring computer-predicted melting and pleas about the Arctic Inuit's plight, the report was already a month old and well-spun through the media cycle. It took an event two nights later to bring this rehash into focus.

On December 15, the Center for International Environmental Law (CIEL), a hard green legal group, convened the press to detail a human rights complaint that CIEL plans to file before the Inter-American Commission on Human Rights (IACH), an organ of the Organization of American States. The aggrieved are Arctic Inuit peoples as represented by the Inuit Circumpolar Conference, the defendant is the United States; the allegation against the U.S. is "for causing global warming and its devastating impacts."

Leave aside for the moment this action's legal merits (there are none). Consider the presentation, which included a remarkable approach to oral argument.

Left to right: CEI Editorial Director Ivan Osorio, CEI Director of International Environmental Policy Myron Ebell, and Argentine environmental attorney Horacio Franco at the conference, "Climate Change, Energy, and the Future of the Global Economy," co-sponsored by CEI and Argentina's Fundación Atlas.

Green Gimmicks from COP-10: Hula dancer from the National Environmental Trust and conference badge neck sash from Greenpeace.

The speaker was Dr. Robert Corell, an American oceanographer and scientific bureaucrat. According to Dr. Corell, the Inuits—whom he described as steeped in a 9,000-year-old subsistence lifestyle (that's a good thing?)—now appear to have their ages-old lifestyle and hand-to-mouth existence threatened by global warming, because their snowmobiles are falling through the ice. You can't make this stuff up.

"Indigenous communities are facing major economic and cultural impacts," Corell said.

"If you are indigenous and you have lived with your ancestors for upwards of 7,000 to 9,000 years and you had a subsistence living which has been dependent upon the existence of ice, that is now a serious problem. Snowmobiles do not detect thin ice; I think you will find indigenous partners in this room who will tell you some of their close relatives who have not made it through the ice pack because they expected it to be more firm than it actually was and their snowmobiles went through."

Warming that would apparently not have occurred but for the United States is the turbulence supposedly imposed on this idyllic stability. Unfortunately for the complainants, there is a lot of evidence that the Arctic climate, including the extent of the ice cap, fluctuates cyclically over periods of several decades. For example, the Arctic was apparently warmer in the 1930s than today.

The Inuits might consider calling John Edwards if he gets back into the ambulance-chasing business. This complaint—seeking an unenforceable determination, under an agreement which the U.S. has not ratified—is mere foreplay to making "climate change" the trial lawyers' next tobacco.

This is because success before the IACH can produce no tangible outcome because the panel has no binding authority and no jurisdiction over the U.S. anyway. As such this likely is an effort to parlay "soft" international law into a stepping-stone for awarding domestic damages. Reading CIEL's 15-page argument and roadmap, the groups appear to be laying a foundation for subsequent tort claims, its lawyers' denials notwithstanding.

Still, this group does dwell excessively on claims of purported deprivations of the Inuits' rights to privacy, residence, preservation of home and property, and the like. Again, this must be "preamble" complaining. For tort purposes, the money claim is a determination that "human rights"—as protected by both treaties and "the law of nations"—have been

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Q & A with Paul Atkins:

A Member of the Securities and Exchange Commission discusses how the Commission does its job and how it could better assist investors

In the wake of corporate scandals such as those at Enron and WorldCom, many in government, Republican and Democrat, have endorsed more regulation by the Securities and Exchange Commission (SEC). But SEC Commissioner Paul S. Atkins still keeps a skeptical eye on the fashionable corporate governance solutions often touted in the press. Since he was appointed to the commission by President Bush in 2002, Atkins and fellow Republican Commissioner Cynthia Glassman have opposed Republican SEC chairman William Donaldson's proposals to mandate independent chairmen of mutual funds and to require registration of hedge funds, both of which passed by 3-2 votes. Atkins recently spoke with Warren T. Brookes Journalism Fellow John Berlau. "For the record, [CEI president] Fred Smith is a great guy," Atkins began the interview. A longer version of this interview is available at www.cei.org.

CEI: What first interested you in the stock market and securities law?

