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Introduction

On February 15, in response to health concerns, the French Academy of Medicine called for the blocking of U.S. meats at the borders. The Americans cried foul, and called the measure blatant protectionism. In May, the French Minister of Agriculture retorted with the need to take the precaution of “banning meat imports even though and perhaps even because—evidence was lacking for making any sound decision”2. 1990’s, the dispute over hormone tainted beef and, the call for Precautionary Principle? No—1881, and the so called “pork war” between France and the United States.

Trade disputes between the United States and Europe are not new; neither are trade in food disputes. The latter, however offer a particularly interesting object of study, as food production belongs to the field of economics and, increasingly, thanks to modern technology, to that of science. However, food consumption still mostly belongs to the field of cultural sociology. Therefore the trade in food takes place at the busy intersection of rational decisions and emotional choices, of facts and values, of liberal and constructivist perspectives.

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It is within that understanding that this paper looks at two recent and ongoing food conflicts between the United States and the European Union: the dispute dealing with use of synthetic hormones in meat \(^3\) and, the dispute dealing with genetically modified food. \(^4\) This article first retraces the disputes as they were heard by the WTO Dispute Settlement Mechanism. It then argues that, because of the WTO’s underlying theoretical foundation that economic actors are rational, arguments on both sides had to rely heavily on facts and science while keeping silent on the value aspect of the issues. As a result, there could be no satisfactory settlement and no reasonable expectation of compliance. This first conclusion begs a question: Can the WTO, because of its functionalist nature ever be the right forum to deal with food disputes? This paper answers with the affirmative and a second hypothesis. The WTO could be the right forum for such disputes, but only if the Precautionary Principle is accepted for what it has become: a norm; and provided that it is perceived, not as a smokescreen for protectionism, but more so as a necessary practice which, by allowing a definition of risks that exceeds scientific considerations alone, is able to reconcile new technology and public fears. In doing so, this article posits that the Precautionary principle offers a possible compromise between a liberalist agenda and constructivist considerations.

**Choice of Cases**

There are many good reasons to choose disputes between the United States and the European Union. Obviously the sheer size of their mutual trade and their combined


\(^4\) European Communities-Measures Affecting the Approval and Marketing of Biotech Product (biotech), WT/DS291.
influence at the WTO lend an impact not only on their respective economies, but on the rest of the world as well. The two selected cases are also qualitatively important as they reflect a global evolution of trade whereby tariff disputes are progressively being replaced by other domains of contention, such as environmental regulations, intellectual property or, as is the case, product standards. By contrast, the other major food dispute case between the two blocks, the so called “banana war”, was a clear case of tariffs and quotas. In that sense, it did not have much to do with food, but much more so with conflicts of commitments and Most Favored Nation obligations. Conversely, the “hormones” and the “biotech” cases, both involve product standards and processes as well as production methods. They are both representative of the new challenges offered by the international homogenization of standards.

Overview of the Cases

The “Hormones” case

Background: Starting in the 1970’s the United States and Canada started to use growth hormones in the production of meat and, the Europeans started to resist them. In 1981, the EC banned the use of several growth hormones in response to a wide spread public outcry following the release of reports linking synthetic hormones to various harmful

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5 The European Union and the United States are each other’s main trading partner. They are the two largest economies in the world. At the peak of the hormones dispute, the European Commission estimated that during the year 1999, transatlantic flows of trade and investment amounted to close to $1 billion a day. See Krzysztof Kuik, Recent Developments in EU/US Trade Relations, 79 U.DET.MERCY.L.REV 433


health effects. At the same time, the EC decided to study five more hormones. In 1985, at the conclusion of this study, the EC instated a complete ban in spite of the United Kingdom’s opposition. The U.K. challenged the ban at the European Court of Justice but while the ECJ judgment sided with the UK, it was on procedural matters only, so the substance of the measure was accordingly re-adopted by the EC. The measure included a ban on imports of all meats containing hormones. It entered into force in 1988.

