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Dictionary of International Trade Law

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...International Trade Law Terms A to Z

...Precautionary Principle

The principle that a country ought to be able to restrict or ban importation of a certain product as a precaution against the possibility the product might pose a danger to human, animal, or plant life, even though scientific evidence as to whether a danger actually exists is insufficient, inconclusive, or uncertain.

Put succinctly, it is the principle that

In the presences of uncertainty, it is appropriate for a regulator to act *before* resolving the uncertainty, if delay might result in an irreparable harm to human or animal life or the environment.⁵¹⁶

The Precautionary Principle is different from a zero-risk approach, whereby no risk whatsoever is tolerated.

Obviously, the danger with the Precautionary Principle is that it may be deployed against imports for reasons that, at bottom, are protectionist. Trade-restrictive measures can be justified by the principle only insofar as they are proportionate to the potential harm, and are implemented in a non-discriminatory and least trade-distorting manner. Because abuse of the principle can undermine free trade, the principle is not expressly recognized in the WTO Agreement on the *Application of Sanitary and Phytosanitary Measures* (SPS Agreement), which focuses instead on sound scientific evidence.

Despite lack of express authority in the *SPS Agreement*, Article 5:7 of the *Agreement* essentially embodies the concept of the Precautionary Principle. In the 1998 *Beef Hormones* case, the Appellate Body endorsed the concept. The European Union (EU) used the principle to ban imports of American beef treated with growth hormones, though in the *Beef Hormones* case, the Appellate Body ruled against the ban. The also has cited the principle in support of its reluctance to license the sale of genetically modified organisms (GMOs). In *Beef Hormones*, the EU challenged the premise that the Agreement does not allow for trade-restrictive measures on precautionary grounds. It pointed to Article 5:7 which authorizes provisional SPS measures “on the basis of available pertinent information” (e.g., from international organizations or other WTO Members) in instances where “relevant scientific evidence is insufficient.”

To counter accusations of protectionism, in February 2000 the EU published a definition of the Precautionary Principle. The EU said that when action is deemed necessary, *i.e.*, when it is agreed there is an unacceptably high risk for society to bear, the action must be proportionate and non-discriminatory. Moreover, the action must be based on a cost-benefit analysis of action versus inaction. The EU said the use of a trade-restrictive measure predicated on the precautionary principle should be accompanied by an identification of the burden of proof as to what scientific evidence would be necessary for a comprehensive risk assessment.

Suggestions for Further Research:

Book:

1. Atapattu, Sumudu, *Emerging Principles in International Environmental Law* (2006).

Articles:

1. Bernetich, John, Note, *Sovereignty and Regulation of Environmental Risk Under the Precautionary Principle in WTO Law*, 35 *Vermont Law Review* 717-739 (2011)

2. Kogan, Lawrence A., *The Extra-WTO Precautionary Principle: One European “Fashion” Export the United States Can Do Without*, 17 *Temple Political & Civil Rights Law Review* 491-604 (2008)

3. Magee, Claire, Note, *Using Chevron as a Guide: Allowing for the Precautionary Principle in WTO Practices (Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984))*, 21 *Georgetown International Environmental Law Review* 615-638 (2009).

4. Mecurio, Bryan & Diana Shao, *A Precautionary Approach to Decision Making: The Evolving Jurisprudence on Article 5:7 of the SPS Agreement*, 2 *Trade, Law and Development* no. 2, 195-223 (fall 2010).