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Business & Economics

Exporting Europe's Protectionism

Lawrence A. Kogan

THE BASIC rules of international trade are simple. The United States and the European Union, the two major trading blocs, have each sought to curb serious health and environmental risks before they cause substantial harm. Both have promoted industrial policies to enhance the competitiveness of their industries and the global economy along with them. The institutional framework of the GATT and the WTO that evolved alongside the United Nations Charter has kept these competing aims in reasonable balance. It has also reflected the main global priorities of later eras: preserving peace and stability through international commerce and the rule of law.

Liberalizing international trade has thus remained one of the primary tenets of international relations. Trade restrictions have not generally been tolerated unless clearly legitimate objectives—such as human, animal and plant health, environmental protection, or national security—were seriously threatened and no alternative means of protecting them were available. Where countries have needed to enact apparently arbitrary regulations to preserve national interests—that is, in the absence of relevant interna-

tional standards or substantially equivalent national standards—they have been required to justify their imposition: A legislating WTO party must prove through an empirical science-based risk assessment that the health or environmental hazard identified is “real” and poses significant harm to society.¹

One WTO provision, Article 5.7 of the SPS Agreement, however, entitles member states to employ precautionary measures to protect human, animal or plant health even when they do not possess sufficient scientific evidence of a product's safety or harmfulness.² Quite stringent tests must be satisfied before this provisional safeguard can be invoked.³ For instance, there must be insufficient relevant scientific evidence concerning the particular health or safety risk that a proposed measure is intended to address, and that measure must be adopted on the basis of available pertinent information. In addition, the government must demonstrate that it has sought

¹Articles 3, 4.1, 5.1–5.3 of the Sanitary and Phytosanitary (SPS) Agreement to the WTO; Articles 2.4 and 2.7 of the Technical Barriers to Trade Agreement to the WTO.

²Article 5.7 of the SPS Agreement to the WTO.

³WTO Appellate Body Report, “Measures Concerning Meat and Meat Products (Hormones)”, February 13, 1998, WT/DS26/AB/R; WT/DS48/AB/R.

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actively to obtain the additional information necessary to conduct a more objective risk assessment, and also that it has made the measure subject to review within a reasonable period of time.⁴ Embedded within this balanced framework is a pragmatic acknowledgement among WTO members that a certain amount of risk is unavoidable in everyday life and that international trade and global stability are good things in themselves.

DURING THE past decade, however, the European Union, with assistance from “international civil society” (a euphemism for non-governmental pressure groups), has sought to alter this equilibrium by enacting regional regulations and promoting process-based industry standards that both depart from this practice and have an extraterritorial impact. These proposals reflect what the EU sees as a more pressing global priority than freer trade—namely, achieving sustainable development.

Sustainable development, as the EU sees it, is rooted in the belief that industrialization, globalization and technological advancement pose potentially terrible but unknown threats to human health and the earth’s ecosystem. National governments should accordingly engage in proactive environmental risk management to extinguish such threats. Central to this notion of stewardship is acceptance of the precautionary principle, described by environmentalists as “a radical new approach to science and technology” that presages a “great shift from [the current] risk-taking age to a [new] risk-prevention era.”⁵

To this end, the precautionary principle imposes on policymakers and on industry a moral and legal “duty of care”, intended “to anticipate problems before they arise or before scientific proof of harm is established”, without regard to the social and economic costs such precaution would engender.⁶ It therefore shifts the regulatory burden of proof,

consisting of both the burden of producing evidence and the burden of persuasion, from the government (concerned about the possible occurrence of a serious harm) to the manufacturer or operator (whose activity may give rise to this harm). Indeed, its enforcement subjects industry to a standard of proof that requires them to “demonstrate safety adequately or sufficiently”, comparable to the “beyond a reasonable doubt” standard in U.S. criminal law. It assumes, in effect, that whoever tampers with the environment is guilty until proven innocent.⁷

It therefore neither requires nor even allows the use of economic cost-benefit analysis—the equity-balancing test generally used in the United States to “maximize net benefits, including potential economic, environmental, public health and safety and other advantages.”⁸ That is because—according to the Commission’s legal adviser—“cost benefit analysis and other influences can lead to undue delays in

⁴Joost Pauwelyn, “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes”, *Journal of International Economic Law* (1999), citing the Appellate Body Report on *Measures Affecting Agricultural Products* (the “Japan Varietals case”), adopted March 19, 1999, WT/DS76AB/R.

