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UNICE DISCUSSION PAPER ON THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL TRADE

I. Introduction

There is an ongoing debate in WTO whether the WTO obligations undermine the ability of a WTO member to take decisions on the basis of the Precautionary Principle and whether, as a consequence of this assertion, the WTO text should be amended so as to include a specific mention of this principle. On the other hand, precautionary decisions have been criticised as veiled forms of protectionism.

The Precautionary Principle articulates an approach to risk management in circumstances of scientific uncertainty, reflecting the need to take prudent action in the face of potentially serious risks without having to await the completion of further scientific research. The principle is mostly applied with respect to legislation covering environmental or health protection. The most broadly accepted reference to the principle can be found in the 1992 Rio Declaration whose Principle # 15 reads:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

This paper addresses one question only: is there a need to include in the WTO legal text a specific reference to the Precautionary Principle ? The paper is meant to be an addition to the **UNICE Statement on the Precautionary Principle** (dated 12 September 2000) and elaborates on the argument included in this statement that "*arbitrary and incorrect application of the precautionary principle will hinder innovation, stifle economic growth and create unnecessary obstacles to the free movement of goods in the internal market and international trade".*

II. Basic Assumptions

In the following we base our analysis on the Commission's Communication on the Precautionary Principle (COM (2000) 1 final of 02.02.2000). As stated above, this paper does not comment on the Communication as such. Instead it applies the Commission's tests and requirements in a WTO-context.

We note the purpose of the Commission's Communication namely to give guidance to the decision-maker when faced with complex legislative issues which have an impact on the environment and/or on human, animal or plant health and we welcome the Commission's intention to contribute to *a structured decision-making process with detailed scientific and other objective information.* Within the WTO context such a process will facilitate the analysis on whether a specific national measure is compatible with WTO obligations.

Union of Industrial and Employers' Confederations of Europe – Union des Confédérations de l'Industrie et des Employeurs d'Europe
Rue Joseph II 40/Bte 4 - B-1000 Brussels - VAT BE 536.059.612 - Tel. +32(0)2 237.65.11 - Fax +32(0)2 231.14.45 - E-mail: main@unice.be - Website: //www.unice.org

Analysis of WTO texts

The WTO does not contain an explicit reference to the Precautionary Principle. Its preamble refers, inter alia, to sustainable development and to the protection of the environment. There are several areas where the allegation could be made that the WTO touches on the autonomous right of states to apply the Precautionary Principle: GATT Article XX, GATS Article XIV, TBT Article 2 and SPS Articles 2, 3 and 5.

Yet even without specific mention the Precautionary Principle is reflected in the WTO's legal texts. The nearest recognition of the principle is to be found in SPS Article 5.7 which allows a country to take provisional measures in cases where relevant scientific information is insufficient. There are further implicit references in the preamble and in Article 3.3 of the SPS Agreement, as recognised by the Appellate Body in the Hormones case. The SPS Agreement, for example, explicitly recognises that WTO members may adopt more stringent (i.e. more cautious) sanitary measures than those implied in an existing international standard. It requires, however, that such, more stringent, measures be justified scientifically.

Article 2.2 TBT-Agreement requires that technical regulations shall not become an unnecessary obstacle to international trade. A technical regulation shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account of the risks non-fulfilment would create. Such legitimate objectives are, for example, the protection of human health or safety, animal or plant life or health, or the environment. This reference could well mean that a "cautious" approach would indeed be considered "legitimate".

GATT Article XX is the general exception clause which allows countries to adopt otherwise inconsistent GATT measures that are necessary to protect human, animal or plant life or health or which relate to the conservation of exhaustible natural resources. The headnote of GATT Article XX elaborates on the way countries may or may not apply those exceptional measures: these measures cannot amount to "arbitrary or unjustifiable discrimination", or to a "disguised restriction on international trade".

