I RECOGNIZE YOU, I RECOGNIZE YOU NOT:

**Sanitary and Phytosanitary Agreement Disputes and the Application of the
Precautionary Principle in WTO Decisions**

by

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ABSTRACT

The late twentieth century has witnessed a rapid rise in the exchange of goods, and a particularly large increase in trade relations involving consumable goods, for humans and animals. This increase in trade, coupled with the speed with which products move around the globe, has raised the importance of the Precautionary Principle. This thesis looks at the evolution of the Principle through four decisions of the World Trade Organization (WTO) involving the *Sanitary and Phytosanitary Agreement* (SPS). Having rendered some controversial rulings, the WTO has not demonstrated in its decisions, exhaustive and robust deliberations, but has instead relied on doctrinaire textualism by basing the resolution of complex issues on a single document, namely the *SPS Agreement*. Furthermore, the Precautionary Principle may have reached its apogee, as it appears destined to be replaced by the more normative constructs of risk assessment and risk management.

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Life should not be a journey to the grave with the intention of arriving safely in a pretty and well-preserved body; but rather of skidding in broadside, thoroughly used up, totally worn out, and loudly proclaiming: "WOW!! What a ride!"

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INTRODUCTION

(Now, however,) after eleven years on the Bench following eighteen at the Bar, I being well advised by observation and experience of what I am about to set down, have thought it both wise and decorous to now boldly affirm that “having well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparatories ... and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my closet all the pokes and bags of the defendants – that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff.”

Thereafter I proceed “to understand and resolve the obscurities of these various and seeming contrary passages in the law, which are laid claim to by the suitors and pleading parties,” even just as Judge Bridlegoose did, with one difference only. “That when the matter is more plain, clear and liquid, that is to say, when there are fewer bags,” and he would have used his “other large, great dice, fair and goodly ones,” I decided the case more or less offhand any by rule of thumb. While when the case is difficult and involved, and turns upon a hairsbreadth of law or of fact, that is to say, “when there are many bags on the one side and on the other and Judge Bridlegoose would have used his “little small dice,” I, after canvassing all the

available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.¹

Globalization has brought about a drastic shrinkage of the planet in terms of trade relations. This phenomenon has rendered possible the movement of thousands of tons of product, particularly agricultural and consumable goods, to be moved from one side of the planet to the other in less than twenty four hours. The globally integrated food supply means repercussions are felt quickly across all markets. At the center of this revolution in the international exchange of goods, particularly consumable/nutritional products, is the Precautionary Principle – a normative principle designed to assist and guide policy makers and politicians in deciding the most appropriate course of action to be taken, when a product or a product related disease or pest threatens human, animal or plant life and health, in spite of a clear absence of a possible or probable cause and effect relationship, still unconfirmed by the scientific community. While some academics and legal authorities position the Principle within the international arena, others are not so convinced. Standing on the doorsteps of the prestigious international

¹ See, Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision” (April 1929), 14 *Cornell Law Review* 274 at 281.

law club, wearing an accoutrement from a normative brand designer, it has yet to be admitted and to be recognized as a full member. The current international jurisprudence only accords it the status of a mere reflection in the tapestry of international trade law, and its full recognition is not likely to be decided for many years to come. Its demise may be on the horizon with the increasing international recognition of the more normative, more precise, and more adaptable concepts of risk assessment and risk management – concepts that provide the WTO and its members with a more robust decision-making and public policy framework.

The analysis will focus on four sanitary and phytosanitary related decisions of the World Trade Organization (WTO), all of which cover an issue or dispute of international trade law, with the *Sanitary and Phytosanitary Agreement (SPS Agreement)*² at the centre of the four disputes. In reading these decisions, one cannot but speculate that the musings of Joseph C. Hutcheson may still be very pertinent, this nearly one hundred years later. The sheer complexity of the issues covered in each of the four decisions, the Panel of three arbitrators supported by resident and invited experts, the Appellate Body in the case of an appeal against the Panel decision, the interventions of some nation-state with an interest in the case, either in support or against the defendant nation-state, are all criteria indicating the “hunch” or “the jump-spark connection” may play a larger role – much larger than one

² Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 59-72 (1999) [hereinafter SPS Agreement] [document on-line]; available from http://www.wto.org/english/docs_e/legal_e/15-sps.pdf; Internet.

would like to admit. Each of the Panel decisions, and each of the four Appellate Body decisions, leaves one to question the rationality behind the final outcome. In the *Hormones Case*³ (January 16th 1998)⁴, the *Australia - Salmon Case* (October 20th 1998)⁵, *Japan - Agricultural Products* (February 27th 1999)⁶, and *Japan - Apples* (November 26th 2003),⁷ the presence of the hunch is particularly evident. Had the WTO awarded supremacy to the wording of the Precautionary Principle, why would the ruling go against Japan in *Japan - Measures Affecting the Importation of Apples*, and in *Japan - Measures Affecting Agricultural Products*? In reading the four rulings, one quickly notices the trifling interest paid to the precautionary phrases of the *Rio Declaration* (quoted below), particularly phrases like, ‘in order to protect the environment’, or ‘where there are threats of serious or irreversible damage’, or ‘lack of full scientific certainty shall not be used as a reason.’ As we will see in section II of the paper, the possibility of the spread of disease in Japanese orchards in *Japan - Measures Affecting the Importation of Apples*, the impact on health in *EC Measures Concerning Meat and Meat Products (Hormones)*, the impact of an insect pest on Japanese crops in *Japan - Measures Affecting Agricultural Products*, are salient examples

³ Panel Report in *EC Measures Concerning Meat and Meat Products (Hormones)* adopted 18 August 1997, WT/DS48/R/CAN and Appellate Body Report *EC Measures Concerning Meat and Meat Products (Hormones)* adopted January 16, 1998, WT/DS48/AB/R.

