THE MAGINOT MENTALITY PERSISTS

Codex Alimentarius vs. DSHEA

By Scott C. Tips

After the bloodbath in the fields of France during the First World War in which almost 1.4 million French lives were lost, the Third French Republic was determined that this would never happen again. Vast sums were approved in the 1930s to construct a series of strong forts and powerful buried defensive positions strung in a line on the border between France and its old enemy Germany. This became known as the Maginot Line, named after André Maginot, the French Minister of War at the time; and it is best remembered as a huge failure.

In a literal sense, though, it was not. For although the Germans outflanked the Maginot Line with their massive assault through the undefended Ardennes Forest in May 1940, they never really successfully attacked the Maginot Line itself (with the exception of one of its forts that did fall). The problem was not that the Line was flawed as a concept, the problem was the ***mentality*** that went with it.

The Maginot Mentality was a French belief that that France was safe behind its ultra-modern and advanced protection system. The French, they thought, could relax and

breathe easier. And they did, until the whole system, the whole Line, was outflanked; and in a matter of weeks, the French Army, the largest and strongest in Europe up to that point, and the Third French Republic disintegrated and then disappeared into the dustbin of history. The French are now enjoying – somewhat – their *Fifth* French Republic; but they have never forgotten what happened so shockingly fast in 1940.

Nor should we forget. For therein lies a lesson for all of us in the wholefoods industry who fought so hard in the early-to-mid-1990s for the enactment of the Dietary Supplement Health and Education Act of 1994 (DSHEA). DSHEA is currently celebrating its 20th anniversary this year, but it is really nothing but a legislative Maginot Line, and like the Maginot Line, it can be outflanked. Even worse, it can be more easily defeated and eliminated at any time by a mere majority vote of both the House and the Senate.

So Why Do We Feel So Secure?

Many of us in the whole-foods and health-freedom movements from the 1980s remember all too well the arbitrary powers that the Food and Drug Administration (FDA) had in abundance. When it came to dietary supplements, numerous times the FDA would just simply decree that a combination of vitamins and minerals that it did not like constituted a new food "additive" because it was in a new and unique combination. As a food additive, the new combination would be treated under FDA regulations as if it were some toxic chemical and needed to have its safety proved at great expense first.

The situation became even worse when in 1990 the Nutrition Labeling and Education Act was passed, an act that was viewed by many as simply tightening FDA control even further over the dietary-supplement industry and, thus, consumers. A backlash amongst consumers resulted and a more pro-health and pro-consumer bill was proposed to rein in the FDA and restrict its arbitrary powers.

Congress was almost literally inundated in an immense outpouring of mail, faxes, and phone calls. In fact, on this issue, Congress received more mail and communications than it had received on any issue since the Vietnam War! DSHEA was the ultimate result. And we have been reaping its health benefits ever since, with the appearance of more innovative products each year (now some 1,000 per year) than was ever contemplated by DSHEA's proponents.

We have had DSHEA now for twenty years and the wholefoods industry and consumers have grown accustomed to its existence. For the American attention span, twenty years is a very long time. Both industry and consumers, which have grown, cannot envision any way that things will change. They feel secure because the passage of time has been on their side. Bills to limit or eliminate DSHEA have come and gone. Some bills have shown some marginal success at chipping away at the edges of DSHEA; but, in all, the core

of DSHEA has never been threatened during its two-decade-long existence. In a sense, like social security but to a lesser extent, DSHEA has become a "third rail" of politics – untouchable by politicians. Proponents of DSHEA have thus grown fat and sassy about its invulnerability.

The Flank Attack

The opponents of DSHEA, those who would love nothing more than to tell you and me what we should and should not consume, are not stupid. They have long recognized that direct attacks upon DSHEA have not worked and, even worse, can stir up counter-attacks that might even extend the freedoms of DSHEA.