Meanwhile in 1987, the United States had already filed a complaint under GATT, but the panel had been blocked by the EC. As a consequence, the U.S. had unilaterally imposed retaliatory duties on EC products, actions which led the EC in turn to file a complaint under GATT. This complaint was also blocked, this time by the US. The stalemate continued until the conclusion of the Uruguay Rounds, which gave the U.S. and Canada not only a stronger legal basis for their complaint: the Sanitary and Phyto Sanitary Agreement (SPS), but also a stronger Dispute Settlement Mechanism to deal with the dispute. Indeed, one of the main issues on the agenda at the Uruguay Rounds had been the liberalization of agricultural trade. Negotiations had focused on the use of Non Tariff Barriers, especially national polices and measures taken for sanitary reasons. This gave rise to a specific WTO agreement, the Agreement on SPS. The SPS allows countries to take measures necessary to protect life and health, (Article 2.1) provided that these

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11 Under GATT 1947 not only a loosing party could stop the adoption of a panel’s decision but also an economically powerful member state could prevent administration form convening et panel in the first place. See A. Lowenfield, *Remedies Along with Rights: Institutional Reform in the new GATT*, 88 AMER. J.INT’L L. 477, 479 (1994).
12 Lowenfield, supra note 11.
measures are based on scientific principles (Article 2.2). Furthermore, Article 3.1 requires that international standards be used whenever they are available. Finally, while Article 3.3 allows SPS measures to exceed international standards, these measures must be scientifically justified and based on risk assessment (Article 5)\textsuperscript{14}. Simultaneously, the creation of the WTO in 1995 came with a strengthened dispute settlement mechanism. Under the New Understanding on Rule and Procedures Governing the Settlement of Disputes, member states can no longer unilaterally block a panel\textsuperscript{15}.

Within this new legal and institutional framework, the U.S. and Canada had a renewed opportunity for recourse. In 1995 they had strongly influenced, some even say forced, the FAO\textsuperscript{16} to alter the \textit{Codex Alimentarius} to reflect a rise in the acceptable limits on five growth hormones, thus making of these new limits the new international standards to be used under the SPS.\textsuperscript{17} The following year, the U.S. and Canada requested a panel at the WTO to hear their dispute. Meanwhile, the EC had not relented in the face of retaliatory measures and quite to the contrary had even strengthened the ban on importation of hormone treated meat.

\section*{The Case}


\textsuperscript{15} Lowenfield, \textit{Supra} note 12


\textsuperscript{17} According to Codex procedures it is possible to put proposals to a vote. The EC voted against the proposal but when it passed by a small margin, it bound the EC and all other members to the new standards, the so-called Maximum Residue Limits. See Frode Veggeland and Svein Ole Borgen, \textit{Negotiating International Food Standards: the World Trade Organization’s Impact on the Codex Alimentarius Commission}, GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY ADMINISTRATION AND INSTITUTION, OCTOBER 2005 at 675.
The panel concluded that the EC had indeed violated its SPS commitments for three reasons: 1) the EC ban was not based on the newly adopted Codex standards (see above), 2) the ban was not based on risk assessment (Article 5 of the SPS), and 3) the ban went beyond the level of protection used for other food and therefore was discriminatory. On appeal in 1998, the Appellate Body reversed the first and third reason of the panel but upheld the second one, judging that the EC had not conducted proper risk assessment under Article 5 of the SPS. The Appellate Body also disagreed with the Panel’s findings that risk assessment and risk management both had to be addressed. The Appellate Body per curiam noted that “the distinction between risk assessment ad risk management is irrelevant as the term risk management is not found in the SPS Agreement.”

Interpretation of the decision by the parties

The U.S. and Canada asked for a complete withdrawal of the ban, but the EC interpreted the Appellate Body’s decision as a condemnation of the way it had conducted its risk assessment, not as a condemnation of its result. The EC therefore decided that it would conduct another risk assessment. This led to further arbitration until finally the WTO concluded that the EC should bring its measures into compliance within 15 months of the Appellate Body report, and that withdrawal was the preferred means of compliance.

**Actions (or lack thereof)**

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18 See Princen, *Supra* note 66, 56.
The EC still did not comply and, in 1999 the WTO authorized the U.S. and Canada to suspend concessions and benefits to the EC. They did so for a total amount of about $116.8 Million.\(^{21}\) The case continued in 2003\(^ {22}\) after the EC offered a new risk assessment in line with their 1990 interpretation of the Appellate Body’s decision (see above). The EC subsequently passed a directive that it believed would bring them into compliance.\(^ {23}\) The U.S. retorted that it was the opposite of compliance; the EC replied that the U.S. could not unilaterally decide whether or not the EC’s interpretation was wrong and that they should resort to the WTO dispute settlement mechanism.\(^ {24}\)

Meanwhile, the EC argued in November 2004 that the continuing retaliatory measures of the U.S. and Canada were now in themselves violations under WTO commitments.\(^ {25}\) The stalemate continues.