⁴ Represents the date on which the Appellate Body circulated the appeal report.

⁵ Panel Report in *Australia - Measures Affecting the Importation of Salmon* adopted 12 June 1998 WT/DS18/R and Appellate Body Report *Australia - Measures Affecting the Importation of Salmon* adopted 20 October 1998, WT/DS18/AB/R.

⁶ Panel Report in *Japan - Measures Affecting Agricultural Products* adopted 27 November 1998, WT/DS76/R and Appellate Body Report *Japan - Measures Affecting Agricultural Products* adopted 27 February 1999, WT/DS76/AB/R.

⁷ Panel Report in *Japan - Measures Affecting the Importation of Apples* adopted 15 July 2003, WT/DS245/R and Appellate Body Report in *Japan - Measures Affecting the Importation of Apples* adopted 26 November 2003, WT/DS245/AB/R.

where the intent of the *Rio Declaration* was set aside for the ‘literal’ approach advocated by the *Vienna Convention on the Law of Treaties*⁸ and by the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes*⁹ or DSU. While the paper does concede that the intent of the dispute settlement system, established by the member nations, and managed by the administrative machinery of the WTO, is to discipline the international trading system and in the process, to instill stability and predictability in the final outcome, it is not a dissertation that will focus on the legal mechanisms, nor will it focus on the ‘black letter’ of the law. It is a critique of the machinery of the WTO in the application of the Precautionary Principle, imbedded in Article 5.7 of the SPS, often termed or qualified as an ‘escape clause’. The paper will show that this escape hatch, namely Article 5.7, is seldom opened by the WTO, although available to nations wishing to extricate themselves from the rather stringent demands of the SPS and the DSU, in order to protect their national industries, or to meet the demands of their constituents. Section III will demonstrate, for each of the four decisions, how the dispute resolution machinery of the WTO cast aside precautionary warnings in favor of a textual interpretation of the *SPS Agreement* in spite of the fact that a more ‘teleological’ approach would likely not have compromised the wording of either the Vienna Convention or the DSU.

⁸ Vienna Convention on the Law of Treaties, May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/CONF.39/27 §26.

⁹ See World Trade Organization website: http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf, viewed on May 11th, 2006.

Principle 15 of the *Rio Declaration on Environment and Development* states that:

[i]n 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 degradation¹⁰.

The *Declaration* remains to this day the most authoritative legal statement on the Precautionary Principle. Prior to the Rio meeting held in June 1992, the Precautionary Principle held some ground in the legal discourse, as it was referred to and at times applied in dispute resolution, in a wide range of areas not exclusively limited to environmental disputes. Chapter 1 will look at the Precautionary Principle from the ‘rule’ and ‘standard’ perspective. Is it a ‘rule’ or is it a ‘standard’? What position does it occupy in international law and in international trade law? Does it have a definitive, a truly normative, and a widely accepted position in either area of law? The chapter will also look at how the Principle is perceived by academia, and within the circles of international relations, international law and international trade law, including how it has been applied before the *Rio Declaration*, and how it has been defined in treaties and international agreements since the signing of *Rio*.

¹⁰ *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Annex I, princ. 15, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874,879.

While the principle's application is mainly associated with legislation and treaties, it has always assumed a broader application in day-to-day situations. It is a principle that each and everyone applies without giving it further thought, as for example the judgment calls we make while driving our vehicles, boarding aircrafts, operating heavy equipment, mountain climbing, bungy jumping, parachuting, motorcycling, or living and working in high rise buildings constructed in earthquake-prone zones; we buy insurance on life, buildings, cars, health; we wear safety helmets and seat belts, and we obey signal men on highway construction zones, some continue to smoke in spite of the compelling evidence against the harmful effect of smoke, and so on. Everyday, we unconsciously apply the Precautionary Principle in our daily activities and in many of the decisions we make.

Not every application of the Principle requires it to be coined within the confines of the legal arena, nor must it always be anchored in cost-effective measures and scientific certainty. To illustrate the Principle in action, let us consider a recent incident where one can observe the application of the Precautionary Principle, including the many nuances that, in time, colour its implementation. The example will further highlight that the Precautionary Principle "is not an algorithm for making decision."¹¹ It is basically the application of prudence "as it is not able to provide a uniform answer to the difficult

¹¹ See, Peter Saunders and Mae-Wan Ho, *The Precautionary Principle is Coherent* [book on-line] (ISIS Paper 31 October 2000, accessed 14 July 2005); available from http://www.biotech-info.net/PP_coherent.html; Internet.

questions arising from the use of potentially harmful technologies,”¹² or as in the following example, where application of prudence involves the use of ‘potentially hazardous or risky technologies’. Its intent is to respond to situations of potential and possible risk.

On August 2nd 2005, at approximately 3:50 PM, an Air France Airbus A340 jet, on a flight from Paris’ Charles de Gaulle airport, skidded off runway 24 Left at Pearson International in Toronto, and shortly thereafter, burst into flames. All 297 passengers and 13 crew members escaped safely from the burning jet. The aircraft was a total loss. Venturing into the speculative domain one could ask, had the crew of Air France Flight 358 applied the Precautionary Principle on August 2nd 2005 in its final approach to Pearson International Airport in Toronto, would the outcome have resulted in a decision to land the aircraft? The answer is complex and multifaceted.

With the precautionary words of the *Rio Declaration* in the background, specifically, “[w]here there are threats of serious and irreversible damage,”¹³ had the crew of Flight 358 applied the meaning of the Precautionary Principle during take-off preparations, the aircraft would never have left Paris, let alone undertake a transatlantic flight at nearly the speed of sound, followed by a landing procedure where the risks are multitudinous. When the risks associated with air flight are confirmed, the results are often catastrophic in terms of loss of life and loss of capital. Furthermore, a full risk assessment applied to the letter, combined with the laws of physics and gravity combined, would have

¹² See, Roberto Androno, “The Precautionary Principle: A Legal Standard for a Technological Age” (2004), 01, no. 17 *Journal of International Biotechnology Law* 11 at 17.