Paul Atkins: I was a law student at Vanderbilt University [in Nashville]. During my second summer I went off to New York, to see what legal practice in New York City was like, and I guess I got enticed by the bright lights of Broadway. I was at a law firm that specialized in securities law, and I was always very interested in the economy and finance, so basically that sort of fit.

When I began working full time for that firm in 1984, it was a very busy time for IPOs [initial public offerings]. There were big changes in the financial markets, so I had to work with the SEC and its rules on a daily basis.

CEI: You first worked at the SEC in the early '90s under Chairman Richard Breeden. How did you come to work at the SEC?

Atkins: I was in New York. I had gotten

engaged, and my fiancée, my wife now, said that she would rather not move to New York and that she wanted me to find a job elsewhere. So, my resume ultimately made it to the chairman's office at the SEC. I interviewed with the chairman, and got an offer.

That was an exciting time. Chairman Breeden certainly had a lot of energy and ideas: small business initiatives and deregulatory initiatives, including modernization of the proxy process. The focus was on making it easier for companies, especially smaller companies, to access the capital markets without having to go through batteries of lawyers and accountants, to reform antiquated rules from the New Deal era for the benefit of investors. It was an important time.

CEI: You also stayed at the SEC to work under Chairman Arthur Levitt when the Clinton Administration came in. What was that like, given your disagreements over some regulations he supports?

Atkins: I enjoyed very much working for Chairman Levitt (from summer 1993 to November 1994). When he became SEC chairman, he was very interested in trying to break down some of the regulatory barriers and make improvements in the SEC's regulations and focus. In the SEC's oversight of the markets, I thought he did some particularly outstanding things. Problems had come to light in the Nasdaq marketplace, where there were some pretty bad practices of collusion among dealers that basically kept prices artificially high for investors who were trying to buy and artificially low for people who were trying to sell. During Chairman Levitt's term, a lot of that was opened up to scrutiny. New rules reforming how brokers handle customer orders were put in place that brought much more openness and competition to the Nasdaq market and has made it a model today. I thought that was a big breakthrough.

Other significant points, included his shining a light on unsavory practices in the municipal bond area—the so-called pay-to-play practices of favoritism—I thought he was definitely right to focus on that. Also, what I really enjoyed with him was working on individual investor issues. We set up an advisory committee of outsiders and developed a series of investor town hall meetings where he went out to talk to individual investors about investing, especially regarding questions investors should ask of their brokers and financial advisors. He had a knack for talking to the average investor.

CEI: Do you hold town meetings now?

Atkins: Yes, and actually I learn a lot by going out and talking to the average investor and hearing what the concerns of investors are. It's really amazing to see, and it shows that we in our insular environment in Washington need to go out and listen to real people. Too often we get caught up in the inside-the-Beltway cause of the moment, and it's very refreshing to go outside and hear different views.

CEI: What have you learned from

talking to people at town meetings?

Atkins: One thing that I hear over and over is complaining about information overload. There's an attitude in this agency that more is better, that disclosure is good. I agree it is, but what has happened with the litigation situation in this country and our agency's rules is that they have combined to make the disclosure documents that come out of corporations and mutual funds into litigation documents. Notwithstanding Arthur Levitt's crusade for plain English, these things are litigation documents. They're meant to be read in hindsight to try to protect the company from the inevitable second-guessing that comes along, whether from the private bar or from government. That's why these disclosure documents become longer and longer and much more impenetrable for the normal person to understand.

That tends to make people throw up their hands, and they either become too dependent on advisers that they might not know anything about, or they feel as if they can't make a decision and that it's hopeless, so they don't invest. So, in trying to help people invest, I think too often we have created an atmosphere that's counterproductive. To try to restore a balance, we have to go back and look at our rules to find out how have they skewed the situation, how have they made it difficult for people to make decisions to figure out what the true information that they need is.

CEI: The SEC passed a rule, from which you dissented, mandating that boards of mutual funds must have independent chairmen. With mutual funds and other investments, investors are told by much of the financial press that the more independent the boards are the better, that a supermajority independent board is better for the companies you invest in. From what you have seen, are there data to back this up?

