



BDI

Bundesverband der
Deutschen Industrie e.V.

POSITION

The Precautionary Principle in New EU Free Trade Agreements

- **Precautionary principle not affected by EU free trade agreements:** The precautionary principle of the European Union, as codified in the European Treaties (Article 191 TFEU) and detailed in a communication from the European Commission in the year 2000 on the application of the precautionary principle, is adequately protected in CETA. The precautionary principle is also safeguarded in the EU negotiating proposals for TTIP. The precautionary principle is part of EU primary law and cannot be undermined by free trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP). The negotiating mandate of the European Commission is tied to this fundamental principle. The new free trade agreements of the EU consequently pose no threat to the precautionary principle and the concept of precaution.
 - **Precautionary principle safeguards protection of environment and health:** In the European Union, the precautionary principle is applied in particular to protect the environment and health. The EU allows precautionary measures to be taken at an early stage if the scientific position does not permit a clear assessment of potential damage. However, regulations which are issued in accordance with the precautionary principle are also based on scientific evidence: Article 191 TFEU requires that scientific and technical data must be taken into consideration when preparing policy measures. In its communication (COM (2000) 1), the Commission states that the precautionary principle is to be applied in cases “where preliminary *objective scientific evaluation*, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community” [emphasis by the editors].
 - **The precautionary principle also requires a scientific assessment:** Since EU primary law explicitly safeguards the precautionary principle within the framework of a trade and investment agreement, the requirement that regulatory decisions should be made based on scientific findings does not run counter to the precautionary principle. However, in practice the application of the precautionary principle may lead to differing results. This has frequently led to public concerns, particularly in the context of transatlantic trade. Since the precautionary principle is not part of the US constitutional law, some fear that either the level of protection will be lowered by TTIP (concern on the EU side), or that the precautionary principle will be used to legitimize protectionist measures (fear on the US side). However, the agreements and the negotiating proposals do not justify these concerns.
 - **German industry supports the precautionary principle:** German industry is fully behind the precautionary principle and supports the inclusion of this principle in free trade agreements, such as is the case in CETA.
-

The precautionary principle in EU law

The precautionary principle is embedded in the European Treaties (Article 191 of the Treaty on the Functioning of the European Union (TFEU)) and is thus codified EU primary law. This principle stipulates that political decision makers can take regulatory action when the scientific risk assessment is not unequivocal. The TFEU explicitly prescribes the precautionary principle for the protection of the environment. In practice its application is much broader, in particular “[...] where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.”¹

The precautionary principle is thus codified in the European Treaties. Therefore, any departure from the precautionary principle would not be possible without a change in EU primary law. In the hypothetical case of a move to abolish the precautionary principle, such a change would have to be made in accordance with Article 48 of the Treaty on European Union (TEU). Any such proposal for an amendment would first have to be unanimously agreed in the European Council and subsequently also be ratified in all member states. In other words: abolishing the precautionary principle would only be possible through a unanimous decision of the Council after a hearing of the Commission and the Parliament and after ratification by the member states. The conclusion of a free trade agreement cannot by itself abolish the precautionary principle.

The application of the precautionary principle was explained in detail in a Communication of the Commission in the year 2000. “Whether or not to invoke the Precautionary Principle is a decision exercised where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.² In the concrete case of the application of a precautionary measure, the Commission must apply the following specific and general principles:

Specific principles:

- Decision makers should carry out a scientific evaluation that is as comprehensive as possible and that, where possible, identifies the degree of scientific uncertainty at each stage of the evaluation.
- Decision makers must conduct a risk assessment and evaluate the potential consequences of inaction.
- Once the results of the scientific evaluation and/or the risk assessment are available, all interested parties should be involved to the fullest extent possible in assessing the various risk management options available.

General principles:

- Proportionality: the adopted measures taken must be proportionate to the desired level of protection.
- Non-discrimination: measures should not be discriminatory in their application.
- Consistency: measures should be consistent with measures already adopted in similar circumstances.

¹ European Commission, Communication from the Commission on the precautionary principle, 02.02.2000, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN>> (viewed 20.06.2016).

² Ibid.

- Examination of the benefits and costs of action and inaction: the pros and cons of action and inaction must be weighed against each other in terms of the overall costs to the Community.
- Examination of scientific developments: a precautionary measure shall be maintained as long as the scientific data remain incomplete, imprecise or inconclusive and as long as the risk is considered too high to be imposed on society.