⁵Jeremy Rifkin, “A Precautionary Tale”, *Guardian Unlimited*, May 12, 2004.

⁶Andrew Jordan and Timothy Riordan, “The Precautionary Principle in Contemporary Environmental Policy and Politics”, Wingspread Conference paper, January 23–25, 1998.

⁷Carl F. Cranor, “Some Legal Implications of the Precautionary Principle: Improving Information-Generation and Legal Protections”, *European Journal of Oncology*, v. 2, p. 37.

⁸“Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulation and Unfunded Mandates on State, Local, and Tribal Entities”, Office

precautionary action and further losses.”⁹

Institutionalizing the precautionary principle would be a major transformation of the current international trade rules. It would replace the prevailing U.S. and GATT/WTO paradigm, which focuses on empirical science (the “knowables”) in analyzing and managing risks. It would impose instead a new model of risk evaluation that dismisses the need to identify ascertainable and measurable risks or the need to establish specific causal links between suspect products or processes and the harm they may cause.

Brussels has, in short, proposed a new model to evaluate potentially serious but unknown risks that would essentially transform the area of risk regulation into a contentious political and legal minefield. And to make matters worse, it redefines both risk and risk regulation in terms not of science but of cultural values.¹⁰

Perception and Averting Risk

ONE OF THE primary “breakthroughs” achieved by the precautionary principle, according to its advocates, is a better understanding of the relationship between the scientific uncertainties of risk and individual and collective perceptions of it. This relationship is explained in a recent April 2003 report adopted by the EU Commission’s Scientific Steering Committee, which identifies a number of economic activities that the European public perceives as being too risky. They include:

exposure to health hazards by chemical factors, safety of food and drinking water, natural and manmade poisons, infectious diseases, and new technologies, especially bio-technology. They include also the welfare of companion animals, wildlife and animals in general, as well as the environment as a whole.¹¹

The report calls upon the commission to enlarge the scope of the scientific risk

assessment that must be performed to justify national regulations that depart from WTO rules. The risk assessment envisioned would go beyond the traditional use of “hard” analytical science (for example, statistical analyses of likelihood and severity of harm, actual exposure data, and the likely impact on affected exposure groups) to the use of “soft” social science principles to assess subjective notions of “quality of life” (based on the public’s perceptions, fears and impressions of uncertain and hypothetical future risks). The report finds that such notions are often directly responsible for the tensions and psychosomatic ailments that reduce human “well-being” (as defined by the World Health Organization) and thereby the quality of life. It also finds that these fears are largely rooted in cultural and ethical values, “which can be different regionally and individually and even change in time.” It then leaps from these considerations to the following conclusion: “[S]ince the final issue of any risk assessment is the impact on people’s life as experienced by the people”, such percep-

of Management and Budget, Office of Information and Regulatory Affairs, Part I, *Report to Congress on the Costs and Benefits of Federal Regulations*, “U.S. Approaches to Management of Emerging Risks”, pp. 51–2, 58.

⁹Theofanis Christoforou, “The Precautionary Principle in European Community Law and Science”, in Joel A. Tickner, ed., *Precaution: Environmental Science and Preventive Public Policy* (Washington, DC: Island Press), p. 249.

¹⁰See Lawrence A. Kogan, “The Precautionary Principle and WTO Law”, *Seton Hall Journal of Diplomacy and International Relations* (Winter/Spring 2004).