The Biotech case

Background

Based one the common belief in Europe that there is a difference between genetically modified (GM) foods and non-GM food, in April of 1990, the EC passed a directive

\(^{21}\) The countermeasure was in the form of 100% ad valorem of U.S tariffs on several imports, up to an equivalent of $116.8 Million, the amount that the panel of arbitration agreed the U.S was loosing annually as a result of the European ban. They for example suspended concessions on Roquefort Cheese, foie gras and Perrier water. The U.S had claimed that the loss was to the extent of $500 Million annually. See George H. Roundtree, *Raging Hormones: A Discussion of the World Trade Organization Decision in the European Union-United States Beef Dispute*, 27 GA.J.INT’L & COMP.L.607, 610 (1999).


\(^{23}\) Directive 2003/74/EC.

\(^{24}\) The EC alleged that the United States acted unilaterally by failing to initiate dispute settlement in accordance with Article 21.5 of the DSU, to determine whether the new EC directive was inconsistent with EC’s obligations. See Chichester, *supra* note 22, 243.

\(^{25}\) See request for consultation by the European Communities. United States- Continued Suspension of Obligations in the EC –Hormones Dispute, WT/DS320/1(November 10, 2004).
regulating the approval of Genetically Modified Organisms (GMOs). Meanwhile in
the US, in 1992, the FDA confirmed that there was no difference between GM and non
GM foods and that therefore GM foods “did not require any specific labeling or
treatments.”

Following the 1990 Directive, the EC studied the introduction of all new GM before
authorizing them into the European markets. Between 1994 and 1998, 18 such GMOs
were authorized. This led to a wave of protests from angry European consumers. In 1997
most Europeans polled on the issue clearly stated that they opposed GMOs in their
entirety. In 2000, French protesters dumped manure in front of McDonald restaurants
throughout the country in response to McDonald’s use of GMO products. Since then
McDonalds in England have also removed GMOs from the products they use. This led to
a series of stricter directives by the EC. For example, the EC passed the Novel Food
regulation, a directive which required that companies producing GM food propose
labels clearly explaining what they are. It was followed in January 2000 by the
Commission introducing labeling requirement for additives and flavoring that had been
GM modified or had been produced from GMO. The EC went further in 2002 and

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26 EU Directive 90/220. Note that in EC law a directive is a form of legislation that requires Member states to comply with an objective that is to be met at a specified date but allows the individual member states discretion as to the manner to achieve that objective. See Brenda Poorbaugh, The Challenges of Exporting Biotechnology Products Created by The European Union Moratorium on Genetically Modified Organisms, 65 DUSQUESNE BUS. LJ 71 (2005).


28 In 1997 a poll of 5000 Europeans indicated that 59% of Danes, Dutch, French, British, Italians and Swedes, did not support the development of GMOs. Poll quoted in Brenda Poorbaugh, supra note 26.


30 Smitherman, supra note 27, 489

31 EC article above FN 27)
instated a *de facto* moratorium on applications to introduce new GMs in the Union. In 2002, the U.S. State Department reported $300 million in lost sales of GM corn and soy. The European directive was removed in 2004 but after the imposition of stricter labeling requirements to ensure traceability of GM products. It is important to note at this point that while the EC legislations are only applicable in Europe, they have a strong influence outside of Europe. Following the EC, many countries decided to stop purchasing GM crops from American companies. This led to the accusation by President Bush that EU legislation was hindering efforts to reduce hunger in Africa.

**The Case**

In May 2003, the US, Canada and Argentina instituted a case at the WTO. The complaints focused on three EC measures: the so called moratorium (see above), the product specific market bans, and several national bans within the EC countries. As it was the case in the "hormones" case, the US, Canada and Argentina, based most of their complaint on violation of the SPS Agreement and the lack of adequate risk assessment under Article 5 of the Agreement.

**The Result**

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32 Directive 2001/18
33 art 8 FN 1
36 Gary G. Yerky *President Bush’s High profile Criticism of EU over GMOS seen Exacerbating Trade dispute*, INTERNATIONAL TRADE DAILY, May 2003.
38 Four trade agreements were disputed: GATT, SPS, the Agreement on Technical Barriers to Trade and the Agreement on Agriculture. But the most significant issue especially as argued by the U.S. was under the SPS
In February 2005, the Panel released a confidential interim report to the parties. It was instantly leaked and was followed in September 2006 by a full report stating that the moratorium was not really a measure under SPS but a delay in the application of such measure. The report asked the EC to comply with its commitments. The panel further rejected the national level bans enacted under the precautionary approach.\(^{39}\)

