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Environmental Model Generates New US Standards

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Like any number of common sense ideas, ISO 14001, the new global environmental management model, took too long to articulate. Although it sounds pretentious and is unnecessarily confusing, ISO 14001 is an important business and environmental development.

In September 1996, after five years of discussion, the International Organization for Standardization, based in Geneva, Switzerland, issued ISO 14001: the first and most generic in a series (14000 series) of consensual international business standards for environmental management.

Despite its user-unfriendly full title, "Environmental Management Systems - Specification with Guidance for Use", ISO 14001 spells out a thoughtful and usable way for companies to set up an "EMS". It is a disciplined, comprehensive Environmental Management System or program, tailored to the company's needs and integrated into all aspects of company operations. An EMS helps companies and organizations establish and achieve three overall goals:

- Regulatory compliance;
- Internal policy goals; and
- Continual environmental improvement.

An obvious byproduct of an EMS is increased credibility with customers, consumers and regulatory authorities.

The term "ISO" has caused a fair amount of confusion. ISO, generally believed to be an abbreviation for the International Organization for Standardization, is not new. It was founded in Switzerland shortly after World War II to encourage international harmonization in standards for manufacturing products and communications.

Since the late 1940's, over 8,000 internationally accepted standards have been issued, ranging from weights and measures to camera speeds and paper sizes. Contrary to what many believe, ISO is not affiliated with the United Nations or any formal European alliance. It now has approximately 120 voting member bodies (or countries). The American member is the American National Standards Institute (ANSI), which was founded as a national safety organization in 1918 and based in New York City.

Although generally identified as the International Organization for Standards, ISO is not really an acronym for this entity. It comes from the Greek word for "equal". This connotes the whole idea of ISO 14001. It is not so much an organization as it is a concept of voluntary private sector standards to be used internationally.

The ISO 14000 series was inspired, in part, by ISO 9000, the well known and popular consensual "quality management" system, which helped fuel the quality control revolution of the 1980's. Spurred by the momentum toward global markets and international trade agreements, ISO 9000 focuses primarily on product quality and on meeting customer requirements.

ISO 14000, the environmental standard series, like its forerunner ISO 9000, has been characterized as everything from a storybook example of international cooperation toward creation of a new age "green" economy to a conspiracy of certain North American and European companies seeking to write their own international

environmental law. The truth is somewhere in the middle.

Much of the impetus and enthusiasm for the ISO 14000 idea came from the 1992 Earth Summit of the United Nations Conference on Environment and Development in Brazil (where 100 countries agreed on the need for international environmental standards). It also came from the Montreal Protocol and certain environmental aspects of the North American Free Trade Agreement (NAFTA). These developments had a diverse range of authors and participants who were often concerned with cross-border pollution issues.

ISO 14001 is important because it emphasizes preventative rather than "after the fact" environmental management. It has straightforward rules on how to achieve an internal environmental program.

The EMS is designed for any type or size of organization in any country. To create an EMS, a company must do the following:

- Create a policy that everyone in the organization can understand. The policy is an environmental mission statement established by top management and communicated in writing to all employees, customers and the public.
- Set objectives and targets based on regulatory requirements and activities that affect the environment. For example, setting specific and, whenever possible, measurable environmental goals that take into account the technological, operational and economic functions and limitations of the organization.
- Put together a program to achieve the objectives.
- Monitor and measure the effectiveness of the program.
- Continue to review and improve the program.

For example, a regulated American company with manufacturing processes that release pollutants into water, land or air, would identify a complete "top-down" program to manage, monitor and adjust environmental impacts based on the actual experience, current capabilities, resources and regulatory history of the company.

While simple, ISO 14001 is not benign. It is likely to evolve into a set of industry-wide standards of care designed by business that will change the thought processes of executives, environmental managers and environmental lawyers, particularly those in environmental litigation. The ISO 14000 series will comprise of 20 separate standards.

More specific ISO 14000 environmental standards in the recent series or under development are likely to be adopted by the same organizations that use the EMS of ISO 14001. ISO 14004 provides guidelines on principles and techniques to implement or improve an EMS. ISO 14015 addresses environmental site assessments. ISO 14020 and 14024 provide rules on environmental labeling. ISO 14023 discusses environmental testing and verification methods.