¹¹“Final Report on Setting the Scientific Frame for the Inclusion of New Quality of Life Concerns in the Risk Assessment Process”, adopted April 10–11, 2003, European Commission, Health & Consumer Protection Directorate-General.

tions must be incorporated into risk assessment.

To buttress this conclusion, the report emphasizes the public anxieties associated with the application of modern technologies to everyday products and processes about which very little is generally known. It postulates that these anxieties stem not from a general and unavoidable fear of the unknown, but partly from the failures of the EU's risk communication and technology education, and partly from the "unnatural character of new technologies." These failings have allegedly had a profound impact on Europeans' perception of self-autonomy and have thus resulted in the public experiencing higher levels of stress and feelings of helplessness.

These higher levels of stress might, of course, be traceable in part to the false and exaggerated claims of technological harm put out time and again by environmentalist organizations and "green" publications. The report does not consider this possibility. What it concludes is that public risk perception and risk communication have a direct bearing on "quality of life" considerations and human "well-being", *whether or not the risks are real*. And since these fears have reduced public confidence in the ability of EU regulators to protect them from harm, there must be more, and more stringent, regulation. The report further recommends that "aspects of the quality of life beyond traditional risk assessment and risk management are to be included in the [risk evaluation] process via the precautionary principle."

These recommendations do not emerge from a philosophical or political vacuum. It is generally agreed that the precautionary principle is essentially a European ethos that advocates a better-safe-than-sorry approach to modern-day living. Rachel Thompson of APCO, a public relations firm, has noted that Europe's resort to the precautionary principle reflects a deeper aversion to risk that is

likely attributable to "sharp demographic differences" with the United States. "European electorates are aging much faster than America's, making Europeans more risk averse."¹²

Yet Europeans must realize that there are tradeoffs. The precautionary principle will slow down European economic growth, reduce European innovation and lessen the opportunities for future generations of their citizens (contrary to the vision underlying the Lisbon Strategy of neoliberal economic reform). Europeans could come to terms with their individual fears in practical ways that do not impose Luddite restrictions on scientific advance and economic growth—restrictions that would have prohibited the development of penicillin if they had been in force at the time. They could collectively challenge lawmakers to develop a more pragmatic and balanced approach to risk management. Instead, they have allowed the regulatory bureaucracy to proceed with precaution-based regulation—and the results are now beginning to be felt.

Risk Aversion in Action

FROM October 1998 to May 2004, the EU Commission imposed a moratorium on new approvals of genetically engineered products. This halted approximately \$300 million in U.S. corn shipments per year. When the moratorium was eventually lifted, it was made conditional upon Brussels' enactment of costly and burdensome (farm-to-table) traceability and consumer-right-to-know labeling regulations. Many countries, including the United States and Canada, believe these will impair international trade in genetically modified products well into the future. Similar regulations have since been drafted in Korea, Japan and China—not coincidentally three

¹²Thompson, "Transatlantic Business in an Era of Crisis and Change", www.apcouk.com.

large U.S. agricultural export markets. But these traceability rules have been enacted *in anticipation of food safety problems that have not yet occurred and that may never occur*. The labeling measures also require product information that is in no way health related. Considering that less trade-restrictive alternatives could have been chosen, these measures were plainly selected because the EU prefers precaution and is not averse to a little trade protectionism on the side.

