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Will the United States Let the European Union Regulate our Chemicals Industry Through the OECD?

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The European Union uses the Organization for Economic Cooperation and Development (OECD) as a way of gaining economic dominance over the United States. This paper examines one case: The EU Chemicals Strategy, which is contrary to U.S. interests, is tied to the OECD. By participating in the OECD, the U.S. may be backing efforts that will hurt U.S. industry and advance the competitive position of the EU. The EU's Chemicals Strategy requires that exporters of chemicals, pharmaceuticals and consumer products into the EU comply with stringent test rationales that are based on hazard, not risk assessment.² The data requirements may affect practically every industry and may cost the U.S. chemicals sector as much as \$9.6 billion. Countless billions in U.S. exports could be subject to bans or restrictions. Parts of the EU's Chemicals Strategy were developed within the OECD, an organization to which the U.S. belongs, but that generally reflects an EU bias. The U.S. may have aided in developing a chemicals testing system that will hurt its trade position. In addition, the OECD is using the upcoming G-7 meetings to further its efforts at becoming a supranational regulatory authority.

Background: What is the OECD? The OECD is a Paris-based group of 30 industrialized nations that develops and suggests economic policy. The forerunner to the OECD was the OEEC, the Organization for European Economic Cooperation, which grew out of the Marshall Plan. The OEEC's mission was to administer economic aid to rebuild post-war Europe. In 1960, the OECD was created and given a broad economic mandate.

In the last 40 years, the OECD's membership has grown to include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The European Commission is a virtual member and active participant in its meetings. Of the OECD's 30 national members, 15 are EU countries, and 6 are seeking to join the EU. The U.S. contributes 25 percent of the OECD's annual budget (at least \$35 million in 2001).³ Although consensus is required for

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² Hazard assessment does not consider exposure levels when checking for toxicity. Risk assessment takes exposure into account.

³ OECD, *OECD Assessed Contributions, 1998-2001* (OECD, 2001); Note: This figure does not include contributions to OECD special projects.

decisions, the U.S. has a poor bargaining position due to European dominance and the EU's explicit goal to overwhelm U.S. economic competitiveness by 2010.⁴

How does the OECD function? The OECD has 2000 employees headquartered in Paris with satellite informational offices in Washington, Mexico City, Berlin, and Tokyo. Donald Johnston, a former Canadian cabinet member, is Secretary General of the OECD. In office since 1996, Mr. Johnston was recently reappointed to another 5-year term.

Each member nation has a permanent representative to the OECD. Ambassador Jeanne Phillips, appointed by President Bush in September 2001, heads the U.S. mission to the OECD. The national representatives form the OECD Council Body, which adopts decisions that are binding on all OECD members.

There are nine Policy Directorates in the OECD: Economic, Environment, Development, Public Management, Trade, Finance Fiscal and Enterprise Affairs, Science Technology and Industry, Education Employment Labor and Social Affairs, and Food Agriculture and Fisheries.

A total of 140 Committees or Working Groups focus on aspects of policy developed under the Directorates. In addition, there are numerous task forces and *ad hoc* groups. The OECD functions as an administrative shell that recruits talent and expertise from member governments and private contractors to perform analyses and render opinions.

A Precedent: How the OECD imposes "consensus." Recent OECD projects undermine the U.S. competitive position, threaten its sovereignty, and reflect an EU bias. Most notably, the OECD launched a project in 1998 to force tax havens to change their tax and financial privacy laws.⁵ The "Harmful Tax Competition" initiative blacklisted 41 Caribbean and Pacific islands, demanding they stop tax breaks for foreigners or face sanctions by the OECD member nations.⁶ Not coincidentally, the EU has been debating the merits of imposing one harmonized tax rate across its borders in order to stop capital flight within the European Union.

Though the project had no basis in law, or good-faith negotiation, the aggressive "peer pressure" tactics of the OECD succeeded in getting 11 islands to change their laws. The initiative has been scaled back considerably under Treasury Secretary Paul O'Neill. However, the OECD is continuing with the project. This episode is worth noting, as the OECD continues to present itself as a consensus-building organization that acts in the interest of its members and asserts its authority to make policy prescriptions for non-members.

