

THE MAGINOT MENTALITY

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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 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 first.

The situation became somewhat 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 nearly thirteen years and the wholefoods industry and consumers have grown accustomed to its existence. For the American attention span, thirteen years is a very long time. Both industry and consumers, which have grown, can not 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 more-than-a-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 allies – 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 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, trade associations such as the National Nutritional Foods Association (NNFA), the Council for Responsible Nutrition (CRN), and the International Alliance of Dietary Food Supplement Associations (IADSA) are telling their members that Codex is not a threat to DSHEA and that they need not worry their pretty, little heads about it at all. Most of these associations’ members readily accept these statements, trusting in their accuracy. But a great disservice is being done to everyone by this misinformation – some would say disinformation – generated by these trade organizations (members of which are being increasingly purchased by pharmaceutical company interests) because action that could be taken now to head off the implementation of strict Codex guidelines and standards is being deferred until these guidelines and standards become a *fait accompli*.

Most of these associations argue 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. A few of the associations admit that it would take a trade dispute between the United States and another country to require 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, the associations’ views are wrong. And 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-supplement standards that will descend upon them. The following reasons are not exhaustive and are only intended to provide a general overview of the problems swelling up on the horizon for DSHEA’s continued existence.

10 Reasons Why Codex Will Trounce DSHEA

Reason No. 1: The World Trade Organization. Where applicable, the WTO uses Codex texts as a reference point for resolving those international trade 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. The WTO cannot itself force a change in any member country's domestic laws, but it can levy a monetary or trade sanction that will strongly encourage the member state to repeal or alter the domestic law itself. This event has already occurred in the United States.

Although admittedly speculative, increasingly enhanced international enforcement mechanisms are the trend. Just remember how the WTO's predecessor, GATT, operated for years without even the right to impose sanctions. Now, the WTO can impose trade sanctions. What plans are in store for WTO's successor 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 centralization.

Reason No. 2: The Sanitary and PhytoSanitary Agreement. The SPS Agreement (to which all WTO Members are signatories) permeates international trade. Alarming, 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) Remember that Codex is establishing the international standards for food safety, which standards include vitamin-and-mineral food supplements.

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. Now that the framework of the Codex *Guidelines for Vitamin and Mineral Food Supplements* has been adopted, risk-analysis numbers to slot into the *Guidelines* are already the topic of

discussion at meetings of the Codex Committee on Nutrition and Foods for Special Dietary Uses. One of the areas here that delegations such as South Africa and the National Health Federation have been opposing is the Committee's new focus upon "the development of methodological aspects for *over-dosage* of nutrients." The Committee's application of a toxicological model towards healthful natural substances is alarming evidence of the international trend towards supplement suppression.

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' commitment 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.

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.

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 FDA. FDA's own policy and mindset requires 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!

Most recently, 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.

Reason No. 5: 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, and to which we are only allowed to know what they want us to know – unless we ferret out the information ourselves.

Reason No. 6: The Codex Procedural Manual. In 2004, over the NHF's strong objections, the Codex Committee on General Principles (CCGP) decided to recommend to the Commission that the notification-and-acceptance procedures from the Codex Procedural Manual be deleted. Prior to this act, 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, a fact rubber-stamped later by the Commission in its subsequent meeting, 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 CCFNSDU 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.

Codex's importance stretches back to 1985, when 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."

Reason No. 8: The Actions and Statements of Codex Officials. During the November 2004 meeting of the Codex Committee on Nutrition and Foods for Special Dietary Uses in Bonn, Germany, I specifically and directly asked (on behalf of the National Health Federation) Dr. Rolf Grossklaus, the CCFNSDU chairman, for either the text of the *Guidelines* or the Committee's Final Report of the meeting to state whether or not it was mandatory for member countries to implement the *Guidelines*. As I recall, Dr.

Jeronimas Maskeliunas, one of the Codex officials, answered me by stating that none of the documents that the Committee is developing are "mandatory." He also noted that "member countries decide how to use them." Yet, upon presentation of the Final Report for review and comment by the delegates and observers, there was absolutely no mention made of either the NHF's question or the response. Dr. Rolf Grossklaus refused NHF's request that the matter be included in the Report and gave no good reason for the refusal. For all official intents and purposes, then, there is no record of this statement and raises serious questions as to why it was kept from the record.

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 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.

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 virtually ensure fertile ground for thinking 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 bulk of the World that treats supplements more like drugs. The pressure will be enormous to do so, and there are enough persons domestically who will 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 supposedly pro-health-freedom organizations and people remember the victory of 1994. They remember how they won that war and now feel 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 outflanking them.