In October 2006, the EC announced its decision not to appeal the WTO panel ruling\(^{40}\). However virulent criticism within the Union and strong opposition by France, Luxembourg and Greece among others bring serious doubts as to compliance.\(^{41}\) Indeed the “biotech” decision does not expressly request that national bans be lifted, but for national measures to be brought into compliance with the SPS agreement. It, therefore, leaves the door ajar, if not open, for EU members to maintain bans if they are able to provide risk assessments warranting stricter measures than those adopted at the EU level.\(^{42}\)

**The arguments: facts v. values**

At this juncture, it is important to understand the line of arguments on both sides of the cases. It is indeed the contention of this article to argue that, the essence of the SPS constrained the parties to have what was essentially a scientific debate. What was not part of the proceedings, even though it was the fundamental point of contention, was the

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\(^{40}\) International Center for Trade and Sustainable Development, Bridges TradeBioRes, Volume 6 no21, December 1, 2006 available at [http://www.ictsd.org/biores/06-12-10/story4.htm](http://www.ictsd.org/biores/06-12-10/story4.htm)  
\(^{41}\) International Center for Trade and Sustainable Development, Bridges TradeBioRes, Volume 6 no21, December 1, 2006 available at [http://www.ictsd.org/biores/06-12-10/story4.htm](http://www.ictsd.org/biores/06-12-10/story4.htm)  
\(^{42}\) FN art
conflict of values between the Europeans and others, especially the United States, when dealing with food and food safety.

Furthermore, to engage in a high profile international dispute, regardless of the outcome, was also an opportunity for the EU, a political institution in its childhood if not in its infancy, to take on, as a supra national entity, a role traditionally adopted by nation-states. Therefore, the task at hand is to review the public arguments (or rather what was said), but also to address what was not said and what was really at stake.

**What was said: the “rational “part of the argument**

The two disputes share similar lines of arguments and counterarguments: economic and scientific.

**The economic argument**

The fundamental issue lodged by the complainants was an economic one and the accusation that the EC was enacting protectionist measures. In the “hormones” case the U.S. claimed that the EU ban was a disguised restriction of international trade in violation of Article 2.3 of the SPS Agreement and nothing but “a desire to protect…the domestic cattle industry”43. In the “biotech” case, U.S. Ambassador Peter Allegeir told the WTO’s Dispute Settlement Body that the EU’s policies “ (had) perpetuated an unjustified trade barrier that has impeded both U.S. exports and the global use of a technology that promises great benefits to framers and consumers around the world”44.

**The scientific argument**

Since, of course, the EU denied protectionism in both case and invoked legal exceptions for matter of health, the debate moved to an examination of science. The claimants had

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long stated that the hormones used in meat were safe for the environment and for human health and that they were following scientifically established standards. Similarly they had made clear that there were no scientifically proven differences between GM and non-GM food, thus affirming that GM food was equally safe for human consumption and for the environment.\textsuperscript{45} The EU presented evidence to the contrary, invoking reports on the effects of hormones on human health as well as the potential environmental adverse impact of GM, notably, the risk to biodiversity resulting from pesticide resistant crop.\textsuperscript{46} As a result, the task was, in both cases, to establish the circumstances under which health and environmental concerns can be legally used to justify trade restriction. The goal of the SPS is indeed to constrains measures designed to protect health and the environment to those that are strictly scientifically necessary, (Article 3.3 and Article 5). The arguments therefore centered on the types of assessment that were required to establish scientific evidence, and, even more so, the level of scientific certainty needed to make a case.

\textbf{What was left unsaid: the value-side of the argument}

Let us begin this section with Patrick Zyylberman’s warning that a fundamental misconception in regards to harmonization is to “imagine that conflicts of values can be pushed aside by agreeing on technical and scientific standards.”\textsuperscript{47} Indeed the problem with the lines of argument afore-described – was that even though they were the only ones possible under the SPS agreement, they hid what was really at stake: the political

\textsuperscript{45} See Steve Suppan, \textit{Backgrounder on U.S. vs. EC Biotech Products Case}, \textsc{The Institute for Agriculture and Trade Policy Publications}, September 2004.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} See Zylberman, \textit{supra} note 2.,
dimension of the trade in food and the matter of food safety. Once can easily concur that “the SPS made it impossible for governments to consider anything but the scientific evidence, thereby reducing their freedom to satisfy demands”\textsuperscript{48} This point is further affirmed by Zylberman’ statement that the SPS Agreement is a “showpiece of historical, rationalistic, (“Anglo Saxon”) liberalism intended that science should play the key role so that food safety could be separated from high foreign policy.”\textsuperscript{49}