Atkins: In a word, no. You should look at the dissent that we wrote for the independent chairman rule, which is on the SEC's website. The staff claimed that it's better to have an independent chairman than not, and that a 75 percent independent board for mutual funds is something that will protect investors more. In fact, there is no empirical evidence to back this up. When you look at the mutual fund problems we've had, some of the worst actually were with funds that had independent chairmen and 75 percent independent boards. There is no empirical evidence to back the rule. My concern is that it's just going to increase costs for shareholders, because somebody's got to pay for all this—to find and hire independent chairmen and the staff that they invariably will need. All these costs eventually are borne by the investor.

CEI: The stock option rule from the Financial Accounting Standards Board (FASB) is scheduled to take effect in June. Assuming Congress doesn't overturn it first, is there anything the SEC should do with this standard, which, of course, will have the force of law in corporate accounting statements, or should the agency just defer to FASB as is the usual practice?

Atkins: Valuation is the key issue here. The two valuation models that FASB has discussed most frequently do not appear to be particularly accurate, especially for companies with broad-based option plans. We need to have a public discussion on valuation. We need to examine the FASB process. From what I've been able to tell, their process could have been improved. From what I understand, they have not done any field testing of the accuracy of their valuation models, even though there were a number of companies volunteering to do it.

CEI: FASB's pretty unique. It's a private group that sets standards that, because of the SEC's practice of deferral, have the force of law. Do you think, in general for FASB standards, that there needs to be any greater SEC review?

Atkins: From the public's perspective, we can certainly enhance the accountability of FASB. Before we adopt their standards, I think that we must have a very careful consideration of process, of openness, of what the effect of these standards are going to have on the marketplace and on investors. I'm just not sure that we have achieved the proper level of accountability.

CEI: So you'll be proposing some changes to that effect?

Atkins: Well, I'm just one of five commissioners.

A Case of Wine for the Supreme Court

by Ben Lieberman

On December 7, the United States Supreme Court heard the first major case dealing with Internet commerce, a Constitutional challenge to state laws restricting direct-to-consumer sales of wine and other alcoholic beverages. The Court's decision, expected this spring, will very likely impact e-commerce in many other goods in addition to wine.

Imagine that you want to shop for wine online and have the purchase shipped to your home. Many wineries now have websites for this purpose—but in 24 states this transaction would be illegal. These states require all alcoholic beverages to pass through state-licensed wholesalers, distributors, and retailers before they reach the public. Therefore, consumers bypassing these middlemen by purchasing directly from the web would be violating the law. The Supreme Court is now deliberating on challenges to two such laws, from Michigan and New York.

The Supreme Court decided to hear this case partly because the lower federal courts have split on the matter, striking down Michigan's direct shipping statute but upholding New York's. Why the different findings? Because two seemingly contradictory Constitutional provisions are at issue.

On the one hand, courts have interpreted the commerce clause to forbid states from discriminating against out-of-state products to protect in-state economic interests. Both the Michigan and New York laws allow in-state wineries to engage in direct-to-consumer sales but restrict out-of-state wineries from doing the same. This appears to be a clear violation of the commerce clause. Indeed, the Sixth Circuit U.S. Court of Appeals struck down Michigan's law for precisely this reason.

But, on the other hand, the 21st Amendment, although best known for repealing prohibition, also granted states broad authority to regulate alcoholic beverages, and would seem to provide Constitutional support for these state restrictions. The Second Circuit upheld the New York law on these grounds.

Both Michigan and New York claim to have a legitimate purpose for their direct shipping restrictions. As the judge in the New York case concluded, requiring sellers to have an in-state presence "ensures accountability" for such things as collection of excise taxes and prevention of sales to minors. But in truth, these problems can be dealt with by means less burdensome than an all-out ban on all but in-state direct sales. In fact, those states that have allowed direct shipments for years report no serious problems.