The mindset behind Brussels's cultural aversion to technology risks (such as those presented by biotechnology) was revealed in a workshop organized by the German Marshall Fund's U.S.-European Biotechnology Initiative. The summary of this workshop is revealing:

One NGO representative was quoted as saying . . . "Why can't the Americans understand that this is not specifically about health and safety and labels and traceability; it's a rebellion against industrial agriculture. We need to be talking about the emergence of new ways of farming which take social and environmental concerns into account, not just GMOs."¹³

Another effect of this mindset is the region-wide REACH (Registration, Evaluation and Authorization of Chemicals). In 2001 the EU Commission proposed REACH as a vehicle to hold companies accountable for the thousands of high-volume chemicals that are produced, formulated and incorporated into manufactured products traded within the EU. REACH is a complex, three-level system for regulation. It requires companies to register virtually all chemicals based on the volume produced or imported; to evaluate those "substances which give rise to particular concern"; and to seek positive authorization for those deemed "substances of high concern." Only in this third case does the proposed REACH system take the potential for exposure into

consideration. And that, as a leading chemical industry trade group reasonably complains, "does not occur until after registration and up-front toxicity and environmental testing." Until then, REACH simply presumes that such chemicals are potentially harmful to human health and the environment—though the commission has not performed a science-based risk assessment on any specific substance or product and thus lacks empirical evidence to substantiate its presumption. A risk-based approach would take into account exposure data as early as possible and would use that information primarily to determine the extent of risk and how best to manage it. It would not make industry jump through needless hoops.¹⁴

Recalling Andrew Marvell, had we but world enough and time, this extensive, overlapping and complex set of regulations (unrelated to actual everyday risks) might cause no harm. In the real world, it will delay for long periods—perhaps indefinitely—the myriad benefits that new chemical products can bring to consumers.

The EU aspires to an unachievable aim: eliminating all risks, based on vague possibilities, to human health and the environment posed by chemical-using industries. Helped by non-governmental pressure groups, it achieves this end by exploiting consumer fears—often irrational—about chemicals without supporting its position with scientific evidence. According to two European environmental law experts:

¹³Peter Pringle, "The U.S.-European Biotechnology Initiative", workshop 3, "Segregation, Traceability and Labeling of GM Crops—An Interpretative Summary of a Transatlantic Conversation About Biotechnology and Agriculture", German Marshall Fund of the United States, April 29, 2002, pp. 3–8.

¹⁴Synthetic Organic Chemical Manufacturer's Association, comments on "The European Commission's Consultation Document Concerning REACH", July 2003, pp. 9, 11.

The scope and intrusiveness of the draft REACH regime suggest a move to exploit the public's unfounded fears. But in the name of health and environmental protection, REACH proponents may be after something bigger. Although the proposed system would differ from past examples of centralized state planning economies, it may produce some of the same results, given the broad discretion granted to government agencies, who will have the power to decide for all of us which chemicals (and thus which products) we should want and which chemicals we should avoid.¹⁵

Cultural Preferences as Protectionism

IF SUCH a regulatory regime is to avoid rendering EU producers uncompetitive internationally, however, it needs to be both defensible and exportable. That in turn requires that such regulations be defended as “cultural values” and distinguished from garden-variety trade protectionism. In a speech to a Greens/European Free Alliance conference at the European Parliament on March 5, EU Commissioner Pascal Lamy sought to do just that.

[O]ur dispute with the United States over its extra tariffs on steel . . . [which] were clearly designed to protect an uncompetitive industry . . . [should be contrasted with] . . . [o]ur refusal to import genetically-modified maize or soya that we have not authorised. . . . [The latter] . . . is not protecting a European industry (we do import soya and maize that are not genetically modified) but reflects our society's highly precautionary preference in this area.

In support of this distinction, the EU has requested that WTO members consider a new market-access model premised not on free trade, but rather on balanced concessions. Such a framework would ensure that in the end, the “cultural values”, which is to say social choices, of all

member countries would be appropriately taken into account. Lamy reasoned that since a country's social choices are expressed in public policy decisions (for example, risk evaluation) and embedded via industry standards in the goods and services that are commercially traded among a country's inhabitants, they are a reflection of the country's unique identity. Consequently, governments and industries of exporting countries should respect an importing country's cultural uniqueness by either tolerating it as a matter of diplomacy or adopting a similar market-access framework particular to their own identity. Unless WTO member governments focus on the ideological rather than on the economic dimensions of trade, Lamy argues, then public confidence in regulators and in the WTO system is likely to falter, and international trade to suffer.

