

The Dilemma of the Precautionary Principle in International Trade

**Konrad von Moltke, Senior Fellow, Trade and Sustainable Development Program,
International Institute for Sustainable Development**

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GATT Articles XX(b) and XX(g) played a central role in the early stages of the trade and environment debate. It was widely assumed that appropriate application of these provisions would address most of the emerging problems. In practice, Article XX has been of marginal utility, both in the dispute-settlement process and in the broader analytical debate. This somewhat surprising result may be attributed in large measure to two factors:

- Article XX assumes that the exceptions it lists will be beyond dispute. It arises from a general obligation of governments to protect their territory and their citizens from recognizable dangers.
- Article XX addresses measures taken by member states of the GATT/WTO. In practice much of environmental policy involves either subnational jurisdictions or international agreements.

Fifty years after Article XX and similar provisions in other trade agreements were adopted, governments find themselves increasingly confronted with dangers that are difficult to identify and almost impossible to quantify. They must balance conflicting priorities: on the one hand, opaque scientific messages must be interpreted to assess and avoid any major threats to their citizens. At the same time they wish to remain supportive of researchers and commercial interests that expect to benefit from the innovations that gave rise to the dilemma in the first place. This is a different activity than that protected by Article XX, so it is not surprising that the Article's normative provisions have not proven particularly useful in dealing with the resulting dilemmas for the trade regime.

Governments have responded differently to the problem of risks to public health and the environment that can only be identified by scientific research, but which scientific research is unable to characterize in an unambiguous fashion. The two approaches that have now clashed in the WTO reflect the fundamental differences in governance structure in the United States and Europe. The U.S. response to uncertain risks that required government action was to develop risk-assessment techniques, a formalized method to build a comprehensive record in support of specific actions by public authorities. Such techniques are universal insofar as they systematize the process of assessing scientific information. Nevertheless, they are particularly adapted to the disjointed character of U.S. government, which requires the constant construction of a formal record at one level or in one branch of government since any decision is liable to be reviewed at another level or in another branch that functions independently. In particular, decisions based on relatively ambiguous scientific findings are liable to be questioned over and over again,

as an issue wanders under public pressure and the play of interests from Congress to the Administration, from there to the courts and to the states, and ultimately back to Congress where the cycle begins anew.

Most other countries do not have this extent of separation of powers, and few have states that are as independent of federal supervision as those that make up the United States. In these countries, balancing conflicting interests requires streamlining the resources of policy-making. Moreover, the citizens of most of these countries are willing to accept a much higher level of government intervention than is the rule in North America. The countries of Europe have consequently moved toward a different approach to the problem of deciding the extent of government regulation, encapsulated in the precautionary principle.

The precautionary principle was first articulated in the German air pollution act of 1968 (*Bundesimmissionsschutzgesetz*), which doubled as an act of general environmental policy. It was known as the *Vorsorgeprinzip*, and explicitly addressed the problem of government action that goes beyond the prevention of known dangers. In the legalistic German system, it provided essential support to government action in the face of systemic scientific uncertainty, in particular with regard to environmental processes. It became central to German environmental policy in the early 1980s, as the government needed to justify its sudden conversion to environmental activism after vast tracts of forest were found to be dying.

It is never possible to transpose instruments without adjustment from one jurisdiction to another. Paradoxically, to achieve comparable results in different jurisdictions it may be necessary to pursue different institutional strategies. This is particularly true of the move from a national context—with a well developed institutional framework that is simply presumed to exist when new measures are introduced—to an international one with only rudiments of a common institutional basis. The precautionary principle, with its potential for misuse without appropriate balances, will prove particularly difficult to operationalize at the international level. In many respects the tradition of risk assessment, with its emphasis on a carefully constructed record, is more appropriate for international organizations. Nevertheless, it is critical to recognize that ‘risk assessment’ as practised in international fora will never be the same as ‘risk assessment’ practised in a single country.

From Germany, the precautionary principle has spread to the rest of Europe, and from there, via UNCED, to the international level. It is evoked by governments everywhere to legitimate the need to act in the absence of clear scientific evidence, particularly in the face of phenomena with a rising probability of high damage even when the starting probabilities were very low. The risk of such an approach, which relies quite heavily on social institutions to develop a consensus on the need for action, lies in situations where there is no interest group conflict to ensure the rigorous assessment of what evidence there is. This has been particularly the case in the EU Common Agricultural Policy, where fear of increased productivity helps maintain the tenuous consensus that unites all parties in resistance to new technologies.

It is critical to recognize that the precautionary principle is meaningless without a robust analysis of the economic aspects of its application in particular cases. Resources are limited and never sufficient to address all risks clamoring for attention. Moreover, application of the precautionary principle in specific situations has economic implications, which should always be made explicit. The appropriate course of action emerges only when scientific uncertainty, social consensus and economic resources are seen together.

The different approaches to scientific uncertainty in determining appropriate government action have led to a number of conflicts within the WTO, most notably those concerning the use of hormones in beef production and the introduction of genetically modified crops. Clearly, the rules used to decide on a course of action will have an impact on the substantive outcome of the process. It is important, however, to recognize that differences in the rules used reflect different approaches to a single problem, as well as the political and administrative culture of the jurisdiction. Attempts to harmonize these differences out of existence are liable to be resisted as attacks on a way of doing things rather than a dispute about science.

The current situation is strongly reminiscent of the process the European Union went through when first confronted with the U.S. invention of environmental impact assessments (EIAs). Like risk assessment, EIAs reflect specific aspects of U.S. political culture as much as any general principle of environmental policy. EIAs are a solution to the need to identify environmental measures relating to specific projects but operating in the disjointed system of U.S. administration and faced with a deplorable lack of prior land-use planning. When the European Union attempted to transfer the EIA system to Europe, it was discovered that extensive modification was necessary until it could serve to complement the highly integrated structures of land use planning and project approval that already existed in Europe. As the Germans in particular found out to their dismay, their prior system was far from perfect and needed substantial adjustment to meet the new criteria of environmental assessment. In spite of such adaptations, the European version of EIA has turned out to be different in many important respects from its U.S. template.

Similarly, it would be a mistake to assume that 'risk assessment' can be transposed from the United States to Europe (or Japan for that matter) without extensive modification; nor could the U.S. system of governance tolerate the degree of administrative discretion implied in the precautionary principle. It was certainly a mistake to write into Article 5 of the WTO Agreement on Sanitary and Phytosanitary Measures language that could be interpreted as meaning that risk assessment is a universal tool of policy. There is also an underlying assumption that science will ultimately provide answers, so that the state of uncertainty is viewed as temporary. In many areas of environmental policy, such certainty is not available in the foreseeable future.

The WTO needs effective international organizations capable of assessing scientific evidence, understanding the different context of policy-making in different countries and able to assist in determining whether measures that have been adopted are reasonable.

That is a daunting task, and one that will require a good deal of time and effort. There are interesting parallels in the process UNEP has gone through in developing an approach to persistent organic pollutants—a process that has taken almost 20 years. To cope with risk assessment and the precautionary principle, the Millennium Round needs to promote the creation of effective organizations outside the WTO and must address the interface between the trade regime and these organizations. These organizations will operate differently from the WTO, according to different principles and utilize different institutional mechanisms. In this respect adapting the precautionary principle to the context of international trade resembles much of the environmental agenda.