In the United States, most companies have attempted to manage environmental affairs by complying in piecemeal fashion with the myriad of statutes and regulations within cost constraints, and often have assumed that statutory and regulatory compliance, often on an emergency basis, will somehow constitute an "environmental program". Given the past successes of the ISO organization, and ISO 9000, many expect the ISO 14000 environmental series to develop new industry-wide standards of care for environmental liability.

Companies will "agree upon" the rules, and may inadvertently set them in stone by following them. Trade associations have done this for years in a number of regulated health and safety areas. Ironically, ISO 14001 studiously avoids establishing specific performance standards.

However, the existence of the standard and other standards in the 14000 series encourages the development of uniform environmental risk management and liability standards for labeling site assessments, environmental audits, duties of disclosure and specific pollution control requirements, to name a few. Many state courts already consider voluntary industry standards to be relevant in determining standards of care and whether a company has acted negligently.

In conclusion, while creating new standards is still a long-term issue that deserves monitoring, the ISO 14000

series and ISO 14001 in particular, are likely to generate scores of new standards over the next two decades as more ISO environmental practices are developed, fleshed out and followed by industry groups.

Advancing Civil Litigation Costs In Germany

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Under German law, civil litigation costs are borne by the losing party, within the scope of statutory limits. If neither party is completely successful, such costs are divided *pro rata*. However, "security" is provided under German law, not for either of the parties, but to ensure that litigation costs will be met. This is achieved in a multi-stage system:

- Third parties "involved" in litigation (witnesses or experts) are reimbursed by the court for their costs and disbursements, so the state is liable for such payments; and
- The court will take action by summoning or calling witnesses or experts, only if it has received an appropriate advance.

The cost of legal representation in court is secured because lawyers may only render services in return for advance payment of fees.

This system of advance payments dispenses with the need for a general security for costs being provided by one or both litigation parties; for example, by means of a deposit. The question remains with regard to which party is liable for the advance payment. Again, the basic rule applies that the advance must be paid by the party that "causes" the costs. This means:

- When the plaintiff starts a legal action, it must pay estimated court costs to the court cashier, and the action will not be served on the defendant unless this estimated payment is made;
- As far as the costs of hearing evidence are concerned, such as witnesses and experts, the party that invokes the evidence must make advance payments; and
- Clients pay advances on lawyers' fees.

If the opposing party is ordered to pay costs, the advances paid means there is a reimbursement claim between the parties. The risk is always borne by the party liable for the advance payments.

Exceptions to the obligation to make advance payments apply only in special litigation cases; for example, in a number of labor law litigation cases, and also if a party receives legal aid due to financial destitution. This is also basically granted to foreigners.

The rule that no security needs to be provided for the opposing party applies only to first instance litigation cases. If a first instance ruling that is not yet final is enforced, which is possible under German law, the enforcing party has to provide the other party with security for the enforced amount because the ruling could be rescinded again in the next instance.

Security may be provided on request by a bank guarantee issued by a German bank.

The provision in Sections 110-113 of the German Code of Civil Procedure is the only special rule that applies to foreigners. It provides that a foreign plaintiff is obliged to provide the defendant with security for litigation costs on request.

The regulation has numerous exceptions and the most important ones apply if reciprocity is guaranteed. This means that if no security is demanded from a German plaintiff in the country concerned, then a foreign plaintiff is also exempt from such obligation.

Most countries are therefore excluded from security that is provided by, and for, foreigners. Based on the European Supreme Court of Justice, to a large extent, jurisdiction security to be provided by, and for, foreigners does not apply within the European Union.

Made in the US: Are Standards Changing?

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The company is in Cincinnati. It appears that all the production happens on the ground floor. Is the product "Made in the United States"?

The federal government recently issued new standards for "irradiated" and "organic" foods, and it is again laying down the law on who may label a product "Made in the US".

In today's global economy, many products contain parts or input from all over the world. May a company label radios "Made in the US", if they are assembled in Northern Kentucky with parts from Japan? If a Cincinnati company makes rattan furniture using American upholstery, but the rattan is from Asia (because it does not grow in Ohio), is the furniture "Made in the US"? What about paper from an Ohio mill where 30 percent of its wood pulp comes from Canada?

US customs require that imported goods are labeled with the country of origin. Otherwise a separate agency, the Federal Trade Commission (FTC), enforces the "Made in the US" law. A company could not import televisions from Korea and label them with American flags that say "Handcrafted in the US". However, what about the machine tools that are labeled "Made in the US" but contain bolts from Germany?