By contrast to the rationalistic approach, one needs to understand the “emotional” importance of food for most European countries, notably but not only, for France and Italy. Any alteration –especially if it comes from the United Sates- of the culinary tradition is easily perceived not only as an attack on the cultural heritage,\textsuperscript{50} but as an imperialist takeover of the cultural identity. For example, Meunier’s study on the attitude of France towards culture reaffirms that “ food is one of the most universally recognized components of French culture and remains of the greatest sources of domestic pride”.\textsuperscript{51} In the same study, she quotes an article by the newspaper Le Monde entitled “\textit{vive le Roquefort libre}”\textsuperscript{52} warning that the “resistance to the hegemonic pretenses of hamburgers is above all a cultural imperative”. Similarly, Francois Dufour, former Secretary General of the French Farmers Confederation stated that “eating habits, quality, gastronomy, cultural identity and social relations all depends on farming and define what

\textsuperscript{48} art 10 p6 fix quote too
\textsuperscript{49} See Zylberman, \textit{supra} note 2, 25.
\textsuperscript{50} See for example Romano Prodi ‘s first speech as European Commission President where he stated that “food is part of Europe’s cultural heritage” Speech of Romano Prodi to European Parliament, Plenary Session, 3 October 2000 (Speech 00/352)
\textsuperscript{51} Sophie Meunier, \textit{The French Exception}, FOREIGN AFFAIRS, JULY-AUGUST 2000.
\textsuperscript{52} Quoted in Meunier (supra) the title of the article in le Monde refers to a 1999 event, when the French environmental activist Jose Bove, smuggled in Roquefort Cheese at the WTO meeting in Seattle.
we refer to as agriculture. It follows from this that the farmer’s fate is indissolubly linked to that of all other citizens.”

Altogether the thought of forced importation of American food in Europe is one that easily unites public opinion especially against the WTO and leads to such indignant statement: “Who are the WTO judges to rule that the American cattle lobby could force potentially harmful hormone treated beef down the throat of European children.”

This crystallized public opinion on the relationship of food and identity as well as a latent mistrust and distaste for American food, offered a fantastic political opportunity for the EU. Indeed the EU, since its inception, has had to constantly struggle to affirm its legitimacy. Challenges to its very existence abound in many of the European countries where many so called “sovereignists” affirm that the European integration is responsible for unemployment, attacks on social welfare and altogether for a “democratic” deficit.

The WTO disputes gave the EU a formidable opportunity to redeem itself for past mistakes when dealing with food safety and to offer itself as the champion of an identity under attack. In that sense the EU could adopt what has traditionally been the role of nation state in Europe, thus becoming a true political and not only economic entity.

Indeed the EU’s current apparent cohesion on food and food safety is the result of a bumpy road. Originally the European legislative framework on food law followed a functionalist logic and was primarily designed to foster and facilitate trade regardless of safety or even social concerns. The cumbersome and unpopular bureaucratic

54 Meunier, supra note 52, 10.
56 See Alberto Alemanno, The Contested Governance of European Food Safety, FOOD AND DRUG LAW, WINTER 2004
procedures,57 eased out somehow when the EU adopted the “mutual recognition principle”,58 as it was laid out in the Cassis of Dijon case.59 This functionalist approach proved successful in terms of trade but disastrous in the face of food safety crises.60 These crises and the ensuing absolute distrust by the public as to the capacity of the European institutions to protect the population, forced the EU to radically new approaches. The EU started displaying less concern for economic factors and more sensitivity to consumers’ anxiety. Indeed, “the BSE crisis marked a year zero for the European Union food regime by forcing the member states and the Community to acknowledge the shortcomings of the European approach to food safety”.61 Consequently the EU adopted both internal and external policies. Internally, various measures (green and white paper62) paved the way to the creation of the European Food Safety Authority63 and to the incorporation into law of the Precautionary Principle.64 Externally, in order to project its own credibility, the EU adopted a strong stance at the WTO both during the various phases of the “hormones” case and during the “biotech” case.

57 For example the laborious Council directive on Chocolate – Council directive 73/24/EEC, 1973. O.J.L. 228, 23

58 On 4 November 2003, the OFFICIAL JOURNAL OF THE EUROPEAN UNION published the Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (2003/C 265/02).

59 ECJ Cassis de Dijon Case 120/28

60 The direst of the crises was the Bovine Spongiform Encephalopathy (BSE) crisis, the so-called “mad cow” disease, first observed in 1984. However one cannot forget the dioxin scare, the issue of antibiotic feed additives and the foot and mouth disease. See Krzysztof, supra note 5.


