



FOR IMMEDIATE RELEASE: September 17, 2004

ARBITRARY AND CAPRICIOUS

The Precautionary Principle in the European Courts

Gary E. Marchant and Kenneth L. Mossman

Killer cranberry juice? The government of Denmark thinks so. Using a new legal concept, “the precautionary principle,” which is based on the idea that it is better to be safe than sorry, the Danish government has prohibited the marketing of Ocean Spray cranberry juice on the grounds that the added vitamin C could conceivably harm some individuals.

The same principle is now being used by the European Union (EU) to create restrictions on U.S.-grown beef, genetically modified foods, chemicals, and various other products. This new concept goes beyond the usual application of precaution that traditionally underlies all health, safety, and environmental regulations. Initially characterized as a general policy or guideline, it has now evolved into a binding legal rule in every jurisdiction in which it has been adopted. Furthermore, because of its inherent ambiguity and arbitrariness, the precautionary principle can be used to justify unreasonable or protectionist measures.

In *Arbitrary and Capricious: The Precautionary Principle in the European Courts* (AEI Press, August 20, 2004), Gary E. Marchant and Kenneth L. Mossman, experts from the Arizona State University’s Center for the Study of Law, Science, and Technology, provide factual support for the U.S. challenge to the European Union in the World Trade Organization. Through a comprehensive empirical analysis of sixty court decisions in the EU, the authors demonstrate that the EU courts have failed to provide a consistent and clear definition of the precautionary principle. Instead, the precautionary principle is being applied in an erratic manner that appears to be based solely on the political and economic interests of the decision-maker.

Some of the specific findings of this study include:

- Despite the fact that the precautionary principle is being used to decide regulatory issues of enormous consequence, neither the EU regulators nor the EU courts have defined or provided any specific formulation for it. The concept therefore remains ambiguous, which permits it to be applied (or not) depending on the particular decision-maker.
- The precautionary principle is being used to justify absurd and unjustified regulations in the EU. For example, individual EU countries have invoked the precautionary principle to ban products such as Kellogg’s Corn Flakes, caffeinated energy drinks, and fruit juice drinks. Only a few of these decisions have been overturned by the courts.

- The precautionary principle is applied inconsistently by the EU courts. In some cases, the precautionary principle is applied as a draconian sledgehammer that results in overturning longstanding due-process principles. It is also used to ban products with no evidence of risk. When applied in this manner, the precautionary principle could result in the banning of any product to which it is applied. In other cases, the precautionary principle is given no weight at all by the EU courts, having no effect on the pre-existing regulatory criteria and regulatory outcomes.
- In several cases, the precautionary principle has been applied by the courts and has resulted in direct conflicts with the recommendations of the EU's own official scientific advisory bodies.

The precautionary principle is now used in more than twenty international treaties and in more than twenty countries. In *Arbitrary and Capricious: The Precautionary Principle in the European Courts*, Marchant and Mossman confirm many of the fears that the amorphous precautionary principle has been applied in an arbitrary and unreasonable manner that can be used to support protectionist and other inappropriate measures. Through their comprehensive empirical analysis, they warn against one of the most significant and controversial innovations in international environmental, health, and safety policy over the past quarter century.

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