¹³ See, Rio Declaration, *supra*, note 8.

seriously influenced any crew to err on the side of caution before contemplating takeoff procedures. Under an 'absolute' and 'rigid' interpretation of the Principle, and in conjunction with the application of the inversion of proof principle, the onus was clearly on Airbus to demonstrate the benefits versus the possible risks. As the risk calculations for any aircraft can never be zero, the Precautionary Principle would have denied taking-off in the first instance and the loss of the aircraft would have been avoided. Taking this even further, a rigid interpretation of the Principle would have terminated, decades ago, all developments in air transportation. The Air France incident of August 2nd 2005 would have never been the object of any discussions. While this scenario is purely speculative, it nevertheless represents the impact of an extreme application of the Principle where the outcome would have resulted in the abrupt termination of air transportation very shortly after the first flight of the Wright Brothers.

Let us assume a scenario. Assume different circumstances existed on August 2nd 2005, such as a presumption Flight 358 was low on fuel thereby jeopardizing the possibility of reaching the nearest alternate landing site. Such a vector would have triggered the Precautionary Principle towards favouring a decision to land, as the alternative would have had a relatively high probability of a catastrophic conclusion, in spite of the fact that adverse atmospheric conditions existed on August 2nd 2005 during final approach to Pearson International. Had this been the situation for Air France 358, the application of the Principle and the decision to land under adverse atmospheric conditions would have resulted in a similar outcome, namely the catastrophic incident now

under investigation by the Transportation Safety Board. In essence, the application of precautionary measures applied against the above circumstances directed the Air France crew to land, but the results, while not tragic in terms of loss of life, were nevertheless devastating as the aircraft was completely destroyed.

It is evident the crew of flight 358 took into consideration various preventive measures and without being aware, performed some form of risk analysis. But, under the rapidly developing situation surrounding the landing of a large aircraft under adverse atmospheric conditions, it is obvious that some threshold needed to be reached quickly, as in nearly all cases where precautionary measures are applied in landing an aircraft. Vienis and Ghisleni state that once consideration of precautionary measures has been carried out

[t]here certainly is a threshold beyond which waiting for further evidence to adopt preventive measures is morally and practically justified; instead it is quite clear that – within certain limits – persisting in raising questions and satisfying scientific curiosity is legitimate from the point of view of the theory of knowledge, as long as systematic doubt does not interfere with preventive action.¹⁴

Obviously, the crew felt the threshold had been reached and any further doubt could not cloud and interfere with the decision to land the aircraft.

¹⁴ See, Paolo Vineis and Micaela Ghisleni, *Risks, Causality, and the Precautionary Principle* [book on-line] (Netherlands: Kluwer Academic Publishers, 2004, accessed on May 21, 2004); available from http://www.netram.net/pdf/man_unc.pdf; Internet.

So far, this paper has focused on describing and speculating on a real and recent event - familiar to most readers – where the Precautionary Principle may have been applied, and in all probabilities, the actors were unaware they were considering and applying precautionary measures. Most of us are familiar with the expressions: ‘better safe than ‘sorry’, or ‘look before you leap’. These are precautionary measures we apply in everyday life. On this point, Sunstein writes:

All over the world, there is increasing interest in a simple idea for the regulation of risk: In case of doubt, follow the *precautionary principle*. Avoid steps that will create a risk of harm. Until safety is established, be cautious; do not require unambiguous evidence. In ordinary life, pleas of this kind seem quite sensible, indeed a part of ordinary human rationality. People buy smoke alarms and insurance. They wear seat belts and motorcycle helmets, even if they are unlikely to be involved in an accident. Shouldn't the same approach be followed by rational regulators as well? Many people believe so.¹⁵

And since many people believe so, the Principle has been and continues to be the object of deliberations in, for example, the sessions of international, national, and municipal courts and tribunals,

¹⁵ See, Cass R. Sunstein, "Beyond the Precautionary Principle," [journal on-line] (*University of Pennsylvania Law Review* vol. 151 2003: 1003, accessed on January 20th 2005); available from <http://www.law.upenn.edu/lrev/Issues/vol151/Issue3/Sunstein.pdf>; Internet.

international regulatory bodies such as the WTO, the United Nations, the European Commission, and other legal regulators and institutions. Despite this interest in the Precautionary Principle, whether from proponents or opponents, its applicability remains the object of active discussions in the courts and tribunals at both the national and international levels.

Legal contentions sometimes arrive at the courts or tribunals already over-cooked while in other cases the courts are presented with the raw constituents with which they will be asked to formulate a resolution to the dispute. To illustrate this, we can use as an example the issue of crimes against humanity, or the principle of diplomatic immunity, both of which are recognized as belonging in the suite of *jus cogens* norms of general international law. “*Jus cogens*, the literal meaning of which is “compelling law,” is the technical term given to those norms of general international law that are widely accepted as being hierarchically superior. They are, in fact, a set of rules which are peremptory in nature, and from which no derogation is allowed under any circumstances.”¹⁶ On the contrary, the Precautionary Principle has not attained the status of “compelling law” or *jus cogens*. The Principle is not part of a higher law that cannot be abrogated by treaties or by the national legal framework, as would be the case for crimes against humanity or the laws in the conduct of war and conflict.

Having attained a greater visibility, at the end of the twentieth century, by the environmental protection movement, the Precautionary

¹⁶ See, Kamrul Hossain, “The Concept of Jus Cogens and The Obligation Under The U.N. Charter” (2005), 3 *Santa Clara Journal of International Law*: 72 at 73.