The European Union's Chemicals Strategy. In February 2001, the European Commission released a White Paper on the EU Chemicals Strategy.⁷ The strategy seeks to improve the competitive position of the European chemicals industry via protectionism. Claiming to protect the environment,

⁴ European Commission Press Release, Speech by Mr. Erkki Liikanen on the "European Competitiveness Report," January 30, 2002, p. 3, (European Commission, 2002).

⁵ Singleton, Solveig, "The Need for Financial Privacy," in Tax Competition: An Opportunity for Iceland, ed. Gissurarson and Herbertsson, (The University of Iceland Press, Reykjavik, 2001).

⁶ Ibid., Dan Mitchell, "The Case for Tax Competition," The OECD thinks it is wrong for taxes to influence decisions regarding where to work, save, and invest. The only way to keep taxes from influencing economic choices, however, is for all countries to 'harmonise' their tax systems.

⁷ European Commission, *White Paper: Strategy for a Future Chemicals Policy*, (European Commission, February 27, 2001).

safety and health, the strategy would require more testing and stringent regulation of chemicals in a system called REACH (Registration, Evaluation, and Authorization of Chemicals).⁸ In a November 2001 resolution, the European Parliament expanded the scope of the strategy to include all chemicals and consumer products.⁹

At the heart of the EU's Chemicals Strategy is the potential to ban or delay the introduction of a chemical or product based on the "precautionary principle."¹⁰ The precautionary principle holds that the mere possibility that a chemical poses a risk is enough to justify banning a product. It allows policymakers to take regulatory steps even when evidence of risk is lacking. In the U.S., regulators are generally required to perform risk assessments to justify bans and regulations. Although U.S. risk assessments often overstate risk and produce needlessly onerous regulations, products are not assumed to be dangerous until proven so. Strict application of the precautionary principle would require that all products containing a given substance be banned if manufacturers cannot prove that a substance is 100 percent safe. The costs of this approach would be staggering.

According to the State Department, "virtually all U.S. chemical exports, totaling \$17 billion annually, will be affected, and nearly every industrial sector will be impacted."¹¹

Strategic target and test results. The EU's strategy targets new substances,¹² most of which are produced in the U.S. When EU scientists applied the tests called for in their strategy, 70 percent of new substances they tested were classified as dangerous.¹³ Canadian scientists found more than one-third of their inventory of 23,000 existing chemicals would be ruled hazardous under the EU's tests.¹⁴ Such a large number of positive results suggest that a testing rationale based on hazards rather than risks is questionable. It also means the EU could employ its Chemicals Strategy to strike a severe blow to the U.S. chemical, pharmaceutical, and consumer products industries, effectively blocking entire markets to new products.

Under the REACH system, exporters of products to the EU must show their product poses no hazard using their own data. If their data is deemed inadequate or submitted late, the product may be denied entry: "no data, no market." Chemical products must be subjected to OECD or equivalent tests to determine if they have potential cancer causing effects,¹⁵ affect the endocrine system, accumulate in the body, or are persistent or toxic in any way. A positive result indicates a hazard. However, there are

⁸ According to the EU's Chemicals Strategy, the number of tests to be performed by the EU will be reduced due to U.S. tests performed under the HPV/HICA SIDS program of the OECD, also known as the "Gore Initiative," *Ibid.*, p. 9; see also <http://www.americanchemistry.com>, "HPV Challenge."

⁹ European Parliament, *Resolution on the Commission White Paper on Strategy for a Future Chemicals Policy*, p. 12, (European Parliament, November 15, 2001).

¹⁰ Communication from the European Commission on the Precautionary Principle, COM (2000), February 2, 2000.

¹¹ U.S. State Department, "U.S. Government Views on EU Chemicals Policy: Action Request to non-EU States," 2002 (U.S. State Department, March 22, 2002).