Furthermore, the precautionary principle applies irrespective of whether an authority chooses a risk-based or a hazard-based regulatory approach. The hazard-based approach looks only at inherent properties of a product, such as features that are part and parcel of a product itself. In contrast, a risk-based approach, along with the inherent properties, also considers the context of such a product, for example the display, packaging and labeling of a product.³ The EU is increasingly leading on a hazard-based approach, which is applied along with a risk-based approach. In both cases the precautionary principle can be applied, namely when a scientific risk assessment yields inconclusive results.

The precautionary principle and a science-based approach – a contradiction?

In the public debate, including the debate on TTIP, the different regulatory practices of the EU and the US are often portrayed as mutually exclusive. However, this description does not reflect the regulatory practice in the two markets. First, regulations in both the EU and the US are based on scientific findings. The EU Commission clearly states that regulatory decisions “requires a structured decision making process with detailed scientific and other objective information.”⁴ The EU system is therefore also science-based.

Second, the public often assumes that US authorities pursue lower levels of protection and that the precautionary principle is not applied there. However, a closer look at the regulatory practice shows that these assumptions are incorrect because regulations in the US are also precautionary and sometimes even stricter than in the EU. One example for the use of the precautionary principle in the US is the handling of BSE: the US Administration prohibited the import of beef from Great Britain at a much earlier stage than did the EU and also maintained this ban for longer. Moreover, in the US a number of products are classified as more risky than they are in the EU and are banned accordingly. Examples can be found in the cosmetic sector in the licensing of medicinal products, tobacco and alcohol. The US also has a lower threshold for pollutants and pesticides for fruit juices than the EU.

WTO law and the precautionary principle

The precautionary principle is not explicitly mentioned in the treaties on international trade law of the World Trade Organization (WTO). However, in certain circumstances precautionary measures are permitted even if they restrict trade. All the proceedings before a WTO panel or the WTO Appellate Body in which the precautionary principle was addressed confirm this interpretation. The following WTO agreements provide scope for precautionary regulation:

³ European Commission, Communication from the Commission to the European Parliament and the Council on endocrine disruptors and the draft Commission acts setting out scientific criteria for their determination in the context of the EU legislation on plant protection products and biocides, 15.06.2016, < http://ec.europa.eu/health/endocrine_disruptors/docs/com_2016_350_en.pdf > (viewed 19.08.2016).

⁴ European Commission, Communication of the Commission – Applying the Precautionary Principle, 02.02.2000, <<http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52000DC0001&from=DE>> (viewed 20.06.2016).

Article XX of the General Agreement on Tariffs and Trade (GATT): Under Article XX GATT, national provisions such as for the protection of public morals, life and the health of humans, animals and plants, of cultural heritage or natural resources are permitted provided that they are not discriminatory and do not constitute disguised trade barriers. Rulings by the WTO Appellate Body which confirm the scope for precautionary measures under GATT XX include the verdicts of the appeals mechanism on *US – Gasoline*⁵ and *Brazil – Retreaded Tyres*⁶ concerning measures for animal or environmental protection, *EC – Asbestos*⁷ concerning measures for the protection of human health along with *China – Audiovisuals*⁸ and *EC – Seal Products*⁹ concerning measures which were issued for the protection of public morals.

WTO Agreement on Technical Barriers to Trade, TBT Agreement: The TBT Agreement, which was negotiated within the framework of the GATT Uruguay Round and came into force on 1st January 1995, creates a regulatory framework for the introduction of technical regulations, standards and conformity assessment procedures by governmental and non-governmental bodies at the national level. Under this agreement the WTO members retain their sovereign power to take measures for the protection of health and safety or of the environment. Since Article 2.2 TBT requires that technical regulations must not constitute any unnecessary barriers to trade, this obligation then also applies to free trade agreements. The signatories must ensure that the regulations are not more trade-restrictive than necessary. Before introducing technical regulations, authorities must take the available scientific and technical information into account and must consider the principle of proportionality. According to the declarations of the Commission on the precautionary principle, those obligations also apply to precautionary regulations. To date, the precautionary principle has not been the subject of a WTO dispute resolution with regard to the TBT Agreement.

