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Edited by

Thomas Cottier

Professor Emeritus, World Trade Institute, Bern, Switzerland, and Adjunct Professor of Law, University of Ottawa, Canada

Krista Nadakavukaren Schefer

Co-Head of Legal Services, Swiss Institute of Comparative Law, and Senior Fellow, World Trade Institute, Bern, Switzerland

With

Jonas Baumann, Brigitta Imeli and Julian Powell, Assistant Editors
Rebecca Gilgen, Language Editor

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Part IV Section V

International Economic Law and Sustainable Development
IV.18 The Principles of Precaution and Sustainability

The 1992 Rio Conference on Environment and Development allowed for precaution and sustainability to enter the international arena and become core principles of the international legal system. Precaution is incorporated in Principle 15 of the Rio Declaration on Environment and Development, and it states that '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, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

Precaution

The question of whether precaution is a principle or an approach is a subject of controversy. Much debate has also surrounded the legal status of precaution under international law. For instance, the Appellate Body of the World Trade Organization (WTO) noted in 1998 that the status of precaution was a subject of controversy among academics, law practitioners, regulators, and judges and felt that 'whether it has been widely accepted by (WTO) Members as a principle of general or customary international law appears less than clear'. According to the Appellate Body, 'it (was) unnecessary, and probably imprudent, for the Appellate Body ( . . . ) to take a position on this important, but abstract, question'. Despite these initial hesitations, over time precaution has been incorporated into an ever-growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. Certain international courts and tribunals have thus considered that precaution is progressively crystallizing into a norm of customary international law.

The adoption of precautionary measures is subject to the capabilities of States. It follows that compliance with precaution may be stricter for developed countries than for developing countries. However, the reference to ‘capabilities’ in Principle 15 of the Rio Declaration is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields. Two peculiar elements trigger the application of precaution within the international legal order: risk and scientific uncertainty. Risk is a more or less foreseeable and contingent danger which can cause damage. As long as there is any trace of doubt as to the occurrence of an event, there is risk. The element of uncertainty is a sine qua non condition of the invocation of precaution and allows for the differentiation of precaution from similar concepts such as prevention and vigilance. Prevention relies primarily on sound science.

Precaution is quite often considered as a relevant principle or approach for the application and interpretation of international legal instruments. Such instruments include a broad array of treaties such as, inter alia, fisheries agreements, trade agreements and river basin agreements. In the Hormones case, the WTO Appellate Body indicated that precaution ‘finds reflection’ in the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), albeit this Agreement makes no explicit reference to precaution. As a consequence, the Appellate Body recognized that a WTO member has the right to establish an appropriate level of sanitary protection that ‘may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations’. It is noteworthy that the Appellate Body acknowledged in the Hormones case mentioned above that ‘responsible, representative governments commonly act from perspectives of prudence and precaution

2 International Tribunal for the Law of the Sea (ITLOS), Responsibilities and Obligations of States with respect to Activities in the Area (Advisory Opinion) ITLOS Reports 2011, 47 [162].
where risks of irreversible, e.g. life-terminating, damage to human health are concerned”.

Precaution has also developed in such a way as to impregnate traditional principles and techniques of international environmental law. Due diligence, for example, now applies in situations where scientific evidence concerning the scope and potential negative impact of an economic activity is insufficient. As such, precaution is a major instrument for sustainability.

Sustainable development

The notion of ‘sustainable’ or ‘durable’ development, also referred to as ‘sustainability’, rose significantly on the international agenda with the 1992 Rio Conference on Environment and Development. Tellingly, the expression recurs 12 times in the relatively short Rio Declaration. In particular, Principle 4 of the Declaration proclaims that ‘(i)n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’. This shows that today international law requires the integration of appropriate environmental measures in the design and implementation of economic development activities. As has been described by some international courts and tribunals, sustainability implies that (e)nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts’. As such, where economic development may cause significant harm to the environment, sustainability imposes a duty to prevent such harm. The ‘right to be free from (environmenal) harm’ is in this sense very much inherent to sustainability.4

While it emerged with the Rio Declaration, the concept of sustainability in fact dated back to the 1980 World Conservation Strategy prepared by the International Union for Conservation of Nature (IUCN). The Strategy notes that ‘conservation and sustainable development are mutually dependent’ and that ‘development has continued unimpeded by conservationists yet with the seeds of its eventual failure lying in the ecological damage that conservation could have helped prevent’. The Report ‘Our Common Future’, prepared by the World Commission on Environment and Development (the Brundtland Commission), has further contributed to proliferating the notion of sustainable development.