Working carefully, at a distance and invisibly to most Americans, certain of these opponents – primarily the FDA and its pharmaceutical concubines – have been setting the stage to outflank DSHEA through a series of interlocking treaty and trade agreements that will require the United States to adopt international food standards that will, ***by law***, supplant DSHEA and install instead a regime of vicious and arbitrary controls upon food and food supplements in the United States. DSHEA will be outflanked – indeed, it almost already is – and it will be replaced. Gone will be the freedom for us to manufacture and consume that multitude of healthful substances that we know about. Equally bad, gone will be those many innovative researchers and manufacturers who for a decade now have been discovering and offering us new and more beneficial, natural ways to protect and enhance our health without harmful side effects.

By working through international organizations, treaties, and trade agreements, these opponents can advance their anti-consumer goals more easily because they use unelected bureaucrats and functionaries who are accountable to virtually no one – certainly not to the average citizen. Moreover, by working internationally, the meetings and events at which these actions take place (where treaties, agreements, rules, and "guidelines" are negotiated and drawn up) occur on distant shores and are unusually unreported by the mainstream press. Most Americans and Canadians, let alone the rest of the world, never, ever, hear of these events – unless they are privy to Whole Foods Magazine, or alternative and non-mainstream news.

Regardless, by the time most citizens even become aware of these events, it is or will be far too late for them to do anything about them. That's why this flanking maneuver by DSHEA's opponents is so insidious – when the net is drawn about a largely unsuspecting public, the public will not be able to do anything but submit.

Most Industry Members and Consumers Are Asleep at the Wheel

Unfortunately, some industry and consumer leaders claim that Codex is not a threat to DSHEA and that the industry and public need not worry about it at all. Most of these statements are readily accepted as accurate. But a great disservice is being done by these claims because action that could be taken now to head off the implementation of strict Codex guidelines and standards is being deferred until it is too late.

Essentially, the argument is that even if the Codex standards that are finally established are harsh (and indeed they will be far harsher than what is currently permitted in the United States), they will only apply to international trade and can ***never*** be imposed on the domestic American market. Some will admit that it would take another country launching a trade dispute against the United States to force any domestic legislative change but that since DSHEA gives more liberal requirements than other countries do, these unnamed other countries could never win since their own food-supplements would easily fall within the permitted sales parameters of DSHEA. In short, the argument goes, there would be no trade barriers to the sale of those other countries' goods within the United States.

For the reasons set forth below, these views are either wrong or else tell an incomplete story. Like a tightly interwoven cloth, many different structures already exist and are being expanded to such an extent that it will be impossible for the domestic laws of any countries to ultimately escape the international food and food-supplement standards that are descending upon them.

10 Reasons Why Codex Will Trounce DSHEA

Reason No. 1: The World Trade Organization. In all international food-trade disputes, the WTO uses Codex texts as its reference point for resolving those disputes where issues pertinent to Codex – such as health and sanitary measures – are at stake, and WTO Members are legally obliged to abide by its rulings. Trade disputes could result in a ruling adverse to the United States requiring a change in domestic American laws. While the WTO cannot itself force a change in any member country's domestic laws, it can levy a monetary or trade sanction that will very strongly encourage the member state to repeal or alter the domestic law itself. This event has already occurred in the United States.

Increasingly enhanced international enforcement mechanisms are the trend. The WTO's predecessor, GATT, operated for years without even the right to impose sanctions. Now, the WTO can impose harsh trade sanctions. What plans are in store for WTO's successor (or parallel) organization and ***its*** enhanced powers that we have not even been told about yet?

If there is one thing you can be certain of in this World, it is that international organizations such as the WTO are merely way-stations on the greater road to highly-centralized, global

institutions that will wield powers previously reserved to national and regional governments. Watch the trend, and the trend here is – and has been for many decades now – towards increasing global centralization.