Principle remains the object of continued controversy as to its standing in international law. The increasing growth in international trade flows created by the forces of globalization, and the creation of the WTO on January 1, 1995, have pushed the discourse on the legal standing of the Principle into the field of international trade disputes and international trade law. Many are convinced that the Principle is an accepted component of international trade law, while others vehemently dispute such a conclusion. In this atmosphere of controversy, disputes referencing the Precautionary Principle, as a defense mechanism, represent the raw ingredients with which courts and tribunals are called upon to produce sound decisions that will, over time, withstand the test of an established and accepted precedent. The reality appears to indicate, at first glance, that the Precautionary Principle is a malleable and somewhat abstract concept, where its use and interpretation are continually debated in the labyrinthine world of international, national or municipal courts and tribunals, and it continues to be the object of an extensive discourse in the corridors of academia and in the debates of the 'high priests' of the legal establishments. While it is far from being grounded in the diurnal discourse and networks of the legal framework, what exactly is it about the Precautionary Principle that will twist the tail of courts or tribunals causing them to violently shift in their interpretation and application of the Principle, either towards or away from considering it as a cornerstone of the global legal framework? Why is the legal establishment selective in its use and recognition of the Principle, and why does it appropriately omit its very existence, particularly in view of the wording found in the *Rio Declaration*? This

paper will answer the question by reference to the deliberations of the WTO as the body responsible for resolving international trade disputes. The focus will be on those trade disputes involving the *Sanitary and Phytosanitary Agreement (SPS Agreement)* with particular attention being paid to the interpretation of Articles 2.1, 2.2, 3.3 and 5.7, and the chapeau of the *SPS Agreement*,¹⁷ where covert reference is made to the rights of nations to implement precautionary measures aimed at protecting human, animal and plant health.

Section I – The Precautionary Principle, will look at the uses and definitions of the Principle using as a starting point the wording of the *Rio Declaration*. The Principle is in fact an offspring of the environmental protection movement, but it has since penetrated numerous fields of legal and policy debate, and in particular the growing battlefield of international trade law. This section will also conduct a

¹⁷ The chapeau of the *SPS Agreement*: *Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade; *Article 2 Basic Rights and Obligations*. 1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement. 2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. *Article 3 Harmonization*: 3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. *Article 5 Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection* 7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

brief overview of the discourse that defines the Precautionary Principle. Is the Principle a mere instrument to guide policy makers in defining policy direction, or is the principle an established rule, an established law? Is it part of the international law regime? While it is far from having attained the status of an established norm of general international law, are there sufficient grounds and precedents to officially declare the Precautionary Principle a definitive cornerstone of international trade law? This paper will argue that the Principle has not reached the maturity required to graduate to the status of international law and international trade law, and that it will be gradually replaced by risk assessment and risk management.

Section II The Sanitary and Phytosanitary (SPS) Agreement Disputes will look at four WTO cases that have referenced the SPS. Nowhere in the text of the SPS will the reader find the words, ‘precautionary principle or precautionary measures, or precaution’, but Articles 2.1, 2.2, 3.3 and 5.7 are nevertheless worded to allude, albeit indirectly, to a general definition of the Precautionary Principle. The reader will find a detailed description of the deliberations surrounding the SPS with particular emphasis on references to Articles 2.1, 2.2, 3.3 and 5.7, followed by an analysis of the argumentation and the modifications that were brought to the Panel decisions by the Appellate body.

Section III To Be Recognized, or Not To Be Recognized? That Is the Question will build a three-dimensional array by superimposing each decision onto each other starting with the earliest decision, namely the *Hormones* decision. The intent is to determine the variances in the

interpretation of Articles 2.1, 2.2, 3.3 and 5.7 of the SPS Agreement and to conclude that the Precautionary Principle, while not specifically mentioned, has either been reinforced through each of the decisions or that it has largely been watered down to a meaningless state.

Lastly, this paper will offer some speculative observations on the future direction of the Precautionary Principle. Without a clear definition, the Principle may be overtaken by the more normative and precise aspects found in the conduct of risk assessment, and risk management exercises – forces that, at first glance, appear to add more fuel to an already heated legal debate. Can the regulatory tribunals and courts, such as the European Court of Justice and the WTO's dispute resolution infrastructure, meet the challenges generated by the fast growing international trade flows, from which ever more complex issues are generated annually? With the increasing flow of goods for human and animal consumption, with the discovery of new diseases such as Bird Flu – diseases that lend themselves to easy transportation across the globe – with the increasing demands of consumers in developed nations for food safety measures, with the expansion of cases related to food law and the sheer complexities encapsulated within those trade related issues, and with the pressures placed on the WTO and national courts such as the European Court of Justice, to resolve those issues, it is highly probable the Precautionary Principle will not be capable of sustaining the impact of those global forces that will continuously violate its precarious legal standing, over the course of the twenty-first century.

I THE PRECAUTIONARY PRINCIPLE

THE *Rio Declaration*¹⁸ remains the most authoritative and legal pronouncement pertaining to the Precautionary Principle. In spite of the status attained at Rio, the Principle has been redefined and reworded many times before Rio, and many times since Rio. Yet, it remains to this day a principle with no definition. Instead, it is redefined and reworded to suit different audiences, and different circumstances and policy issues. Before undertaking an analysis of the four WTO decisions identified in the introductory section of this paper, it is an opportune time to situate the reader in the circuitous and ambiguous definitions of the Precautionary Principle to appreciate the outcomes of the four Sanitary and Phytosanitary decisions.