The real reason behind these laws is economic—Internet sales may be a great way for consumers to save money by cutting out the middleman, but the middlemen are not too happy about it and are fighting back. The liquor wholesalers and distributors claim to be concerned about illegal alcoholic beverage transactions, but are really interested in holding onto their local monopoly status and high product markups. They have prevailed upon these states to restrict direct-to-consumer competition.

Purchasing wine online not only saves consumers money, it also expands consumers' product choice and opens new opportunities to entrepreneurs. Of the thousands of wines produced, only a small fraction are available in liquor stores. And many small wineries see Internet sales as their last best hope of survival, because the big wholesalers rarely bother to carry their low volume vintages. Indeed, several small wineries, along with wine consumers unable to make these purchases, have brought the court challenges.

If the Court interprets these laws as truly necessary to prevent minors from gaining access to alcohol via online sales, ensure payment of excise taxes, or both, then it is likely to uphold them. But if the Court sees them as thinly veiled protection of

Liquor wholesalers and distributors claim to be concerned about illegal alcoholic beverage transactions, but are really interested in holding onto their local monopoly status and high product markups.

in-state alcoholic beverage industries' economic interests, then it will likely strike them down. Judging by the oral arguments, the latter argument seems to have won the day.

Justice Antonin Scalia expressed doubt that requiring "an in-state office somehow prevents wineries from shipping to minors or prevents them from evading taxes," and added that the experience from the 26 states that allow direct shipping from other states "suggest it's not a problem." Justice Ruth Bader Ginsburg noted that the purpose of the 21st Amendment "was not to empower states to favor local liquor industries by erecting barriers to competition."

Although the 21st Amendment applies solely to alcoholic beverages, a Supreme Court ruling in favor of protecting interstate direct wine sales under the commerce clause could clear away other potential barriers. Beyond wine, middlemen for a wide variety of goods and services—including motor vehicles, real estate and mortgages, contact lenses, medical supplies, and pharmaceuticals—are also exerting in-state political clout to restrict Internet competition. Federal Trade Commission (FTC) Chairman Timothy Muris, commenting on a FTC report advocating an end to state restrictions on wine e-commerce, noted that, "our findings in the wine industry suggest that anti-competitive state regulations may significantly harm consumers in many of these industries." This being the first such case to reach the Supreme Court, a decision allowing direct Internet wine sales will set a powerful precedent, and could go a long way in shaping the future of Internet commerce.

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COP-10: Green Gimmicks

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results by using implausible scientific and economic assumptions. And even if global warming occurs as predicted, the alleged adverse impacts have been exaggerated or simply made up.

At the same events and in an appearance on Argentine television, I discussed the costs that the Kyoto Protocol would impose on developing countries like Argentina. Although developing nations don't have to make cuts in Kyoto's first round, they would have to be included in further rounds if global emissions are going to be slowed significantly. But, unlike western Europe and Japan, countries like India, China, and Brazil are still increasing in population. Greater population means greater energy demand. Thus, Kyoto, by leading to energy rationing, would be a disaster

for the developing world.

Fortunately, many major developing country leaders seem to understand this. China, whose rapid economic growth has made it the world's second largest producer of greenhouse gases, stated emphatically in Buenos Aires that as a developing nation it will not accept any curbs on emissions now or for at least 50 years. The resistance of major developing countries to sign on to energy rationing, plus the fact that the European Union, Japan, and Canada probably won't meet their initial targets means that Kyoto has probably reached a dead end. But that won't keep its supporters from trying to resurrect it. They'll be coming soon to a courtroom near you.

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violated.

Potential plaintiffs are placing great value in a ruling—even one by the IACH—that anthropogenic climate change violates human rights. Such a determination could qualify plaintiffs to sue for money—and thus possibly a non-subsistence lifestyle—under the 1789 Alien Tort Claims Act. That Act gives any foreigner with a tort claim access to the U.S. federal courts, so long as they allege violation of a treaty or "the law of nations."

Therefore, whatever its weaknesses, this approach should be taken seriously. Substantively, of course, many other difficulties impede an effort to assign responsibility for some portion of climate change—particularly since earlier climate changes have occurred naturally, without calamity (or lawsuits), and which even many alarmists admit cannot be distinguished from alleged man-made climate changes.