Reason No. 2: The Sanitary and PhytoSanitary Agreement. The SPS Agreement (to which all WTO Members are signatories) permeates international trade. Alarmingly, its Preamble specifically mentions Codex and states that WTO Members (and therefore all SPS signatories) desire *"to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission."*

Then, Article 3 of the SPS Agreement reads: "*To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members* ***shall*** *base their food safety measures on international standards, guidelines or recommendations, where they exist.*" (emphasis added)

The web is woven tighter with Article 5.1 of the SPS Agreement's provision that: *"1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations."* For dietary supplements, then, national authorities are required to take into account risk-assessment techniques developed by *"the relevant international organizations"* (i.e., Codex) in establishing safety limits on dietary supplements. Such safety limits will necessarily include (at least in the regulators' minds) limits on both supplement potencies and supplement availability.

Since Codex sets the international standards for food safety, which standards include vitamin-and-mineral food supplements, the SPS Agreement is one of the gateways by which Codex standards will be imposed upon the United States using "food safety" as the justification for harsh restrictions. Look for that key word "food safety" to be used increasingly as the rationale for the application of a ***toxicological*** model towards healthful natural substances. This international trend towards supplement suppression is based in large part upon Codex's new focus upon "the development of methodological aspects for ***over-dosage*** of nutrients."

Reason No. 3: The Central American Free Trade Agreement. Modeled after the "success" of NAFTA, CAFTA is an attempt to create an even larger regional block in the Western Hemisphere on the model of the European Union. Section 6 of CAFTA requires its members to form an SPS Committee for the purpose of insuring ongoing harmonization under the terms of the SPS Agreement. It is important to read the *Agreement* itself and not just the Act so as to uncover the provisions governing dietary supplements. Sections 6 and

7 further lock-in CAFTA signatories' commitments to the WTO, SPS, and Technical Barriers to Trade (TBT) Agreements. This not only entangles the United States and other signatories in the developing maze of Codex regulations, but it sets the stage for yet further tie-ins in future trade agreements or expansions of trade agreements such as the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).

CAFTA also provides that within 30 days of its passage, an inter-governmental committee must convene and work to assist the seven signatory governments in carrying out their ***obligations*** under the WTO and SPS Agreement. Cleverly, the word "harmonization" is not to be found directly in CAFTA's Section 6; but it is of course found in Section 3 of the SPS Agreement itself, to which later agreement CAFTA refers.[1]

CAFTA is yet another puzzle piece that is intended to fit into place so as to require domestic harmonization to international Codex standards.

Reason No. 4: The Free Trade Agreement of the Americas. An expansion of the CAFTA idea, which in turn was an expansion of the NAFTA idea, the Free Trade Agreement of the Americas (FTAA) is yet another tightening of the net. Not surprisingly, its Articles 19 and 20 mandate U.S. harmonization to the standards of "relevant international organizations." The existence of FTAA and its being fostered on an unsuspecting public by politicians and the mainstream media is just yet further proof that we are not done with the "harmonization" agenda. It's a process that is ongoing (witness also the TPP and TTIP), and to which we are only allowed to know what they want us to know – unless we ferret out the information ourselves.

Reason No. 5: The FDA Itself. FDA's own policy and mindset seeks harmonization and the eventual elimination or emasculation of DSHEA. The United States *Federal Register*, October 11, 1995, specifically describes FDA's policy on the development and use of standards for the international harmonization of regulatory requirements and guidelines. In there, FDA states that *"where a relevant international standard exists, or completion is imminent, it will generally be used in preference to a domestic standard . . . .."* This dovetails with FDA's actions time after tiring time at Codex meetings where they have done nothing – or at most almost nothing for cosmetic purposes – to protect consumer access to dietary supplements. Indeed, at these meetings, the FDA functionaries are often the ones leading the grand charge towards harmonization.

These FDA efforts to harmonize American food rules and regulations have even been admitted to elsewhere by the FDA. In a responsive letter to then-Representative Ron Paul's demand of July 28, 2006, for information about such efforts, the FDA admitted that, "*FDA does, however, intend to continue in various ongoing harmonization efforts under other currently-existing mechanisms, such as the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH); the*

International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH); the Global Harmonization Task Force (GHTF, for medical device harmonization); the International Organization on Standardization (ISO); and other voluntary standards organizations (such as the Codex Alimentarious [sic] *Commission, the NAFTA SPS Technical Working Groups, and the Food and Agriculture Regulatory Systems activities of the Security and Prosperity Partnership.*" While the FDA also disingenuously told Rep. Paul that it was excluding dietary supplements from its harmonization efforts, the truth can be seen in its subsequent actions during the intervening years (see below).