Preliminary conclusions

This first and provisional analysis of the WTO law with respect to the Precautionary Principle allows for two preliminary conclusions:

1. In adopting trade measures on the basis of precaution WTO-members must lay down the reasons for such measure. The measure must be "necessary" (or relating to) to achieve the non-trade aim. Necessity can, for example, be demonstrated with a comprehensive scientific risk assessment. In fact, in order to avoid hidden protectionism the WTO (and most clearly the SPS Agreement) requires countries not to take measures without having some scientific indications that there is a risk. The WTO does however not prescribe what level of risks its members should accept. This latter decision entirely lies in the sovereign domain of the WTO member.

2. In justifying domestic action on the basis of precaution WTO members have to respect the specific obligations embodied in the WTO legal texts. If for example a specific article of an agreement requires to undertake a risk assessment (see Article 5.1 SPS-Agreement) non-fulfilment of such risk assessment cannot be justified with the Precautionary Principle. The Precautionary Principle cannot override "substantive law". Yet even if not having the character of a binding norm it may be relevant for the interpretation of the 'hard WTO law'.

III. How to justify trade restrictions taken on the basis of the Precautionary Principle under the specific WTO obligations

WTO criteria

The above-mentioned provisions of the different agreements allow WTO members to restrict trade under certain conditions. The GATT establishes the basis: national treatment. Countries can take a precautionary approach and prohibit the importation of certain products if they also prohibit the domestic production of this product. If a country adopts an otherwise GATT-inconsistent trade measure it can justify such measure with GATT Article XX.

The TBT Agreement goes one step further: a national measure covered by TBT can be an unnecessary obstacle to international trade even if the measure is applied in a non-discriminatory way. The TBT allows trade restrictions for legitimate objectives.

The most stringent and specific agreement is the SPS Agreement. WTO members undertake both to base their SPS measures on scientific principles and not to maintain them without sufficient scientific evidence. The SPS allows for provisional measures in case of scientific uncertainty.

A common theme runs through all agreements, the WTO favours the protection of legitimate policy goals, such as health or environmental protection, yet it is adamant about hidden protectionism: in principle, trade measures will be considered compatible with these agreements if they are **ne*cessary***, if they are ***least trade-restrictive,*** if they are applied in a way so as not to lead to ***arbitrary or unjustifiable discrimination*** and if they do not constitute a ***disguised restriction on international trade***.

The GATT jurisprudence

The GATT (1947) jurisprudence on Article XX gave the term "necessary" a very restrictive reading. The WTO's Appellate Body has opened this interpretation by accepting that Article XX must be seen in light of the norms of international law, it must in particular be interpreted according to the rules set forth in the Vienna Convention on the Law of Treaties. The latter provides that a treaty *shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*. In the "Shrimp Turtle" case the Appellate Body has stated that GATT Article XX has to be read in light of the preamble of the WTO Agreement and especially the commitment to sustainable development as an objective of the multilateral trading system. The WTO obligations will therefore, in the future, probably be interpreted in light of evolving norms and rules of international (health, safety and environment) law. In addition, since several international agreements specifically mention the Precautionary Principle, it cannot be ruled out that future WTO jurisprudence will make reference to these agreements when interpreting WTO obligations.

Commission criteria

The Commission has established 6 criteria which trade measures based on the Precautionary Principle should reflect: ***Proportionality, Non-discrimination, Consistency, Cost/Benefit Analysis, Review and Assigning the responsibility for producing the scientific evidence.***

Proportionality goes beyond the traditional GATT necessity test. It requires a balancing of the conflicting aims whilst a necessity test "only" establishes whether the measure is necessary to achieve the non-trade aim. In distinguishing between the "general design" of the measure and the "manner in which it is applied" the Appellate Body might have introduced however some proportionality aspects into its jurisprudence.

Non-discrimination is one of the basic pillars of GATT. Precautionary trade measures must be applied in a non-discriminatory fashion, i.e. comparable situations should not be treated differently and different situations should not be treated in the same way unless there are objective grounds for doing so.

