

UNU-IAS Report

Trading Precaution: The Precautionary Principle and the WTO

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... The specific purpose of this paper is to explore the role of precaution in the WTO Agreements. The paper is part of a series of studies being undertaken at the United Nations University Institute of Advanced Studies (UNU- IAS) to explore the differing standards for regulating biotechnology in different regimes, including the Biosafety Protocol, the FAO Agreements and in various countries that have adopted legislation on these matters, such as Canada, Brazil and India. We hope that this series of case studies will highlight the overlaps and similarities between the various regimes, as well as their differences and the consequences of these differences.

The series is motivated by a belief that a clearer understanding of the various uses of the precautionary principle or approach will contribute to a more cohesive and harmonious approach to the regulation of biotechnology at the international level and mitigate some of the damage that is threatened by the current state of affairs.

The UNU-IAS was established in 1996 as a research and training centre of UNU to undertake research and post graduate education on emerging issues of strategic importance for the United Nations and its Member States. Pursuant to its Statute, UNU-IAS undertakes its work in an independent, neutral and objective manner. A key purpose of the Institute is to promote interaction between the UN System and other bodies. Development of this report is part of the wider programme on biodiversity at the Institute. The programme is also looking at bioprospecting in the deep seabed, certificates of origin for genetic resources and training for developing country officials.

A.H. Zakri, Director, UNU-IAS (p. 1).

Introduction

... This paper examines the debate on the evolution of the precautionary principle in the context of the WTO. In so doing, it attempts to shed light on proposals to enhance the incorporation of this principle in the rules of the multilateral trading system and to diminish tensions in this regard between the WTO and MEAs. It is highly likely that the interaction between the WTO and MEAs will continue to increase as governments tackle

trade-related issues linked to certain environmental concerns, such as trade in genetically modified organisms.

A greater understanding of the precautionary principle is necessary in the multilateral trading system, while there is also a need to grapple with the economic harm that can be caused by the implementation of the principle. Predictable regulatory frameworks that encourage technological innovation and facilitate international trade are important components of economic development, particularly for developing countries. The paper poses some relevant questions in an attempt to discern the issues at stake, and argues that a better understanding of the elements of precaution may avoid confusing the precautionary principle with protectionism... (p. 2).

... Underpinning the debate on the precautionary principle is the fundamental question of how to develop public health and safety and environmental policies when, on the one hand, there is a lack of scientific consensus and, on the other, an important public constituency may have irrational (from a scientific perspective) opinions on the matter. Is it possible to have some common threshold of risk, or, at a minimum, a common practice of risk assessment? (p. 3).

The precautionary principle is related to a range of broader policies and approaches to deal with situations of incomplete or inconclusive scientific information in an era of rapid technological advances. The precautionary principle attempts to fill the gap between scientific uncertainty and risk regulation. The application of precaution will vary according to the circumstances. Nevertheless, while for some it is an overreaching concept, for others the application of precaution is context specific and will vary accordingly. It is precisely these considerations that make it difficult to develop a generally applicable definition of the precautionary principle.⁶

Divergent regulatory approaches in the United States and the European Union are based on public perception of risk and are reflective of differing social preferences. While both regional players take into account aspects of risk and precaution in forming decisions, the manner in which precaution is operationalized is fundamentally different, as well as the principle's status in their domestic laws. Importantly, differing Transatlantic preferences, in some instances, have translated into stricter measures in Europe that place restrictions on trade in certain goods, which are considered acceptable or even desirable products in the United States.

... Two examples in the context of WTO dispute settlement, which illustrate the regulatory differences between the EU and US, are the disputes on hormone-treated beef and genetically modified organisms. **A Transatlantic divide has become clear with respect to these disputes, whereby there are fundamentally divergent understandings of science and its role in risk assessment and regulation.**¹⁰ As set out in this paper, the WTO Dispute Settlement Body (DSB) has struggled to rule on how best to determine the appropriateness of domestic regulations, which are based on precaution and arguably not sufficiently supported by scientific risk assessment. (p. 3).

... 10 For an in-depth treatment of the Transatlantic divergences on precaution see Theofanis Christoforou, "The Precautionary Principle, Risk Assessment, and the Comparative Role of Science in the EC and the US Legal Systems," in Norman Vig and Michael Faure (eds.), *Green Giants?: Environmental Policies of the US and the EU*, MIT, 2004, Chapter 1; Nigel Purvis, "Building a Transatlantic Biotech Partnership," *Biotechnology Regulation*, Fall 2004, pages 67-74; **Lawrence Kogan, "The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk," *Seton Hall Journal of Diplomacy and International Relations*, V(1), Winter/Spring 2004, pages 77-123.** (p. 12).

... Bibliography

...Kogan, Lawrence (2004), "The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk," *Seton Hall Journal of Diplomacy and International Relations*, V(1), Winter/Spring. (p. 16).