63 The European Food Safety Authority (EFSA) is the keystone of European Union (EU) risk assessment regarding food and feed safety. In close collaboration with national authorities and in open consultation with its stakeholders, EFSA provides independent scientific advice and clear communication on existing and emerging risks” available at http://www.efsa.europa.eu/en.html

Therefore, what the EU accomplished, hidden behind the scientific debate around the SPS, was to strengthen its own political cohesion by showing the European public that social and cultural considerations played a part in decision making. It reaffirmed Byrne’s point that the Commission” will take into consideration not only science but also many other matters, for example, economic, societal, traditional, ethical or environmental, as well as the flexibility of controls”. In that sense the EU revived its past position on culture when, during the Uruguay rounds, it had defended the “cultural exception” in order to protect the audiovisual sector. Similarly, the food disputes at the WTO had much less to do with scientific risk than with political opportunities.

Given the seemingly irreconcilable conflict between a debate on scientific risks and one on cultural identity and political opportunity, can we see a positive future for the peaceful and mutually acceptable resolution of food disputes at the WTO? After all, the two aforementioned cases are proof to the contrary. This paper suggests that the answer lies with the Precautionary Principle. It posits that the European Union was correct in arguing against the U.S. during both cases that the Precautionary Principle was already a norm of International Law. It goes further by saying that the Precautionary Principle should be seen as the perfect venue to reconcile liberalization of agriculture and food products and consumer anxiety linked to new technology. Thus, the Precautionary Principle could allow the WTO to move away from a strict functionalist perspective while incorporating the understanding that economic actors operate outside of rational choices especially

65 D. Byrne, “EFSA: Excellence, integrity and openness”, Inaugural meeting of the management Board of the European food Safety Authority, Brussels December 2002, quoted in Alberto Alemanno, The Contested Governance of European Food Safety, FOOD AND DRUG LAW, WINTER 2004
when dealing with food. By doing so, the WTO could display the flexibility necessary to ensure broader compliance.

First, notwithstanding the decisions by the WTO Panels and Appellate Body, there is little doubt that the Precautionary Principle is a customary norm of International law, reflecting both an increasingly general practice of states in their international legislations as well as their external relations, and an *opinio juris* expressed in a growing number of statements, declarations and treaties.

The Precautionary Principle emerged as an axiom of German law in the 1970’s. The *Vorsorgeprinzip* stated that “even in the face of scientific uncertainty… actions should be taken to prevent harms to the environment and public heath.” In other words, when in doubt in dealing with new technologies, err on the side of caution. The issue related to this principle in the extent to which the Precautionary Principle, based on an uncertainty, can be manipulated to resist any new technologies (the long term impact of which are by definition unknown since they are new.) As a result, to confer binding legal force to such a principle has been the object of much controversy. To date, two conflicting positions have emerged in international relations. On the one hand, the position adopted by the U.S. and affirmed in the Appellate Body’s decision in the” hormones” case, is that precaution should be an approach, and not a principle, and be based on risk assessment. On the other hand the EU argues that precaution is a principle and no longer a voluntary approach and should be based not only on risk assessment but also on risk management.

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68 *Id.*
and even on risk communication.\textsuperscript{69} In other words, the first proposition defends a precautionary approach that “assesses new technologies by trying to calculate the mathematical likelihood that they will harm the public.”\textsuperscript{70} The second proposition weights policy alternatives in the light of the results of the risk assessment and, if required, selects and implements appropriate control options, including regulatory measures.”\textsuperscript{71} The main argument in denying that precaution is a principle and affirming that it is merely an approach posits that it is not a norm of customary international law. Therefore if a nation state is not explicitly bound by a specific treaty obligation to recognize the precautionary principle, no other obligation to do so exists. This argument correctly points to the fact that there has been to date no authoritative decision by an international tribunal recognizing the precautionary principle as a norm of customary law. But while this observation is true, its conclusion- that therefore the precautionary principle is not a custom- is erroneous or at least it displays a bias reflective of the Anglo Saxon common law tradition. Indeed one cannot disagree that judicial decisions can provide the evidence of the existence of a custom. Article 38(1) of the International Court of Justice Statute groups judicial decisions and the writing of experts as “subsidiary means”, thus the last alinea of Article 38 is often described as purely evidentiary. In other words, if there is a precedent, there is evidence that there is a law. However, and this is where the Anglo Saxon bias can be felt, it does not mean that if there is no precedent, there is no law. This would give a legislative power to the judges that they do not have in international law. Indeed “the relegation of judicial decision to a subsidiary status reflect the reluctance of states to accord courts and the International Court in particular- a law

\textsuperscript{69} See Alemanno, \textit{supra} note 56.
\textsuperscript{70} See Pollan, \textit{supra} note 67.
\textsuperscript{71} \textit{Id}
making role”. A customary norm is not the result of a judicial decision but, following a literal reading of Article 38(1) of the Statute of the ICJ it is “an evidence of a general practice accepted as law”. It is therefore strictly under those criteria that the legal status of the Precautionary Principle needs to be discussed and not whether or not it has been made a precedent.