Recall, too, that the FDA and the Federal Trade Commission (FTC) have entered into the so-called Trilateral Cooperation Charter, a form of regulatory "handshakes" with their counterpart agencies in Canada and Mexico to conduct joint enforcement activities across national borders and to further the partnership that the chief executives of those three countries are fostering on many levels, not just on a dietary-supplement level. Neither Canada nor Mexico has DSHEA-type laws and any further harmonization towards those countries' systems of dietary-supplement regulation will be antithetical to DSHEA.

Most ominously, however, the FDA has, in its recent Proposed Rulemaking for Nutrition Labeling, put forth a number of label changes to foods and food supplements that will align our rules with Codex standards.[2]

Ever since the National Health Federation's victory at the 2009 Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) meeting (where an Australian-led attempt to reduce, across the board, vitamin-and-mineral NRVs was rebuffed), Australia and other Codex delegations have continued pushing their anti-nutrient agenda. Conspicuously silent during these debates has been the U.S. delegation. Now we know why.

Interestingly enough, Codex Alimentarius is mentioned in the FDA's Proposed Rulemaking multiple times. And with this Proposed Rulemaking, the FDA wants to dumb down our RDIs to the abysmally low Codex levels with no fewer than eight vitamins and minerals, while one (folic acid) already matches the Codex NRV and two others are within spitting distance. In the case of Biotin, FDA proposes to cut its Reference Daily Intake by 90% in order to match the Codex value![3]

While a few RDIs have actually been raised – ill-advisedly in the case of Calcium – these are the bare exceptions. In the near future, if the FDA has its way in implementing its Proposed Rulemaking, we can promise you that the FDA will work to conform the other Nutrient Values to those of Codex – either trying to nudge the Codex values up to still-low FDA levels or else reducing FDA levels down to Codex ones.

Were those Global standards for vitamins and minerals higher than our own, then such a change might be advisable, even admirable. But we all know that most of the rest of the

World *despises* supplementation, either separately or in foods, and since these proposed label changes for daily values apply equally to the Supplement Facts panel as they do to the Nutrition Facts panel, they are very dangerous changes indeed for the supplements that consumers rely upon.

There is a definite connection between these proposed ***daily*** values and ***maximum upper permitted levels***, with harmonized global standards paving the way for overall ***reduced*** vitamin-and-mineral levels whether in pill form or food form. This is my 15th year of actively participating and arguing about dietary-supplement and general-food standards and guidelines at Codex meetings and I have seen the trend. Believe me, the trend is not your friend, not here.

Reason No. 6: The Codex Procedural Manual. In 2004, over the National Health Federation's strong objections, the Codex Committee on General Principles (CCGP) and the Commission itself decided to delete the notification-and-acceptance procedures from the Codex Procedural Manual. Prior to this deletion, three levels of acceptance for Codex texts had existed (acceptance, rejection, acceptance with changes); and countries were accordingly permitted to notify the Commission as to which level of acceptance they would apply to each individual Codex standard within their territories. With that provision now gone, the already-thin veneer of Codex's "voluntary" nature was stripped away. In short, the Codex officials and its member States no longer see a need for "acceptance" procedures when the Guidelines will be deemed automatically accepted by them regardless.

Reason No. 7: The Codex Guidelines for Vitamin and Mineral Food Supplements. The text of the *Codex Guidelines for Vitamin and Mineral Food Supplements* supports the mandatory application of the Guidelines within the jurisdictions of its member States. Specifically, the *Guidelines* states in its Paragraph 1.2 that "These Guidelines *do apply* in those jurisdictions where products defined in 2.1 [i.e., vitamin-and-mineral food supplements] are regulated as foods." (emphasis added). Because the United States is one of those jurisdictions that regulates dietary supplements as a food, the *Guidelines* will and do apply.