Assisting such plaintiffs, however, is the Bush Administration's biggest environmental policy blunder: the Climate Action Report 2002. The report—submitted to the United Nations as America's official "policy and position" on climate change—"admits" U.S. complicity in climate change, albeit with some watery qualifications. Presumably, its authors assumed that this, like so much else in the diplomatic arena, is a consequence-free feel-good project. Jurists increasingly disagree.

All of this begs for the opportunity to put climate alarmism on trial. To date, grandstanding lawsuits, like that of New York Attorney General Eliot Spitzer, et al. against select utilities, are not likely to yield substantive debate but only settlements for windmill quotas. Depending on how the Inuits proceed, they might surprise the world through altering their ages-old culture—by adopting litigiousness.

Christopher C. Horner (chorner@cei.org) is a Senior Fellow at CEI. A version of this article appeared in Tech Central Station.

The Good, the Bad, and the Ugly

The Good: Jury Orders Activist Group to Compensate Rancher for Defamation

On January 21, A Tucson, Arizona jury ordered a green litigation group to pay $600,000 to a rancher for defamation. In a 9-1 verdict, jurors in Pima County Superior Court ordered the Tucson-based Center for Biological Diversity (CBD) to pay rancher and banker Jim Chilton $100,000 for damage done to his reputation and that of his cattle company, and $500,000 in punitive damages. Chilton sued CBD for putting out a press release that claimed that he had mismanaged his forest service allotment in an attempt to block the renewal of Chilton's grazing permit. CBD released 21 photos of barren patches of Chilton's 21,500-acre allotment, featuring captions that described the area as "denuded" by cows. But Chilton's attorney showed jurors wide-angle photos of the same locations that, according to *The Arizona Daily Star*, "revealed the surroundings as worthy of a postcard, with oaks and mesquites dotting lush, rolling hills," and in closing arguments told jurors that he had proven that at least four photos weren't even on Chilton's allotment. "I've visited Chilton's grazing lands and he is noted for exemplary stewardship," says CEI Adjunct Scholar Robert J. Smith. "Those lands are world famous for unique populations of Mexican birds, moths, and plants; and are a mecca for naturalists. Furthermore the Forest Service lands already include many mines, old homesteads, and roads. I doubt the cattle excavated the mines."

The Bad: Feds Side with Protectionists Against U.S. Shrimp Consumers

On January 6, the U.S. government struck a blow against free trade by upholding tariffs currently levied on shrimp from China and Vietnam and imposing tariffs on shrimp from Brazil, Ecuador, India, and Thailand. The decision marks the end of a year-long battle between domestic shrimp producers and their foreign competitors.

P.R. Newswire Photo Service

In December 2003, shrimp producers from seven southern states, collectively known as the Southern Shrimp Alliance, lodged a complaint with the U.S. International Trade Commission (ITC), alleging that the six countries were illegally dumping shrimp into the U.S. market. After a year of wrangling, the panel found for the domestic shrimpers—though it will review its decision with respect to India and Thailand, given the havoc wrought by the recent tsunami. The other countries can expect steep levies—China alone faces tariffs anywhere from 27.89 to 112.81 percent. According to Wally Stevens, chairman of the American Seafood Distributors Association/Consuming Industries Trade Action Coalition Shrimp Task Force, the decision to impose tariffs "causes havoc in the market, may raise prices for consumers and hurts thousands of American who work in the shrimp consumer sector."

In recent years, U.S. regulators have indulged in a series of anti-dumping crusades, levying tariffs on everything from steel to catfish. But, as 2003-2004 Warren T. Brookes Journalism Fellow Neil Hrab writes, the U.S. should start "set[ting] a good example for other trading nations" and not adopt anti-dumping measures, for doing so might "discourage other governments from initiating anti-dumping investigations for protectionist purposes" against the U.S.

The Ugly: Morgan Stanley Caves in to Legal Bullying—Again

Large firms have recently faced a spate of gender-discrimination lawsuits filed by female employees who allege that their employers have denied them advancement and entitlements granted their male counterparts. And many of plaintiffs have found their champions in trial lawyers bent on advancing an agenda through the courts rather than legislation.