Every company that wishes to label products "Made in the US" has the same questions. What percentage of the products' value must originate in the US to be able to say "Made in the US"?

Traditionally, the FTC applied a fuzzy "all or virtually all" standard. "Virtually all" of the product must be made in the US. However, recently the FTC decided that in today's global economy, raw materials and parts come from all over the world.

The FTC saw it as in American's best interests to give a product 75 percent made in the US an advantage over a similar product 100 percent from China. In 1997, the FTC proposed a new policy by which "Made in the US" could apply to products "substantially made" in the US, and proposed a 75 percent threshold for US content.

Complying with bureaucratic procedure, the FTC opened the issue to "public comment". The vehement opposition to the proposed guideline surprised the FTC. The *New York Times* commented that the ferocity of the response had shocked the commission. Populist radio talk-show hosts pilloried the idea and urged listeners to call in protest. Thousands of angry people flooded Capitol Hill with postcards.

Organized labor mobilized a campaign, but US industry did nothing. Companies were reluctant to admit they wanted to claim "Made in the US", while still using foreign components.

On December 2, 1997, the FTC did an about face when it issued a new policy reaffirming the old "all or virtually all" standard. This means more than just business as usual. The FTC expects to enforce the traditional "Made in the US", while it explores various policy options.

Companies labeling products "Made in the US" need to reassess their defenses. Competitors might blow the whistle, and the FTC will become more aggressive. Also, some competitors may be making illegal "Made in the US" claims.

Globalization of commerce may one day erode the US consumer's jingoism. Americans pay a premium for certain products originating abroad, but the list is short: suits from Italy, wine from France, cars from Germany, cigars from the Caribbean, electronics from Japan and beef from Argentina. When US consumers recognize that foreigners know about quality, and that foreigners also need jobs, "Made in the US" could cease to be an issue.

France Liberalizes Foreign Direct Investment

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On February 14, 1996, Law No. 96-109 amended regulations concerning foreign investment in France. There are three types of investment. They are:

- Subject to an administrative declaration;
- Subject to prior authorization; and
- Where no prior authorization is required.

Foreign direct investment in France is, in principle, without restrictions, requiring only a simple administrative declaration before it is realized. Failure to respect this obligation is penalized with the maximum fine applicable to a Class 4 contravention; which is 5,000 French francs. Certain types of operations are subject to prior authorization:

- Investments in activities related to exercising public authority in France, even though this may be on an occasional basis;
- Investments that may impinge on public order, public health or public security; and
- Investments in research, production or commerce, relating to arms, munitions, gunpowder and other explosive substances that are destined for military purposes or for use in warfare.

Authorization is deemed to have been received one month after the declaration of investment is delivered to the Minister of Economic Affairs, unless, in the interim, the minister pronounces the adjournment of the operation in question. After one month has elapsed, the minister may renounce the right to call for an adjournment.

Failure to apply for prior authorization is subject to a fine equal to the maximum applicable for a Class 5 contravention; for example, 10,000 French francs, and this amount is doubled for subsequent offences.

Additionally, the Minister of Economic Affairs has the power to issue an injunction. If the investment is made without prior authorization or despite refusal of authorization, the minister may call on the investor to desist from the planned action and modify the action or, at the investor's cost, restore all parties to their pre-investment situation.

This may also occur if the minister is not satisfied with investment conditions. Prior to issuing an injunction, the minister must advise the investor of the intention to do so. The investor has 15 days in which to put a case forward.

Furthermore, if an investor fails to respect an injunction, the Minister of Economic Affairs may notify the investor of the situation, and require the investor to respond within 15 days. If the investor fails to respond, a financial penalty equal to twice the value of the unauthorized investment may be imposed.

Finally, all engagements, conventions or contractual clauses entered into, directly or indirectly, in the course of an unauthorized investment in one of the above-mentioned areas, are rendered void. Investments where no prior authorization is required are as follows:

- Setting up companies, branch offices or new businesses;
- Expanding a company activity, branch office or existing business;
- Increasing share-holding in a foreign controlled French company, where the investor already controls more than 66.6 percent of the capital or voting rights in the company;
- Subscribing to a share issue by a foreign controlled French company, where the aim is to raise capital, subject to the investor not exceeding the percentage of shares held before subscription;
- Direct investment operations within an organization whose chief business is property (real estate), other than constructing buildings for sale or rent;
- Foreign direct investment operations not exceeding 10 million French francs, in artisan businesses, the retail trade, hotels, restaurants and services or where the exclusive object is the exploitation of quarries or gravel pits; and
- The acquisition of farming land.