Stripped of its high-minded rhetoric and convoluted reasoning, however, the Lamy proposal amounts to nothing more than another creative non-scientific justification for national product distinctions that are susceptible to manipulation as disguised trade barriers. As an exporter, the EU has nothing to lose by agreeing to respect an importing country's values-ridden risk evaluation framework—especially where those regulatory standards are equal to or less rigorous than its own. Products processed or manufactured in accordance with EU precaution-based standards will almost always satisfy the standards of a risk-based regulatory system. As an importer (perhaps the largest import market in the world), the EU has everything to gain by requiring the industries of an exporting country to satisfy Europe's more costly precaution-based system.

¹⁵L. Bergkamp and J.C. Hanekamp, “The Draft REACH Regime: Costs and Benefits of Precautionary Chemical Regulation” (2003), footnote 16.

This not only furthers the EU's open public policy goals by minimizing *perceived* health and environmental risks and allegedly restoring public confidence in EU regulators, but it also advances its less overt protectionist agenda. In particular, it raises the bar on foreign exports sufficiently to provide regional EU industries with the "level playing field" needed to compete against more efficient industries in the global marketplace.

Take Lamy's distinction between good and bad protectionism in relation to GM foods. Even the European Competitiveness Council has acknowledged how far behind the United States the European biotech industry has fallen. As *Agrifood News* noted in a report on November 26, 2002:

Spending twice as much on research and development, and employing twice the number of people, the U.S. is creating more biotechnology products and services than Europe. . . . [In 2001], market capitalization of U.S. [biotech] firms was five times that of EU companies.

That alone would provide the commission with ample incentive to protect the relatively undeveloped European biotech industry from competition. By saddling American GMO exporters with market-access hurdles more onerous and costly than those imposed within the United States, the EU "levels" the economic playing field—that is, tilts the playing field to the advantage of European companies.

The EU Commission goes to some effort to deny this obvious fact. It contends that the higher environmental standards imposed on EU businesses pursuant to the precautionary principle actually enhance their competitiveness in world markets because of the more sophisticated technologies they are forced to employ. Other things being equal, that might be true. But the EU's rationalization ignores the reality that the more expensive tech-

nologies needed to satisfy those standards raise industry costs and make EU companies *less* competitive. Rather than being absorbed by such companies, the higher technology costs are almost always reflected in higher product prices. The negative competitive advantage they impose is roughly equivalent to the added cost of going beyond average international production costs to satisfy the higher EU market standards.

Hence the commission seeks to level the playing field again by exporting its costly precaution-based regimes abroad to other countries along the global product supply chains, such as China. Examples include the regulation on GMO traceability and labeling, the proposed REACH regulation on management of high-volume chemicals, and the combination of the directives preventing waste from electrical and electronic products and restricting the use of hazardous substances in consumer electrical and electronic products. Precaution advocates, drawing on recent internal developments within the EU, have explained the rationale underlying the export of mandatory EU environmental policy initiatives as follows:

Initially, precaution was [used] by German authorities in the early 1980s to justify unilateral application of technology based standards to reduce acid rain. But once in place, the Germans pressed the EU to adopt similar standards across the rest of Europe, to prevent its own industries being placed at a competitive disadvantage. This was not enlightened environmentalism at work but the dictates of a competitive market of member states.¹⁶

Similar protectionist goals underpin the export of EU regulations to other

¹⁶Andrew Jordan and Timothy O'Riordan, "The Precautionary Principle in Contemporary Environmental Policy and Politics", Paper delivered to the Wingspread Conference, Racine, Wisconsin, January 23–25, 1998.

countries. This was made abundantly clear in a presentation given by Jeremy Wall of the Forest-Based Industries Unit of the EU Commission. According to Wall,

EU forests are for their most part well managed, engendering higher costs to forest owners and to wood buyers, but no market advantage is accrued over competitors, many of whom do not always bear the full costs of SFM [sustainable forestry management]. Thus, a key recommendation of the study [of the competitiveness of the European Union woodworking industries] was to ‘export EU environmental (and social) standards’, in other words to promote the raising of forest management standards world-wide—which is good for forests—and thereby enhance competitiveness—which is good for [EU] forest-based industries.