Consistency with similar measures already taken is explicitly required by the Article 5.4 SPS Agreement and is an intrinsic element of the tests required under GATT and TBT. If trade-restrictive measures are not consistent with the measures already adopted in similar circumstances or using similar approaches they could be considered as an unnecessary obstacle to international trade in the TBT-context or as an unjustifiable discrimination in the GATT Article XX-context. It should be noted however that consistency does not mean uniformity. Countries can distinguish circumstances and approaches if they do not consider them similar.

The SPS and the TBT Agreements require **scientific developments** to be taken into account (Articles 2.3 TBT and Articles 5.7 SPS). New scientific evidence can either make the trade-restrictive measure redundant or can make it definitive.

The WTO does not require an examination of the benefits and costs of action and lack of action nor does it address the issue of who is or should be responsible for producing the scientific evidence.

Conclusion

If a country adopts a cautious approach and strictly applies criteria contained in the Commission's Communication it will have no problem with WTO provided that the trade restrictive measure it adopts is provisional. Such trade-restrictive measure will survive a WTO compliance scrutiny.

IV. The Threats of the Precautionary Principle to the International Trading System

The analysis has shown that WTO-members have rather wide discretion on whether to adopt a very strict or a less strict approach. It is part of the sovereign prerogative to attach a high or a low priority to specific environmental or health issues. The international trading system does not interfere with the choices a society makes. It only interferes if there is a complete lack of scientific evidence or if the trade measure is applied in a discriminatory fashion, broadly speaking.

Legally speaking the application of the Precautionary Principle does not create problems with WTO. Economically speaking the sovereign right to decide on a very strict level of precaution causes problems because of the ever growing economic interdependence between the WTO-members. If, for example, the European Community takes a different approach to risk management than the United States, the WTO might not be infringed, but transatlantic trade can be severely restricted. It is interesting to note that both the TBT and the SPS Agreements tackle this issue cautiously by explicitly requesting reliance on international (harmonised) regulations and standards and by presuming that these standards are compatible with the respective agreement. Furthermore both agreements contain provisions on "equivalence" allowing the members to recognise as equivalent to their own standards and regulations those of other nations. At least between those WTO members which have similar health, safety and environmental standards huge differences in risk management approaches should to be avoided. European business therefore calls on the OECD membership to use all possibilities, be they WTO, bilateral or plurilateral, to come to common risk management strategies through mutual recognition, convergence of laws and regulations or even through harmonisation.

A rigid interpretation of the Precautionary Principle will almost automatically create a bias against the development of new technologies. If the slightest scientific indication is sufficient

to decide on an outright ban of a product, industry will be unable to develop any newly developed technology further. It is up to society to accept new technologies, the decision-maker can however greatly help in setting up a tool for decision-making which is based on facts and science. It is noteworthy that society has much less problem accepting the inherent risks of old technologies compared with the acceptance of the risks inherent in new technologies.

V. Is there a Need for a Specific Reference of the Precautionary Principle in the WTO?

The WTO already contains implicit references to the Precautionary Principle. A WTO-conform use of the principle will not lead to a negative WTO ruling. Both, indeed, do not necessarily conflict.

Despite its seemingly widespread political support the Precautionary Principle triggers endless discussion whenever it is applied. Its biggest problem is the variety of interpretation that goes with it. The Commission rightly refrains from trying to find a generally applicable definition of meaning and scope of the Precautionary Principle. Its application is too diverse. The Communication is a policy tool which should guide the decision-maker and which should help him to take the “right” decision. A policy tool can however not be formed into a generally applicable definition.

The European business community does not believe that the WTO should attempt to define this principle. However, it makes sense to find ways to use the principle appropriately. By providing guidelines for its use in a politically transparent process the WTO could explain, for example in an interpretative understanding, the possibilities and limits and thereby contribute to reducing the contentiousness of the principle’s application.