Part A looks at the nature of the Precautionary Principle in terms of positioning the Principle as a ‘standard’ or as a ‘rule’ as it exists, albeit unmentioned, within the framework of the Sanitary and Phytosanitary Agreement. While the words ‘Precautionary Principle’ or ‘precautionary approach’ are never used in the text of the *SPS Agreement*, the Principle, some will argue, is nevertheless covertly

¹⁸ See, *Rio Declaration*, *supra*, note 10.

present in the wording of Articles 2.1, 2.2, 3.3 and 5.7.¹⁹ When considered against the wording of the identified articles of the SPS, is the Principle a ‘standard’ or is it a ‘rule’, or is it simply a broad principle for the use of policy setters and politicians? The intent is to set the stage for Section III, where the analysis will focus on determining whether the terms of the *SPS Agreement* dovetail within the definition of a ‘rule’ or that of a ‘standard’, and furthermore, what impact the classification has had on the decisions of the Panel and the Appellate Body. Part B extends the framework in several ways. The relevant questions involve looking at the variances in the definitions of the Principle, from the vantage of academia and the law, in terms of positioning the Principle as either a component of international law or, as a truncheon, used indiscriminately by opportunistic politicians and pressure groups, and by opponents to the advancements of science and technology. Assuming it is a cornerstone of international law, has it reached the status of a rule of *jus cogens* on the international horizon, in spite of a clear absence of *opinio juris*? Does the Principle act as an anchor, amongst the many, in the exercise of sovereign power by the state? Part C will present a very broad and general account of the historical development of the Precautionary Principle up to the present, using several historical and current examples to demonstrate its evolution and

¹⁹ See, SPS Agreement, *supra*, note 2. Many experts in the field of international trade law are convinced that in spite of its absence in the wording of the *Sanitary and Phytosanitary Agreement*, the ‘precautionary principle’ is nevertheless a central element in World Trade Organization jurisprudence particularly in those cases implicating the SPS Agreement and the references in the *opinio juris* of the WTO to Articles 2.1, 2.2, 3.3, and 5.7. Since the wording of the ‘precautionary principle’ is vague and lacks a clear and widely accepted definition, the intent nevertheless directs authorities to apply the ‘better safe than sorry’ principle, meaning that in the absence of clear and convincing evidence to the contrary, faced with the possibility of a product, action, or event having the potential of causing harm, authorities should err on the side of caution in order to protect human, animal and plant life and health.

its application, while Part D will present a very cursory survey of some of its definitions.

A The Precautionary Principle: Ex Ante or Ex Post?

The Precautionary Principle is normative in nature, but is it normative in an *ex ante* or an *ex post* sense? If the Principle is an *ex ante* instrument, the expected forms of behaviour are clearly defined along with the repercussions that will be activated if the defined forms of behaviour are not followed. For example, 'seat belts must be worn at all times' or 'radar detecting devices are not allowed' are both *ex ante*, as the expected behaviour is clearly defined. If the Principle assumes an *ex post* colouration, such as 'drive carefully at all time', then the conduct is evaluated after the fact and the repercussions are determined based on the nature and the seriousness of the conduct. While retaining its 'normative' status, the *ex ante* label turns the Principle into a rule, while an *ex post* status makes it a standard. As we will soon see, the two labels dictate a very different approach.

Professor Korobkin differentiates between 'rules' and 'standards' as follows:

Rules state a determinate legal result that follows from one or more triggering facts. The 65 mile per hour (mph) speed limit is a rule. If a driver travels faster than 65 mph, he has violated the law. If he travels at 65 mph or less, he has not violated the law. No other circumstances are relevant to the legal consequences of the driver's

act. Standards, in contrast, require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion. A law requiring drivers to travel “no faster than is reasonable” is a standard. To determine whether the driver has or has not violated the law, an adjudicator must investigate the range of relevant driving conditions and apply the background principle of reasonableness to the situation.²⁰

Assuming the Precautionary Principle is a rule, why does it generate so many definitions and interpretations? If a rule may take the form of ‘you must not exceed a speed of 45 kilometers in a school zone’, or ‘you must not speak loudly in a library’, or ‘you must stop in both directions when the signal lights of a school bus are flashing’, such rules will normally define the behaviour required in order to abide by the rule. Furthermore, breaking rules will normally entail some form of repercussion against an activity considered to be ‘antisocial’. What if the directive merely states ‘you should always drive carefully on icy roads’, or simply, ‘drive carefully’, will the warning project the same impressions in the minds and behaviour of drivers as compared to the postings of speed limits? The speed limit posting of ‘maximum 100 kilometers per hour’ entails some form of repercussion or penalty. If one exceeds the speed limit, one will be fined and demerits points will be generously allocated against the offender’s driving record. Insurance rates may also increase.

²⁰ See Russell B. Korobkin,, “Behavioral Analysis and Legal Form: Rules vs. Standards Revisited” (2000), 79 *Oregon Law Review*, 23 at 25.

On the other hand, the limitations generated by the expressions ‘you should always drive carefully on icy roads’ are limitations largely defined by each driver experiencing icy conditions. Should an incident happen, the authorities and the courts will determine whether or not the driver was driving carefully at the time, or whether he was careless in assessing the risks of icy road conditions. The behaviour will be applied against many scenarios and probabilities, and the courts may resort to experts to assist in defining whether the conduct of the driver was one where caution was not sufficiently applied.

Louis Kaplow states that the differentiation between rules and standards lies in an *ex ante* and *ex post* outcome.²¹

Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*. For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.²²

Similarly, Kaplow relates the use of rules or standards to the legislature, and the reasoning of legislators in formulating solutions to ‘political’²³ problems as either ‘rules’ or as ‘standards’.

²¹ See, Louis Kaplow, “Rules versus Standards: An Economic Analysis” (1992-1993), 42 *Duke L. J.* 557 at 559-560.

²² *Ibid.*, at 559-560.

²³ The use of the term ‘political’ is not limited to problems and issues normally understood as those related to the pure definition of the term ‘politics’, but instead the term is meant to be inclusive of all

When the legislature enacts a rule, it specifies in advance of some action whether that action will be penalized. When the legislature enacts a standard, it delegates to a court the authority to determine after the action whether that action will be penalized. Rules state that you may not do A, B, and C; a standard typically says that you may not behave “unreasonably,” or “negligently,” or “unconscionably,” leaving it to the courts to determine whether an action meets these criteria.²⁴

But what are the deciding factors that will push legislatures, be those ‘legislatures’²⁵ national, or be they the ‘legislatures’ of

issues that require the intervention of political actors or legislators, be those issues in the social, economic, trade, national or international relations domain.