WTO Agreement on Sanitary and Phytosanitary Measures, SPS Agreement: the SPS agreement creates a regulatory framework for national provisions governing food safety as well as animal and plant health. It obliges the members of the WTO to apply international standards, such as the Codex Alimentarius, as the basis for their own measures. According to the SPS Agreement, a scientific justification is required for SPS measures. However, the SPS Agreement contains an exception for precautionary measures: as long as scientific uncertainty persists, provisional precautionary measures can be taken in accordance with Article 5.7 of SPS Agreement on the basis of available relevant information. At the same time, member states must review these measures and abolish them should there be new scientific findings. Here, too, in practice the rulings of the WTO Appellate Body demonstrate that states have regulatory autonomy, and that this regulatory autonomy is respected in international trade law. Furthermore, member states are free to invoke regulations based on scientific minority views and do not have to follow the predominant scientific opinion.¹⁰

⁵ WTO Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, 1996, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId=14573&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016).

⁶ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, 2007, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId-List=81686&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016).

⁷ WTO Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, 2001, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId-List=1236&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016).

⁸ WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 2009, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId-List=107112&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016).

⁹ WTO Appellate Body Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, 2014, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId-List=124807&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016).

¹⁰ WTO Appellate Body, *EC – Measures Concerning Meat and Meat Products (Hormones)*, 1998, <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueId-List=33861&CurrentCatalogueIdIndex=0&FullTextHash=> (viewed 29.06.2016). The fact that the ruling in this case was in favour of the plaintiff does not lessen the importance of the verdict for the interpretation of

The precautionary principle in EU free trade agreements: SPS, TBT, regulatory cooperation and sustainable development

CETA

The precautionary principle is embedded in several chapters in CETA:

- Preamble: the contracting parties declare in the preamble that the parties retain regulatory autonomy, the “right to regulate”.
- Exceptions: Article XX GATT permits states to issue measures for the protection of humans, animals, natural resources or the environment even if they go against their obligations under GATT, provided that these measures do not discriminate between countries where the same conditions prevail and do not constitute disguised protectionism. Article 28.3 in CETA explicitly includes the general exceptions under Article XX GATT as part of the agreement, for example with reference to the chapters on national treatment, SPS, TBT and investments.¹¹
- SPS and TBT: the WTO agreements on SPS and TBT are mentioned in the CETA chapters on SPS and TBT measures (Article 5.4 in the CETA chapter on SPS and 4.2 in the CETA chapter on TBT). These WTO agreements emphasize the right to regulate, which thus transfers to the SPS and TBT chapters in CETA.
- Regulatory cooperation: the right to regulate is also protected in the CETA chapter on regulatory cooperation. The convergence or harmonization of different regulations is voluntary under CETA and cannot be enforced. Should the approaches with regard to the precautionary principle be too far apart, an alignment, convergence, mutual recognition or harmonization of regulations is not possible. Specifically, Article 21.5 of CETA reads; “A Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party.” Consequently, the contracting parties reserve the right to take precautionary measures on the basis of their own regulatory principles and are not obliged to come to any agreement in the area of regulatory cooperation.
- Trade and labour: the CETA chapter on trade and labour, Article 23. 3, paragraph 3, confirms the right of the contracting parties to take measures to protect the health of workers, even if there is no clear scientific proof of a hazard.
- Trade and sustainable development: in the CETA chapter on trade and sustainability Article 22.1, paragraph 1 refers to the Rio Declaration on Environment and Development which provides for the use of the precautionary principle in the case of scientific uncertainty (15th principle).¹² Here it should also be pointed out that the chapters on trade and labour and trade and environment are not covered by CETA’s dispute settlement provisions. Any conflict about the application of precautionary measures

the precautionary principle in the SPS agreement since the EU was not charged with any infringement of Article 5.7 of the SPS agreement which provides for the right to precautionary regulation in cases of unclear scientific position with SPS measures.

¹¹ The following articles of CETA refer to GATT and the TBT and SPS agreements in CETA: Article 28.3 (1) CETA with reference to Article XX GATT; Article 4.2 CETA with reference to Articles 2 to 9 of the WTO TBT agreement along with its annexes 1 and 3; Article 5.4 and Article 21.1 (1) with reference to SPS.

¹² United Nations Conference on Environment and Development, The Rio Declaration on Environment and Development, 1992, <http://www.unesco.org/education/nfsunesco/pdf/RIO_E.PDF> (viewed 20.06.2016).

must therefore be resolved through diplomatic channels; retaliatory action is not permitted under CETA's chapter on trade and sustainable development.

The precautionary principle is therefore clearly embedded in CETA. The parties' right to regulate is protected. In future EU free trade agreements, the precautionary concept should therefore be included along similar lines to CETA.