¹² New substances are substances not in use in the EU before September 1981, European Commission, *White Paper: "Strategy for a Future Chemicals Policy,"* p. 29, (European Commission, February 27, 2001).

¹³ *Ibid.*, p. 24.

¹⁴ 8000 of an inventory of 23,000 chemicals tested positive for persistence and toxicity and/or for bioaccumulation and toxicity, (David McBain, Chief, New Substances Division, Environment Canada).

¹⁵ When labeling chemicals as carcinogenic, environmentalists tend to cite rodent tests. The tests involve massive exposure of the chemical to rodents bred to be cancer-prone. Researchers then infer that humans may also develop cancer if exposed to small amounts of that chemical. See Ames and Gold, "Too Many Rodent Carcinogens: Mitogenesis Increases Mutagenesis," *Science* 249 (August 31, 1990): 970.

numerous problems with this approach. The science on endocrine disruptors is far from clear. In natural systems, hormones affect the endocrine system. Under certain tests, endocrine disruptors may be inaccurately characterized as dangerous. Further, a National Academy of Sciences report recently stated that it lacked data showing that "hormonally active" compounds caused any adverse impacts on humans.¹⁶ Even in the absence of a proven risk, the precautionary principle may be arbitrarily invoked to ban a product. This is a technical barrier to trade under World Trade Organization rules.

The OECD and the EU's Chemicals Strategy. Although the International Program on Chemical Safety (IPCS)¹⁷ was created to develop a scientific basis for global chemicals management, environmentalists prefer to use the OECD as a vehicle to administer their agenda in the area of chemical safety.¹⁸ Thus, parts of the EU's Chemicals Strategy were developed within the OECD.

The U.S. and the OECD. Many economists in the U.S. value reports developed by the OECD. They consider the OECD to be a good forum for certain subjects. Many government employees regard their experience with the OECD to be positive. But the work of U.S. employees on OECD projects is isolated, uncoordinated, non-transparent, and untracked except possibly by the U.S. mission to the OECD in Paris.

The US exhibits schizophrenic policy toward the OECD. It supports the OECD's chemicals work, yet doesn't endorse hazard-based assessments, a product of the OECD's chemicals testing framework. Nor does the U.S. support the precautionary principle, a concept which OECD documents try to present as part of customary international law.¹⁹

Despite U.S. support and membership, the OECD acts counter to U.S. interests. It supports the EU position on the Kyoto Protocol, harmonization of tax rates (one tax rate across borders), stringent biotechnology regulations (traceability and labeling of foods), restrictions on hormone-treated beef, animal welfare, and geographic indicators, (e.g., requiring the word "Chablis" be reserved for wine produced in the Chablis region of France). The EU moved most of these topics to the OECD from other legitimate international forums where more scientifically-based findings were less favorable to the EU.

EU bias in the OECD is, at times, blatant. OECD documents appear to be the work of the EU's legal counsel, in that they develop arguments against the trade position of the U.S. In supporting the EU's interests in such a broad range of areas, it has become necessary for the OECD to duplicate the work, and usurp the mandates, of several other global organizations and programs in which the U.S. has a stronger position -- such as the World Health Organization, the Food and Agriculture Organization,

¹⁶ National Research Council, *"Hormonally Active Agents in the Environment,"* Washington, D.C.: National Academy Press, (2000).

¹⁷ Role of IPCS (International Program on Chemical Safety, WHO/UNEP/ILO), http://www.who.int/pcs/pcs_about.html.

¹⁸ Intergovernmental Forum on Chemical Safety, a conference of Environment Ministers established to implement Agenda 21, Chapter 19. See <http://www.epa.gov/oppfd01/international/support.html#C1>.

¹⁹ For example, *"Uncertainty and Precaution: Implications for Trade and Environment,"* OECD COM/ENV/TD(2000)114/REV1, May 4, 2001, especially paragraphs 25-40 and 107-113;

See also *"The Role of Precaution in Risk Assessment and Management: An American's View,"*

John D. Graham, OMB, remarks prepared for *"The U.S., Europe, Precaution and Risk Management: A Comparative Case Study Analysis of the Management of Risk in a Complex World,"* January 11-12, 2002;

http://www.whitehouse.gov/omb/inforeg/eu_speech.html.