²⁴ See, Eric Posner, “Standards, Rules, and Social Norms” (Fall 1997), 21 *Harvard Journal of Law & Public Policy* 101 at 101.

²⁵ The term ‘legislature’ is meant to denote any national or international body or organization having been officially allocated the mandate of setting laws as rules or standards. A ‘judiciary’ provides the enforcement and dispute settlement mechanism responsible for assessing behaviour against such laws. The World Trade Organization is in essence, a ‘legislature’ having the mandate for setting laws, in the form of ‘rules’ or ‘standards’. It also performs a judicial function through its Dispute Settlement Body which is responsible for hearing complaints from its citizens (in the case of the WTO, the citizens are national governments) on matters related to international trade disputes. For a discussion of the role of international institutions see, e.g., Judith Goldstein, “International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade”, in *The WTO as an International Organization*, Ann Krueger & Chonira Aturupane eds. (Chicago: University of Chicago Press, 1998) at 133. Judith Goldstein states that ‘international institutions exist to perform explicit functions. They create principles and rules that reduce uncertainty, they provide information and monitor the behaviour of other states, and they link issues, so as to expand the possible deals among nations.’ Again, in reference to the judicial aspects of the WTO, she states that the WTO ‘has attempted to depoliticize trade through the creation of more detailed and pervasive rules. Two results of this process are key. First, over time, increased legalization has led to a decline in uncertainty over the distributional effects of trade agreements. Second, the hub for dispute adjudication has moved away from participating nations to the trade regime itself.’ Commenting on the dispute settlement mechanism of the WTO, Goldstein states that this new process ‘should provide a credible commitment – for the first time – that countries will be punished if they fail to adhere to their WTO obligations.’ See, e.g., also David Vines, “The WTO in Relation to the Fund and the Bank: Competencies, Agendas, and Linkages”, in *The WTO as an International Organization*, Ann Krueger & Chonira Aturupane eds. (Chicago: University of Chicago Press, 1998) at 59. Vines states that ‘(t)he core activity of the WTO relates to the negotiation and implementation of explicitly *global rules* on government policies relating to cross-border trade.’ In comparing the WTO to the International Monetary Fund, ‘unlike the Fund, whose primary output is adjustment assistance (advice and loans) to individual countries, or the Bank, whose primary output is development assistance (advice and loans) to individual countries, the primary output of the WTO is rule writing and enforcement of an explicit global regime. It is an organization that *writes rules* and, in so

international organizations such as the World Trade Organization (WTO)? Posner states that when enacting laws, legislatures ‘must determine two quantities.’ The first of those quantities relates to the one-time cost of enacting a law. For instance, a law related to the behavior of drivers on highways will be enunciated as a one-time event wherein the parties will find relatively clear specifications related to the sanctions that are activated when the law is broken. The initial costs of specifying in advance the attached penalties, is a one-time cost and results in a relatively linear enforcement cost. The second quantity confronting legislatures is addressed by ‘multiplying the cost of judicial enforcement by the expected number of accidents.’²⁶ Although simplistic, the ‘rule’ or ‘standard’ determination is arrived at by comparing the costs of the first quantity to the costs of the second. If the cost of the first is higher, the legislature should normally resort to the enactment of a standard. Posner explains this conclusion by stating that when only a few infractions are contemplated, the legislature will normally rely on the Courts to evaluate the incident, and following this evaluation, the Courts will apply the appropriate remedy. If the number of infractions is determined to be many, such as speeding violations, or avoiding the use of seatbelts or motorcycle helmets, the

doing, makes laws with which its contracting parties agree to abide. Unlike the Fund and the Bank whose effectiveness ultimately stems from a combination of an internal knowledge base and an ability to exert conditionally on individual countries, the effectiveness of the WTO rests upon its combination of a global forum in which rules can be brokered and a dispute settlement process in which they can be enforced. In essence, the WTO is a ‘legislature’ and although Goldstein and Vines refer to the creation of ‘principles and rules’ or simply to ‘rules’, no argumentation is presented as to where such principles and rules fall in the *ex ante* and *ex post* continuum as explained by Richard Kaplow. Regardless of whether the WTO sets principles, rules, or standards, it performs legislative and judicial functions, through the creation of laws and precedents, and also through the resolution of trade disputes.

²⁶ See Posner, *supra*, note 22 at 101.

legislature will normally resort to the use of a 'rule' thereby relieving the Courts of the task of evaluating each incident on a case-by-case basis.

In choosing between a rule or a standard, the choice confronting the legislative arm of any society should, according to Clayton Gillette, focus 'on our capacity to strike a balance among the costs of drafting, implementing, and enforcing the alternative formulations.'²⁷ In essence, politicians and policy makers must look at relatively complex equations where social, legal, and economic factors are considered. If the regulation being contemplated is easy to define, such as 'you must always wear a protective helmet when operating a motorcycle', then such a regulation easily informs all motorcycle operators that protective helmets are required, and the penalty of an infraction is also easily determined and administered. For example, the first offense may entail a fine of \$100, while the second offense may be fined at a rate of \$250, and the third offense could possibly result in the loss of driving privileges for six months. Such a regulation does not require a determination by the courts. Instead, the police or other trained personnel can apply the law and make the appropriate decision within the domain defined by the regulation.