Observation shows that the use of the Precautionary Principle is a growing practice of influential states in their internal legislation and external commitments. The Precautionary Principle is national law in many countries. It is regional law at the European level (Article 130r (2) of the EC treaty). Numerous countries, including Argentina and Canada (both were complainants in the “Hormones” case) have recognized the binding nature of the principle in international treaties to which they are parties (Cartagena Protocol on Biosafety, UN Framework Convention on climate Change). Finally the international community as a whole recognized the Precautionary Principle as an inherent part of sustainable development in Principle 15 of the Rio Declaration.

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73 For example Canada. See the Oceans Act, S.C. 1996, Canadian Environmental Protection Act, 1999. India also uses the Precautionary Principle. The Indian Supreme Court has stated “no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the Country”. Quoted in Sabrina Shaw and Risa Schwartz, Trading Precaution: the Precautionary Principle and the WTO, UNU-IAS REPORT, NOVEMBER 2005
74 The Maastricht Treaty of 1992 states that the EU environmental policy shall be based on the precautionary principle and on the principles that preventive action should be taken” quoted in Michael Parish, Science Behind the Regulation of Food Safety: Risk Assessment and the Precautionary Principle, CRS REPORT FOR CONGRESS, AUGUST 27, 1999 found at http://www.ncseonline.org/nle/crs reports
75 The Cartegena Protocol clearly states its compliance with the precautionary principle of the Rio Declaration in Article I “In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection.” Available at http://www.law.nyu.edu/kingsbury/int_law_archive/intl_law_f03/basicdocs/FrameConvClimateChange.htm
76 Principle 15 states: “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,
These aforementioned examples are enough to assert that there is widespread practice of the Precautionary Principle. The task at hand at this juncture is to address whether or not there is an *opinio juris* and more precisely whether the objection of the United States is enough to establish that, while there is a widespread practice of the principle and clear statement by countries of the EU that they believe the practice to be law, the Precautionary Principle is nonetheless, not a norm of customary law. The ICJ in both the Norwegian Fisheries case and the Asylum case makes the answer clear. Indeed the Court stated that a customary rule may arise notwithstanding the opposition of one state, provided that the necessary degree of generality is otherwise reached. The apparent opposition of the United States is therefore not enough to deny the emergence of a custom. The final step is to figure out whether or not the U.S. can be bound by the rule if it opposes it. It is generally accepted, within the positivist framework that characterizes international law, that a state cannot be bound by a norm that it does not accept and even consistently reject, unless the said norm has a peremptory character. At this juncture we need to see if the opposition of the U.S. to the Precautionary Principle is constant or if it is opportunistic. It is clear the United States does not consistently oppose the Precautionary Principle, especially when dealing with its own food safety. For instance internally the U.S. employs the Precautionary Principle in the Federal Food Drug and Cosmetic Act as amended by the Food Quality Protection Act of 1996. It mandates a precautionary safety factor in addition to an ample margin of safety. Congress has also

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”

78 Norwegian Fisheries Case.

79 Asylum Case, Columbia v. Peru 1950 ICJ 266

80 See Damrosh, *supra* note. p 101

81 See Parish *supra* note 74.
used a precautionary zero tolerance approach to food safety with the implementation of the Delanay clause which takes into consideration potentially cancer causing additives. Externally the International Joint Commission Dispute Settlement Body between the U.S. and Canada under the 1909 Boundary Water Treaty also uses the Precautionary Principle. In other words, there is no consistent objection to the Precautionary Principle, quite the contrary. General practice and general acceptance that this practice is law suffice to demonstrate the emergence of a customary norm of international law.