Since March 2004, a number of companies, including Wal-Mart, Boeing, and Morgan Stanley, have faced gender discrimination lawsuits from disgruntled female employees. Are the claims credible? In many cases, we will never know, as most firms have settled because, in the words of one defense lawyer, the firms "don't want to go to trial and look like a bigot in front of the jury." Many firms believe it worth their while to avoid aggressive activist-lawyers like Elizabeth Grossman, who want to "make law, and to expand the system to serve employees who are protected by laws." Last year, Grossman helped target Morgan Stanley by representing a primary plaintiff whose claims of discrimination were questionable, at best. Emboldened by this capitulation, another former female employee, Anne Kaspar, recently sued Morgan Stanley for gender discrimination. Her claims are flimsy—she did not have the required basic qualifications for the promotion she wanted—but, given its previous actions, Morgan Stanley may well settle again to avoid a protracted lawsuit.

Although the female plaintiffs have received considerable profit through these discrimination suits, they are not the only winners. Trial lawyers who want to make law in the courtroom have also benefited. "That prospect," write CEI Editorial Director Ivan Osorio and CEI Assistant Editorial Director Elizabeth Jones, "should alarm anyone who cares about the democratic process. And it should give Congress the incentive it needs to enact tort reform: to preserve its own authority."

Media Mentions

Senior Fellow Iain Murray lays out the case against the Kyoto Protocol on the occasion of its coming into force:

The Kyoto Protocol on climate change... sets the world on a course to economic disaster while doing nothing to alleviate global warming.

Kyoto attempts to alleviate what may be a major cause of warming—the emission of greenhouse gases—by suppressing energy use in the developed world. Yet energy use is vital to modern health and wealth. The Kyoto treaty itself recognizes this fact by exempting developing countries, eager to achieve prosperity, from greenhouse gas reductions. As a result, China and India are likely to become the major emitters of greenhouse gases on the planet within a few decades. This means that, even with Kyoto, global emissions of greenhouse gases will continue to increase.

- Syndicated by Cox Newspapers, February 18

Director of Food Safety Policy Gregory Conko and Adjunct Fellow Dr. Henry I. Miller look past the latest headlines to another instance of the United Nations keeping food out of hungry people's mouths:

The U.N.'s systematic sacrifice of science, technology, and sound public policy to its own bureaucratic self-interest obstructs technological innovation that could help the poorest of the poor. In particular, the U.N.'s involvement in the excessive, unscientific regulation of biotechnology—also known as gene-splicing, or genetic modification (GM)—slows agricultural research and development and promotes environmental damage. Ultimately, it could prolong famine and water shortages for millions in less developed countries.

During the past decade, delegates to the U.N.-sponsored Convention on Biological Diversity negotiated a "biosafety protocol" to regulate the international movement of gene-spliced organisms. It is based on the bogus "precautionary principle," which dictates that every new product or technology—including, in this case, an improvement over less precise technologies—must be proven completely safe before it can be used.

- *National Review Online*, February 15

Director of Air Quality Policy Ben Lieberman explains why we should be optimistic about energy prices in the years ahead:

The year 2004 will be remembered as a year of high prices for gasoline and natural gas, and Americans are understandably worried about the cost of energy for 2005 and beyond. But the federal Energy Information Administration (EIA) recently released a preliminary version of its Annual Energy Outlook 2005, and it paints a surprisingly optimistic picture for the decades ahead.

With regard to petroleum, EIA acknowledges that global demand will remain strong, especially with China's growing need for motor fuels unlikely to subside. Nonetheless, the report does not predict runaway prices. Demand may be increasing, but EIA believes that the global supply can expand to meet it.

The story is similar for natural gas. EIA expects to see enough new supplies coming online in the years ahead to meet demand, which is "projected to grow from 22 trillion cubic feet in 2003 to almost 31 trillion cubic feet in 2025."