Murder on the other hand is a more complex issue requiring the intervention of most of the legal framework of an ordered society system – police, courts, administrators, prison personnel, lawyers, juries, and judges. Criminal offences are resolved on a case-by-case basis, as each

²⁷ Clayton P. Gillette, "Rules, Standards and Precautions in Payment Systems" (Mar., 1996), 82 *Virginia Law Review* 181 at 185.

case brings a new set of circumstances for the consideration of the legal system. On this point, Gillette adds:

Precise directions are more appropriate when we have the greatest confidence in our capacity to inform target actors (those at whom legal directives are aimed), to describe antisocial forms of behavior (so that target actors know the scope of permitted and prohibited activity), and to recognize the occurrence of such behavior (for purpose of enforcement). Uncertainty about any of these factors warrants the use of less precise formulations. For instance, if the conditions under which antisocial behavior might arise are too varied to be described *ex ante*, a precise rule that proscribes specific activities will be less effective than a flexible standard in addressing the full range of undesirable conduct.²⁸

The criminal act of killing someone is a prime example where ‘conditions ... are too varied to be described *ex ante*.’²⁹ Hence, we have categories specified in the Criminal Code, for example, manslaughter, murder in the first degree, in the second, etc.

Bodansky states that ‘rules attempt to define in advance what conduct is permissible. They generally consist of two parts: a set of triggering facts and a legal result’.³⁰ If the school bus lights are flashing

²⁸ Ibid., at 185.

²⁹ Ibid.

³⁰ Daniel Bodansky, “Rules and Standards in International Law” [journal on-line] (*NYU Law School* vol. 1, 2003, accessed on September 11th, 2005) available at

and a driver does not stop, the action will result in a serious traffic violation and financial repercussions. The rule has been defined and the sanctions are known, as for example, the above infraction entails a fine of \$500, the award of demerit points, and the loss of a driver's license for one year. Using the position taken by Professor Korobkin, Bodansky states that it is a triggering factor that positions an incident within the 'rule' or within the 'standard' court. "If the triggering facts are present, then the rule specifies the legal outcome in a determinate manner. In contrast, a standard is less precise about what facts lead to what legal results. It thereby provides the law-applier with more discretion both in determining the relevant facts and in applying the law to those facts."³¹

Is the Precautionary Principle capable of identifying antisocial forms of behavior, and are the Courts or tribunals capable of recognizing the occurrence of antisocial behavior when it clearly involves an infringement against the Precautionary Principle? The Principle as stated in the *Rio Declaration*³² is merely a guide for authorities in setting policy direction. In itself, it is not a rule nor is it a standard. Going back to Professor Posner's earlier statement:

When the legislature enacts a standard, it delegates to a court the authority to determine after the action whether that

http://www.law.nyu.edu/kingsburyb/spring03/globalization/BodanskyRules_v_StandardsPaper.pdf. Internet.

³¹ Ibid., p. 2.

³² See, *Rio Declaration*, *supra*, note 10.

action will be penalized. Rules state that you may not do A, B, and C; a standard typically says that you may not behave “unreasonably,” or “negligently,” or “unconscionably,” leaving it to the courts to determine whether an action meets these criteria.³³

While the characteristics of rules are self-evident, the characteristics of a standard tend to be somewhat tenebrous and blurred. One could argue that the Principle is a standard by its very wording, but a more precise definition would have the wording of the Principle embedded or wrapped within a legislative decree. The envelope must be legislative in nature as on its own, the *Rio Declaration*³⁴ is not a standard.

Suppose a city enacts a bylaw against the use of pesticides for cosmetic purposes, and embeds within the wording of the bylaw, the intent of the Precautionary Principle. Whether the bylaw takes the form of a rule or a standard, the fact remains that embedded within the wording of the bylaw, one finds words that complement the significance of the Precautionary Principle. For instance, the wording of the bylaw or regulation would clearly state, that in the absence of concrete scientific evidence, there exists a strong probability that the use of pesticides for cosmetic purposes will be harmful to human, and animal health, and will be detrimental to the ecosystem. The city has the power to implement precautionary measures to enact a municipal law designed to regulate the use of pesticides until science unequivocally

³³ See, Posner, *supra*, note 24 at 101.

³⁴ See, Rio Declaration, *supra*, note 10.

proves the harmlessness of the product. Such a bylaw would evidently specify fines should residents contravene the spirit of the regulation. If a resident is found to have sprayed his lawn, then the triggering factor – the spraying of the lawn *post* the bylaw's enactment – would activate a legal action on the part of the bylaw enforcement authorities. The behaviour is clearly antisocial as it infringes on social norms designed to regulate activities detrimental to the health of human and animals and to the ecosystem. Definitely at the 'rule' end of the rule/standard continuum, the Precautionary Principle once contained and recast within a legislative envelope becomes in this case, a pure rule, clearly defining antisocial behaviour or the triggering factors, and attaching penalties when such behaviours occur. The rule is clear, the undesired action is well defined, and the enforcement of the regulation is normally delegated by the courts to an administrative body, as literally no interpretation and evaluation is required in the application of the bylaw. The meaning of the Principle has been saved by wrapping the words with a legislative mantle, as without a legislative cloth, the words of the Principle carry no rule-like characteristics.

Let us extend the example to an arbitrary international scenario where we have a legal instrument or regulation that embeds the words of the Precautionary Principle. Under this scenario, we would migrate closer to the standard-end of the continuum, where infractions would 'in contrast, require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a

legal conclusion.’³⁵ Here, the courts would determine the seriousness of the infraction and the proportionate penalty. The penalty would be the ‘legal result’ generated from the activation of one or several triggering factors.