In 1985, the United Nations adopted UN Resolution No. 39/85, which resolution adopted guidelines for consumer-protection policies. Among other things, this Resolution highlights the fact that "Governments should take into account the need of all consumers for food security and should support and, as far as possible, adopt standards from the . . . Codex Alimentarius." The "food safety" and "food security" drum is an instrument that is repeatedly beaten by Codex committees and its participants, as if it should preclude an individual's right to select his or her own path to food security.

Reason No. 8: The Codex Alimentarius Commission's Strategic Plan 2008-2013. The Codex Strategic Plan clearly and unequivocally states, in its opening Strategic Vision

Statement, "*the Commission will develop internationally agreed standards and related texts* ***for use in domestic regulation*** *and international trade in food that are based on scientific principles and fulfill the objectives of consumer health protection and fair practices in food trade.*" (emphasis added)

Other mentions of domestic application of Codex standards and guidelines appear throughout the document. For one more example, under "Goal 2: Promoting Widest and Consistent Application of Scientific Principles and Risk Analysis," Codex again states that it intends its texts to be applied "at the international and national levels."

The successor Strategic Plan, just out this year, is equally clear and plain in its intent, as was the predecessor five-year strategic plan of Codex. Codex fully intends that all nations eventually adopt and apply its standards and guidelines at the national level.

Reason No. 9: Judicial Activism. American judges are increasingly looking to international law in making their decisions. *"Judges in the United States,"* U.S. Supreme Court Justice Ginsburg noted in her address to the Constitutional Court of South Africa, *"are free to consult all manner of commentary—restatements, treaties, what law professors or even law students write copiously in law reviews. For example, if we can count those writings, why not the analysis of a question similar to the one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights? ... The notion that it is improper to look beyond the borders of the United States in grappling with hard questions . . . is in line with the view of the US Constitution as a document essentially frozen."* This, along with a number of court cases where judges have applied international law to domestic cases, underscores the fact that the American judicial system will be, and has increasingly become, friendly and accustomed to the idea that international law should be applied domestically. This incredible sea change in the application of U.S. laws by the judicial system does not bode well for DSHEA in the face of any eventual legal challenge to it or any part of it, especially by anything deemed by the courts to be an international treaty trumping American law.

Reason No. 10: Internationalism. Given all of the above, indicative of a web of interlocking treaties, trade agreements, executive "handshakes," and other actions taken without our real approval or even oftentimes knowledge, the foremost reason that DSHEA is threatened is because all of the above events, actions, and mindsets are creating an atmosphere no longer conducive to guarding national integrity. The continued development of international institutions such as Codex and the WTO (and its eventual successors) as well as the relationships between and among Codex and national authorities regulating the food and food-supplement markets ensure fertile ground for rulemaking absolutely antithetical to DSHEA. Rather, the future environment, unless this trend is reversed and reversed soon, will be to "harmonize" our regulatory regime (which includes

DSHEA) to those of the 99% of the countries of the World that treat supplements like drugs. The pressure to conform will be enormous, and there are enough powerful persons domestically who support this agenda to act as 5th Columnists to drag us down to this lesser-level of freedom. This is the ultimate reality that must be dealt with.

Still Fighting the Last War

Charitably, let me write that, like the French in 1939-1940, the current trade associations and related hangers-on are still fighting the last war. These well-intentioned individuals warm-heartedly remember the victory of 1994, feeling secure behind DSHEA. Some even argue that any severe threat to DSHEA will result in a rapid mobilization of opposition that will crush any anti-DSHEA proponents and their actions. Like the French in 1940, however, the Americans do not see the Germans and others outflanking them.

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[1] See applicable text in CAFTA on SPS at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

[2] *See* "Food Labeling: Revision of the Nutrition and Supplement Facts Labels," 79 *Federal Register* 11879-11987, March 3, 2014, at: https://www.federalregister.gov/articles/2014/03/03/2014-04387/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels.

[3] 79 *Federal Register*, Table 2 at page 11931, which reveals all.