Having established that the Precautionary Principle is a norm of customary law does not suffice however to ensure compliance with the norm. The desirability of it use is as important as the binding nature of its substance. The term precaution is a highly subjective term, hence the reluctance of critics of the principle to accept it as a rule. Indeed to a certain extent the Precautionary Principle can be seen as “culturally framed concept[…] muddled in policy advice and subject to the whims of international diplomacy and unpredictable public mood.” However this very definition meant to shed a negative light on the Precautionary Principle shows quite reversely the positive aspect it can offer. As a “culturally framed concept” the Precautionary Principle allows a cultural interpretation of risk management and not a strictly scientific one. Scientifically, the term risk “usually refers to the expectation value, that is the probability of an adverse effect of

82 Id.
83 Treaty between the United states and Great Britain relating to boundary waters, and questions arising between the United states and Canada http://www.ijc.org/rel/agree/water.html.
84 Timothy O’Riordan and James Cameron, Interpreting the Precautionary Principle, 71 International Affairs (Royal Institute of International Affairs 1944-), 625 (1995).
an action, multiplied by its gravity.”

Culturally, the precaution is an “attitude of decision makers, reflecting their values and/or the values of those they represent in taking a particular decision.” The Precautionary Principle allows a delay between the introduction of a new technology and its acceptance, delay that allows the interplay of elements other than science. In that sense the assurance to the population that the Precautionary Principle will be used gives new technologies the opportunity to be accepted. Indeed one can agree with Scherzberg that “avoiding the arousal of mistrust towards new technologies not only assuages people’s mood, but also maintains as society’s capacity for innovation”. On the other hand, the refusal of the Precautionary Principle often leads to a rejection in toto of all new technologies, whether good or bad.

The final point to make in this study is to address whether not the WTO can incorporate the cultural dimension of risk in food disputes and accept the precautionary principle as “culturally framed concept” whereby risk assessment can introduce elements other than science to justify measures under the SPS agreement. This would mean a broader interpretation of Art 5.7 of the SPS Agreement, which permits provisional emergency measures when there is scientific uncertainty but places very strict restrictions, as well as the burden of the proof on the defending party to a dispute arising under this article. Thus the article it is not that “precautionary” in nature since the emergency needs to be present already when such measures can be adopted. Reversely a true application of the

86 Ryan Hill, Sam Johnston, and Cyrie Sendahonga, Risk Assessment and Precaution in the Biosafety Protocol, UN University, July 2004 quoted in Shaw and Schwartz, supra note 74.
Precautionary Principle “would allow for action to be taken to prevent harm and, therefore to avoid provisional measures being adopted on an emergency basis.”

This understanding has started to appear in other fora. For example, the Word Conference of International Food Trade held in Melbourne, Australia in 1999 adopted a general recommendation for recognizing precaution as a “critical element in drawing up Codex standards and highlighting the “discussion of legitimate factors other than science”.

The WTO Dispute Settlement Body which eventually concluded in the “hormones’ case, that the Precautionary Principle” still awaits authoritative formulation in international law, has nonetheless opened the door for an understanding of precaution and risk as exceeding science only. Indeed in the “hormones” case, the Appellate Body stated that the risk to be evaluated under Article 5(1) of the SPS “was not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist.” This clearly meant that each SPS measure must be analyzed separately and on a case by case basis.

“The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas”. It is, therefore, important for the WTO to accept the Precautionary Principle as a concept that favors acceptance of new technology and not deter from it. As such, it would not only foster the growth of technologies by lessening the perceived risk attached

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87 Shaw and Schwartz, supra note 74.  
88 Zylberman, supra note 2, 27.  
89 Appellate Body Report  
90 See EC measures Concerning Meat and Meat Products (Hormones), AB-1197-4 Report of the Appellate Body, WT/DS26/AB/R  
to them, but it would help the WTO diminish the tension that currently exists between trade and the environment.

Conclusion

On December 27, 2006, the Food and Drug Administration announced that it was set to approve food from cloned animals. It further asserted that no labels would be required before such food could appear in supermarkets, since cloned animals and their offspring were “virtually indistinguishable” from conventionally bred animals. This will undoubtedly unleash a flurry of debates highlighting the economic, scientific, health related and ethical stakes of the issue. Furthermore if and when the final approval comes, it is likely then that the food will be put on the international market. It is also likely that the European consumers will be less than eager to see Dolly-the-cloned-ewe’s offspring on their plate. Based on precedent, should trade disputes ensue, no decisions by the WTO Dispute Settlement Body will be compelling enough to change consumers’ behaviors and trigger compliance. Indeed “[i]n the end compliance will always be the outcome of a political calculus of decision-makers who also take into account other political considerations than WTO law or the possibility of retaliation.” New technologies need time before they are readily accepted by the population at large. Within that understanding the public knowledge that policies and regulatory measures will be enforcing the Precautionary Principle may prevent a rejection in whole of the new technology, especially in the field of food. The agenda of free trade, which now

permeates all venues of life from manufactured goods to agriculture to food, needs to be tempered by considerations other than economics if it is to succeed.