Sustainability has extended far beyond the realm of environmental policies and debates. The Marrakech Agreement establishing the World Trade Organization (also called the WTO Agreement), for instance, strikes a balance between the objectives of trade, environment and development by referring in its preamble to ‘the objective of sustainable development’. The WTO Appellate Body saw in that reference evidence that ‘the signatories to (the WTO) Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy’. The Appellate Body also deduced from that reference the need to interpret the General Agreement on Tariffs and Trade (GATT), and in particular the notion of ‘exhaustible natural resources’ (GATT Article XX (g)) in an evolutionary way so as to include both non-biological and biological resources. A WTO Panel in China – Rare Earths even went as far as recognizing that the word ‘conservation’ in GATT Article XX (g) has a broad meaning that strikes ‘an appropriate balance between trade-liberalization, sovereignty over natural resources, and the right to sustainable development’. In the same way, the Appellate Body in China – Raw Materials found that the preamble of the WTO Agreement lists various sustainability objectives, including ‘raising standards of living’, ‘seeking both to protect and preserve the environment’ and ‘expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development’. The Appellate Body deduced from this language that the WTO Agreement ‘as a whole, reflect(s) the balance struck by WTO Members between trade and non-trade-related concerns’.5

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4 On the implications of sustainability, see Permanent Court of Arbitration (PCA), Iron Rhine Railway (Belgium v The Netherlands) (Award) [2005] ICGJ 373 [59]. The ‘right to be free from (environmental) harm’ was referred to in Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures, Order of 13 December 2013) [2013] IJCR Rep 398 [19].

5 On the Appellate Body’s observation about environmental policy being a goal of national and international policy, see WTO, United States: Import Prohibition of Certain Shrimp and Shrimp Products
Sustainability has likewise entered the fabric of European law. As its founding texts establish, the European Union should abide by the principle of sustainable development in its internal as well as external action (see, the Preamble, Article 3.3 and 3.5 of the 2012 consolidated version of the Treaty on European Union; Art. 11 of the 2012 consolidated version of the Treaty on the Functioning of the European Union; and the Preamble of the Charter of Fundamental Rights of the European Union).

Sustainability entails an inter-generational dimension. Principle 3 of the Rio Declaration states: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'. The need for sustainability reflects the need to preserve future generations and guarantee they will enjoy as many opportunities as possible. As stated by the International Court of Justice (ICJ), 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.

Whether sustainable development is a ‘concept’, ‘principle’ or ‘objective’ is not yet clear. International courts and tribunals quite often consider that the ‘essence’ of sustainability is the balance between economic development and environmental protection. However, State and institutional practice highlights that sustainable development is in fact based on three ‘interdependent and mutually reinforcing’ pillars: economic development, social development and environmental protection.

Laurence Boisson de Chazournes and Makane Moïse Mbengue

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IV.19 The Role of Environmental Processes and Production Methods

In international economic law, trade measures imposed in connection with environmental and climate change concerns often fall into the category of measures linked to processes and production methods (PPMs) discussed in Part II above in the context of national treatment. They represent a wide range of trade instruments, from border tax adjustment (BTA) of environmental taxes and technology-related product standards and labels, to the inclusion of imports in domestic emissions trading schemes (ETS) requiring importers to surrender emissions allowances on the amount of emissions associated with the production of imported products. Despite the increased awareness of global environmental problems, such as the loss of biodiversity, water scarcity, deforestation and climate change, the use of environmental PPMs remains a controversial topic in the World Trade Organization (WTO).

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