Codex Alimentarius, the United Nations Environmental Program (UNEP), and the International Program on Chemicals Safety (IPCS).²⁰

For all of the criticisms one may have for the UN and its organizations, at the very least these bodies have been given legal mandates. Chemical safety was assigned to the IPCS in 1972 by the UN Conference on Human Environment. The chemical safety mandate of the IPCS was reaffirmed in 1992 by the UN's Conference on the Environment and Development in Agenda 21, Chapter 19. In recognizing Codex Alimentarius as a standard-setting organization for foods, the WTO indirectly affirms the role of the IPCS, which performs the scientific work on chemical safety for Codex.²¹ Codex Alimentarius is transparent. Industry, government, and the public are involved in its meetings. OECD meetings and policy-making are usually opaque and inaccessible to the public, to the press, and sometimes even to members and observers. Though the OECD is neither a law-making body nor a scientific organization, it is trying to become a global regulator in the areas of tax, trade, safety, health, and the environment.

OECD: a global regulator? In order to extend the influence and reach of the OECD, Donald Johnston, its Secretary General, has expressed a desire to expand its membership.²² He intends to ask G-7 nations, at their upcoming summit in June 2002, to create a task force to reorganize the "international governing architecture."²³ Recent OECD publications develop the idea of transferring authority from national governments to a supranational authority. The transfer of authority from individual countries to the EU is cited as the ideal model.²⁴ Globalization, it is argued, has reduced the policymaking capacity and legitimacy of national governments. Multilateralism is now a form of governance.²⁵ The EU says its own experience in governance should inform global governance.²⁶ EU support for the OECD's role in global governance is ensured because close cooperation with the OECD is guaranteed under the treaty that established the European Community.²⁷ Under such a transfer of power, the OECD's regulatory influence would be global. The OECD suggests that the UN would better accomplish its mission through a reformed OECD.²⁸

Secretary Johnston cites the OECD's founding convention, which binds all members to Council Body decisions, as a means of achieving this transfer of power. He believes there is no need to change the present convention to accomplish this aim. He will ask G-7 nations to begin taking steps to enable the OECD to become a supranational regulatory authority through which other organizations may work.

²⁰ Websites: <http://www.who.int/>; <http://www.fao.org/>; <http://www.codexalimentarius.net/>; <http://www.unep.int/>; <http://www.who.int/pcs>.

²¹ WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Article 3, (April 15, 1994).

²² OECD, *OECD-Challenges and Strategic Objectives*, p. 16, (OECD, October 23, 2001).

²³ *Ibid.*, p. 18.

²⁴ OECD, *Government of the Future—Getting from Here to There*, pp. 35, 101, and 207 (OECD, 2000).

²⁵ OECD, *Governance in the 21st Century*, 2001, pp. 56-58.

²⁶ European Commission, *White Paper: European Governance*, July 25, 2001, pp 5 and 26, (European Commission, 2001) see also European Commission, "Harnessing globalisation: do we need cosmopolitics?" p. 5, Speech by Pascal Lamy at the London School of Economics, (European Commission, February 1, 2001).

²⁷ Consolidated Version of the Treaty Establishing the European Community, (incorporating the Treaty of Amsterdam, October 2, 1997): Article 301 (ex Article 231), "The Community shall establish close cooperation with the Organization for Economic Cooperation and Development, the details of which shall be determined by common accord."

²⁸ OECD, *OECD-Challenges and Strategic Objectives*, p. 21, (OECD, October 23, 2001).

The Danger: On What Authority Are OECD Policies Binding? The OECD is not a law-making body. But according to Article 5 of its 1960 Convention:

- “In order to achieve its aims, the Organization may,
- (a) take decisions which except as otherwise provided, *shall be binding on all members* (emphasis added)
 - (b) make recommendations to all Members; and
 - (c) enter into agreements with Members; non-member States and international organizations.”²⁹

In the 1990s, the OECD emerged as an organization that doesn't merely promote policy but tries to assert legal and regulatory authority over members and non-members, relying on the binding nature of Article 5.