The EU negotiating proposals for TTIP

The precautionary principle is included in the negotiating proposals of the EU Commission for TTIP. The EU proposals envisage the inclusion of the precautionary principle in TTIP through the following rules:

- *Exceptions*: the exceptions contained in Article XX GATT are also adopted in the EU negotiating proposal for TTIP in the chapter on national treatment. As a result, scope is provided for exceptions in market access if, for example, these are issued for the protection of animals, health or the environment and are not applied in a discriminatory or protectionist manner.
- *SPS and TBT*: the TBT agreement of the WTO is incorporated in its entirety in Article 2 of the TBT chapter in the EU negotiating proposal on TTIP, whereby the *right to regulate* for the protection of health and environment is also adopted.¹³ For Article 2 of the SPS chapter the EU proposes that, in addition to regulatory autonomy, the regulatory systems and the risk management practice of the contracting parties should also be preserved.¹⁴ As in the case of CETA, this wording is a clear implicit anchoring of the precautionary principle.
- *Regulatory cooperation*: the precautionary principle is also safeguarded in the chapter on regulatory cooperation in the EU negotiating proposal. The right to regulate is to be established in the preamble of the chapter. In addition the proposed text also pledges that TTIP will not restrict the scope of the contracting parties to pursue a high level of protection in the areas of environmental protection, health, safety and also data and consumer protection. The EU's proposal on TTIP regulations on regulatory cooperation are designed not to bind any contracting party to a particular outcome. Each side shall continue to be able to apply its own principles with regard to regulation, risk assessment and risk management. In a footnote here explicit reference is made to the Treaty on the Functioning of the European Union (TFEU) and the principles embedded therein (including the precautionary principle).
- *Sector-specific chapters*: according to the EU's TTIP proposal, the regulatory scope of the parties shall not be restricted in the sector-specific chapters. The proposed EU text for the chapter on chemicals consequently states that this chapter is not to contain any obligations which commit the contracting parties to a particular result in regulatory cooperation or that lead to regulatory activities being accelerated, suspended, delayed or halted.¹⁵

¹³ European Commission, Textual Proposal Technical Barriers to Trade (TBT), 07.01.2015, <http://trade.ec.europa.eu/doclib/docs/2015/January/tradoc_153025.pdf> (viewed 20.06.2016).

¹⁴ European Commission, Textual Proposal Sanitary and Phytosanitary Measures (SPS), 07.01.2016, <http://trade.ec.europa.eu/doclib/docs/2015/January/tradoc_153026.pdf> (viewed 20.06.2016).

¹⁵ European Commission, TTIP-EU proposal for: Annex/Chapter on Chemicals, <http://trade.ec.europa.eu/doclib/docs/2016/July/tradoc_154795.pdf>, 14.07.2016 (viewed 16.08.2016).

- *Sustainability*: the EU negotiating draft for the TTIP sustainability chapter also contains clear references to the precautionary principle.¹⁶ Article 1, paragraph 2 contains a reference to the Rio Declaration on Environment and Development which in the 15th principle provides for a precautionary approach in cases where scientific evidence does not yield an unequivocal outcome. Moreover, Article 3 of the chapter is entirely devoted to the right of the contracting parties to regulatory autonomy and to the independent definition of standards of protection.

Conclusion

The BDI supports the precautionary principle. The EU member states are bound by EU primary law to apply the precautionary principle when designing and implementing regulatory measures. Moreover, the precautionary principle is clearly contained in the CETA text and in the EU's negotiating proposals for TTIP, even if the concept is not explicitly mentioned. The implicit anchoring of the precautionary principle along with the protection of the right to regulate is to be welcomed. The fact that the precautionary principle is not explicitly mentioned in the CETA treaty text or in the EU TTIP proposals does not impair the right of the contracting parties to take precautionary measures. In addition to the treaty text of free trade agreements, the position of the respective parties is also strengthened by the provisions of the WTO with regard to their right to take measures on the basis of their respective regulatory approaches and principles. The concerns that trade agreements could undermine the European precautionary principle are consequently unfounded.

¹⁶ European Commission, EU textual proposal trade and sustainable development, <http://trade.ec.europa.eu/doclib/docs/2015/November/tradoc_153923.pdf>, 06.11.2015 (viewed 20.06.2016).

Imprint

Bundesverband der Deutschen Industrie e.V. (BDI)
Breite Straße 29, 10178 Berlin
www.bdi.eu
T: +49 30 2028-0

Editors

Dr Stormy-Annika Mildner
T: +49 30 2028-1562
s.mildner@bdi.eu

Marietta Angeli
T: +49 30 2028-1524
m.angeli@bdi.eu

Fabian Wendenburg
T: +49 30 2028-1421
f.wendenburg@bdi.eu