Thus, the EU seeks to export its standards (and costs) to foreign producers directly. Increasingly, however, it employs a more subtle and even covert method: It subsidizes NGOs in other countries that then seek to reproduce EU-style rules at home through political pressure. This remote-control policy is hard to trace, because often the EU (and sometimes individual EU countries) give subsidies to European NGOs that pass on the money to their subsidiaries abroad. What makes this policy so effective is that the sums of money are often large by local standards, but they arrive in the semi-disguise of humanitarian outreach.

Some of the most outrageous examples of this practice concern the campaign against GMOs in countries with large malnourished populations. As the *New York Times* noted in a February 21, 2003 article, one such country, the Philippines, has recently become the target of a sustained campaign by anti-GMO activists. The reason? The Philippines is home to the International Rice Institute, which is

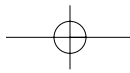
attempting to develop a strain of rice fortified with vitamin A, called “golden rice.”

But this has not gone unnoticed in Europe, and the NGO community, flush with EU grants, has responded. The South Asia Regional Institute for Community Education (SEARICE), the Philippines’ main anti-biotech NGO, has received substantial funding from the Development Fund of Norway, including an anti-GMO, anti-biotech propaganda campaign. SEARICE has also received funding and support from the Swedish Society for Nature Conservation and the Swedish International Development Cooperation Agency, the Swedish government’s aid agency. And the Humanist Institute for Development Cooperation, a Dutch NGO and recipient of EU and Dutch government largesse, also provides support to SEARICE, as well as to hundreds of other local organizations in dozens of developing countries.¹⁷

While the EU has publicly declared GM foods to be “safer than conventional plants and foods”, its member states (and the EU itself) generously fund anti-biotech groups like Greenpeace, Friends of the Earth, and Consumers International. Each of these groups has actively opposed the provision of GM food aid to the developing world.¹⁸ As the Center for Consumer Freedom noted, “the Director of the European Union Commission on Consumer Protection [has] admitted that Europe funds the very environmental organizations that stirred up anti-biotech hysteria in sub-Saharan Africa, prompting Zambia’s president to reject” millions of dollars of U.S. food aid. In a bizarre yet telling *non sequitur*, a Greenpeace spokesman declared, “Science is not a church or a religion. It is not enough anymore for European consumers

¹⁷Don Cruz, “Attack of the Mutant Watermelons”, *NGO Watch Digest*, June 22, 2001.

¹⁸“World Food Summit: Yes to Biotech Foods”, www.consumerfreedom.com, June 24, 2002.



to have somebody with a white coat, a professional, say it's O.K."¹⁹

This is Luddite psychobabble. What is going on here? Abandoning clear scientific standards in favor of vague and arbitrary cultural ideas, employing the resulting pseudo-science as a protectionist device, and using apparently independent NGOs to help enforce this protectionism, the EU has embarked upon an adventure in environmental cultural imperialism. This is a global practice reminiscent of an earlier European colonial era. And the fact that Europe is using "soft power" to enforce it

will hardly make it more palatable to people who will be unable to feed themselves as a result. A confrontation by the world's free-trading governments with the EU's regulators could deal another serious blow to an already ailing WTO, but a failure to confront would abet a grave assault on entrepreneurial capitalism and threaten the global economic growth that promises to drive the 21st century. □

¹⁹"Europe Admits to Funding Hunger Artists", www.consumerfreedom.com, February 13, 2003.