- *Human Events*, January 25

Senior Fellow Christopher C. Horner warns our European friends against trying to force the U.S. into Kyoto-style global warming policy:

The chairman of the U.S. Senate's environment committee, Sen. James Inhofe, warned the EU against pursuing its climate change agenda—stalled to date in the international negotiating process—through backdoor means such as the World Trade Organization (WTO).

Inhofe said: "As ['COP-10'] talks in Buenos Aires revealed, if alarmists can't get what they want at the negotiating table, they will try other means. I was told by reliable sources that some delegation members of the European Union subtly hinted that America's rejection of Kyoto could be grounds for a challenge under the WTO. I surely hope this was just a hypothetical suggestion...Such a move, I predict, would be devastating to U.S.-EU relations, not to mention the WTO itself."

- *EU Reporter*, January 7

Warren Brookes Journalism Fellow John Berlau corrects those who would underestimate the burdens and economic consequences of new corporate governance regulations:

Robert J. Samuelson dismissed legitimate concerns about the effects of the Sarbanes-Oxley Act on the risk-taking behavior he deems necessary for economic growth. The law is having an effect on public companies, not just in time spent on compliance, but in financial costs and constraints on innovation through its micromanagement of corporate structure. The law firm Foley & Lardner found that Sarbanes-Oxley has increased the costs of being public by an average of 90.4 percent for middle-market public companies. The firms' survey also found that the firms' accounting, audit, and legal fees have doubled. While this can be costly to Standard & Poor's 500 firms, it can be prohibitive for smaller companies, which often are the innovators in creating new jobs and products.

- *The Washington Post*, January 1

Great Moments in Litigation

In January, a California man sued Apple Computer for being "forced to purchase an Apple iPod," the company's popular portable music player, since it is the only portable player that plays music downloaded from Apple's iTunes online music store (the music files also play on computers and home stereos). Apple says its AAC file format helps it combat music piracy. That is an approach music companies might consider. A group of record labels recently sued a deceased 83-year-old Charleston, West Virginia woman who, her daughter said, "was computer illiterate." The companies, which got a copy of the death certificate from the defendant's daughter, later agreed to drop the suit. And a Cleveland man sued NBC for $2.5 million for an episode of the network's gross-out contest show "Fear Factor" in which contestants ate dead rats, alleging that it made him dizzy and nauseated.

...END NOTES

Great Responses to Litigation Threats

Some companies have gone to ridiculous lengths to protect themselves against lawsuits—and now someone is recognizing such efforts. In January, the legal watchdog group Michigan Lawsuit Abuse Watch announced the winners of its Wacky Warning Label contest. The top prizes, in order, went to: "Do not use for personal hygiene" on a toilet brush; "This product moves when used" on a children's scooter; "Once used rectally, the thermometer should not be used orally" on a digital thermometer; and "Never remove food or other items from the blades while the product is operating" on a blender.

Nanny Statism's Cutting Edge

"San Francisco is Nanny State, U.S.A.," declares a recent *San Francisco Chronicle* op ed, citing proposals to ban smoking just about everywhere, require cyber cafés to check IDs during school hours, impose a fee on grocery bags, and ban handguns. This may be unsurprising in America's most liberal city, but other parts of the country apparently are trying to catch up. In January, a Texas state legislator proposed requiring school districts to measure students' body mass index and include that information in regular report cards. Arkansas adopted a similar law during the 2003-2004 school year. A Harrisburg, Pennsylvania high school student was charged with a violation of a state ban of weapons on school property for carrying a paintball gun in the trunk of his car, and allegedly using it for vandalism. And a Tampa, Florida middle school recently banned rubber bands because they can be used to launch paper projectiles.

Eliot Spitzer Takes on...Food

In December, New York Attorney General Eliot Spitzer indicted the former president of the James Beard Foundation, a nonprofit culinary institute, for embezzlement. However, not content with pursuing a routine criminal probe, Spitzer blocked a group of concerned chefs and food industry leaders from reconstituting the Foundation's board. Why? "The attorney general doesn't want any food professional on the board," world-renowned chef Charlie Trotter told *The New York Times*, because of the potential for conflict of interest.

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