What is at stake? What kind of damage could the EU's Chemicals Strategy have on U.S. industry? The State Department estimates \$17 billion in chemicals exports will be affected. This figure does not take into account other affected industries, those that use chemicals in their production: plastics, medical devices, toys, and consumer goods. The U.S. chemicals industry estimates the total cost of the EU's testing requirements to be between \$5.5 billion and \$9.6 billion.³⁰ Just four commercially important chemicals account for a loss of \$8.8 billion through import bans or restrictions.³¹ The damage of such a policy is not merely monetary; jobs are also at stake. The EU's focus on the precautionary principle will lead to arbitrary discrimination against U.S. chemicals and products. The EU's strategy in blocking U.S. beef provides a cautionary note.

In 1999, the WTO ruled in favor of the U.S. in its case against the EU's import ban of hormone-treated beef. The EU was unable to demonstrate that U.S. imports created a risk to health. It could not prove that hormones were present in U.S. beef in levels above those in untreated beef. The scientific findings that supported the U.S. case were developed through Codex Alimentarius. In its ruling, the WTO did not find the precautionary principle (which the EU gave as its legal argument to support the import ban) to be part of customary international law.³² But the EU continues to block \$116.8 million worth of U.S. beef per year, saying it's still gathering evidence to prove its case. Now the EU has support for its case via the OECD. Even though hormones in beef are naturally occurring and at harmless levels, flawed tests developed by the OECD could label them as endocrine-disrupting substances, subject to an import ban under EU's Chemicals Strategy.

What should be done? Unless the U.S. chooses to publicly denounce the OECD's policies, by virtue of its membership the U.S. is tacitly supporting, accepting, and bound by the work of the OECD. The OECD has moved from suggesting to imposing policy. Its efforts to become a global supranational regulatory body pose a direct threat to U.S. sovereignty and industrial competitiveness.

²⁹ OECD, “*Convention on the Organization for Economic Cooperation and Development*, Paris,” December 14, 1960, (OECD, 1960).

³⁰ U.S. State Department, *U.S. Government Views on EU Chemicals Policy: Action Request to Non-EU States*, (U.S. State Department, March 20, 2002).

³¹ Acrylonitrile, propylene oxide 1, 3-butadiene, and phenol (American Chemistry Council).

³² United States Trade Representative, Press Release, “WTO Finds U.S. Trade Damaged by EU Beef Import Ban,” July 12, 1999; <http://www.ustr.gov/releases/1999/07/99-58.pdf>.

- 1) Before the G-7 meeting, the U.S. should persuade members to derail OECD's attempts to expand its authority and become a supranational regulatory body. If that doesn't work, the U.S. should veto Secretary Johnston's proposed resolution.
- 2) The U.S. should deal with the EU only on a bilateral basis. The U.S. should withdraw from the OECD and direct its resources to more apolitical global organizations.
- 3) The U.S. should be prepared to demonstrate that, in its current form, the EU Chemicals Strategy creates non-tariff technical barriers to trade.
- 4) Recently, U.S. Ambassador to the OECD Jeanne Phillips asked the U.S. to cut funding for OECD programs that fall outside of the OECD's economic mandate. Since the OECD's founding purpose was to develop economic policy, industry must also petition the Bush Administration to transfer non-economic work and resources back to the institutions where such work belongs. As a start, the OECD's chemicals safety work should be transferred to the International Program on Chemical Safety (IPCS), where scientists are better able to refine testing rationales.
- 5) The OECD should resume its original mandate as a European regional policy institution that tracks the economic progress of nations, fosters dialog among members, and recommends policy actions. Valuable work has been done and continues to be produced by the OECD. But with its present lawmaking and governing aspirations, it has far over-stepped its initial purpose.