These reforms have led to the almost total liberalization of foreign investment in France.

Italy Makes Radical Changes to Securities Law

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Italian law and regulations concerning capital markets have been radically amended due to implemented European Union Directives. The new regulations and statutes have been devised to update and improve the functioning and operations of the capital markets.

Legislation was enacted recently to induce competition in capital markets by opening the Italian securities markets to foreign investors and dealers. Furthermore, the new laws and regulations have been structured to simplify some procedures; for example, stock exchange listings and public offerings, which previously made it a burden to access capital markets.

The changes in the law were necessary to facilitate easier access to the stock exchange by Italian investors, and to induce them to invest in securities other than treasury bonds, which have been the traditional investment for many Italians. As a result of these amendments and the positive performance of the Italian economy, the Milan Stock Exchange, the most important market in Italy, has been extremely successful, showing an increase of nearly 60 percent.

The privatization of the Italian Stock Exchange was fully implemented in 1997 and it began operating on January 2, 1998. As a result of the new legislation, the Italian Stock Exchange Corporation is authorized to determine securities listings and trading, exclusions or suspensions from securities trading and to organize and manage the capital markets. However, CONSOB will remain the authority in charge of supervising companies seeking to list their securities on the stock exchange, as well as approving information prospectuses.

In conjunction with the Treasury Ministry, CONSOB is drafting a comprehensive law regulating Italian finance and capital markets. The main issues to be regulated by the *Testo Unico della Finanza* include the reorganization of capital markets, brokers' and dealers' activities and the new rules on corporate governance of companies listed on the stock exchange.

The new regulation of investment and accessory services came into effect November 3, 1997. This regulation was designed to open the Italian capital markets to international competition and simplify certain procedures, which previously hindered access to Italian markets. The most significant aspect of regulating investment and accessory services is that brokerage companies and dealers may now determine their internal procedures and market their products in a less restrictive manner.

CONSOB and the Bank of Italy continue to safeguard investors' interests by maintaining supervisory roles in overseeing the operations of companies and banks in the market. The new regulation deregulates the dealers' and market makers' operations, while reiterating the supervisory powers of the Italian authorities.

Regarding investment services, such as portfolio management, the new regulation has introduced provisions that will be inserted into portfolio management contracts, while eliminating others that make reference to limitations in investment securities products not listed on the stock exchange. The regulation's objective is to grant the maximum contractual authority to the parties of the agreement such as the bank, the brokerage firm and the individual investor.

At the end of December 1997, CONSOB also issued a regulation providing new rules for drafting information prospectuses for securities to be listed on the stock exchange. Insider trading was also addressed and stricter rules were put in place. Currently, a draft regulation is being examined, which will permit soliciting investments through the Internet.

Provisions issued by CONSOB in 1997 called for the recognition of 34 foreign regulated markets. As a result, the most important foreign regulated markets are now recognized in Italy. This recent expansion suggests that securities investments traded on foreign regulated markets are no longer subject to previous limitations.

In 1997, the German and Hong Kong authorities for securities and futures signed cooperation agreements and a memorandum of understanding with CONSOB. The agreements are intended to foster cooperation between the authorities and the exchange of information. CONSOB has signed similar agreements with agencies in Belgium, Brazil, France, Ontario (Canada), Portugal, Spain, Taiwan, the UK and the US.

The Italian Stock Exchange had a very successful year in 1997. Due to the privatization of companies such as *Telecom Italia*, ENI, *Banca di Roma* and *Aeroporti di Roma*, investors had the opportunity to diversify their investments by purchasing shares in recently privatized corporations and by investing in investment funds.

The number of investment funds offered to Italian investors increased dramatically and, due to their positive performances, the investors' demands also increased. It is noteworthy that an increasing number of medium-sized Italian corporations are evaluating and considering the possibility of listing on the stock exchange. These and other developments demonstrate both the evolution and growth of the Italian economy, as well as the change in the mentality of its investors.