Expanding our scenario, suppose country X is the home of a multinational firm engaged in the fabrication of highly dangerous chemicals. The firm is operating under a contractual arrangement with country X, where it has been agreed that all measures will be taken by the firm to protect human, animal, and plant health from leakages or other comparable incidents. The plant is old but relatively well maintained. Recently, it has become the object of recurring events resulting in injuries to X’s nationals. Inspections have revealed some serious deficiencies, and should such deficiencies materialize, the impact on the environment, the ecosystems and the health of the people, animals and plants would be felt for years to come. The multinational is engaging in antisocial behaviour as it has labeled the warning of X as unfounded and alarmist. The multinational has in effect nullified the initial agreement with X, where the firm had contractually agreed to address all the safety and environmental concerns of X. The behaviour of the multinational is clearly antisocial, as it threatens X’s soil and population. To protect its interests against the ‘threat of serious or irreversible damage, a lack of full scientific certainty *will not be used by* X, as a reason for postponing cost-effective measures to prevent

³⁵ See, Korobkin, *supra*, note 20.

environmental degradation'.³⁶ To resolve this issue, the court will 'apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion.'³⁷ The legal conclusion would likely be repercussions against the firm. The background principle or set of principles would arise from the legal agreement between the firm and country X where preventative and remedial actions would be specified in the event of an incident. The triggering factors would be the leakage or the incident giving rise to execrable conditions on the territory of X. The Bhopal incident in India immediately comes to mind.

In essence, the Precautionary Principle can operate at both end of the rule-standard spectrum. Recognized as part of the *SPS Agreement*, the Principle is more appropriately positioned as a standard. The analysis of the four SPS disputes will show that the Panel and Appellate Body will 'apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion.'³⁸

Since the term 'precautionary principle' contains the word 'principle', one could question why a 'principle' ought to be treated as a 'rule' or as a 'standard'. The term 'principle' entails for some people, a type of decree, or a type of directive, legal or possibly moral, but a directive nonetheless. A 'principle' is often seen as the source for subordinate laws or truths. The Webster dictionary defines 'principle' as 'a source of origin; the primary source from which anything proceeds;

³⁶ See, Rio Declaration, *supra*, note 10.

³⁷ See, Korobkin, *supra*, note 20.

³⁸ Ibid.

a general truth; a law comprehending many subordinate truths; a law on which others are founded or from which others are derived; a governing law of conduct; uprightness (*a man of principle*).³⁹ Freestone and Hey make the distinction by stating that:

[a]t a practical legal level there is an important difference between a principle and a rule. Whereas it may be possible to apply a rule in what, superficially appears to be a direct and fairly mechanistic way (as for example in the application by the courts of the criminal law rules relating to theft), a principle by contrast, is more open textured and informs the way that rules are to be applied.⁴⁰

Freestone and Hey appear to define a 'principle' closer to the definition of a 'standard' as both terms are open-ended. Further interpretation and balancing is required for both as compared to that of a 'rule'. For the purposes of this paper, the term 'Precautionary Principle' is classified within the ambit of a 'standard', and the *SPS Agreement*, while normative in nature, is mainly applied as a standard of international trade law at the WTO level.

B The Precautionary Principle - Definition

Extensive discussions have yet to produce a definitive agreement on the position of the Precautionary Principle in international law.

³⁹ Virginia S. Thatcher and Alexander McQueen, in *The New Webster Encyclopedic Dictionary of The English Language* (Chicago: Consolidated Book Publishers, 1971), 660.

⁴⁰ See David Freestone and Ellen Hey, "Implementing the Precautionary Principle: Challenges and Opportunities," in *The Precautionary Principle and International Law: The Challenge of Implementation*, David Freestone and Ellen Hey, eds. (The Hague: Kluwer Law International, 1996), 249 at 254.

Some are convinced the Principle has earned a legal placement in the prestigious domain of international law, as it particularly relates to disputes involving trade and on issues related to environmental matters. Others dispute this conclusion and base their position on the ambiguity of the Principle, its lack of a clear and widely accepted definition,⁴¹ its lack of substance and stability, and an absence of strong, consistent, and meaningful *opinio juris*. “Because of its multiple appearances and diverse meanings, the precautionary principle does not have one generally agreed upon definition. While it purports to address questions of scientific uncertainty in policy making, the application of the precautionary principle is itself uncertain.”⁴² The Principle gives rise to uncertainty because it lacks a legislative base, and without a legislative base, it is merely a vanilla-type ‘principle’ devoid of any authority and meaning.

The Principle is too flexible and often assumes a different shape to fit the situation it is called upon to resolve. Every new incident, that activates triggering factors, generates a new version and a new meaning of the Precautionary Principle. Furthermore, there is confusion as to the definition of the Principle, and there is further confusion between the wording of the Principle and the definition of what constitutes a

⁴¹ Interdepartmental Liaison Group on Risk Assessment, “*The Precautionary Principle: Policy and Application* (London: Government House, 2002, accessed on July 20th 2005); available from <http://www.hse.gov.uk/aboutus/meetings/ilgra/pppa.pdf>; Internet.

⁴² See Don Mayer, “The Precautionary Principle and International Efforts to Ban DDT” (2002), 9 *South Carolina Environmental Law Journal* 120 at 136.

risk.⁴³ In reference to the *Rio Declaration*, the expression ‘threat of a serious or irreversible damage’ leaves huge gaps in interpretation. While the government of one country will rule a situation as a potentially serious threat, possibly giving rise to irreversible damage, the government of another state will adopt a diametrically different position. Hence, the wording of the Principle, as found in *Rio*, generates its own ambiguities. It is far from being a steadfast rule such as ‘you must wear a seatbelt when traveling in an automobile’. If it is not a rule, then does the Principle fall within the class of a standard? Is it normative in nature? If the Principle has a normative color, why does it assume the characteristics of a chameleon?⁴⁴ Why does it change its colors depending on the event it straddles? The answer lies in the very substance of the Principle, and the extensive and wide variety of argumentation comprising this debate, is proof that the substance is flawed. The wording of the *Rio Declaration* leaves nation-states and tribunals with a wide area of interpretation and freedom, that may in the end lead to its demise. Its final fate may rest on the mere provision

⁴³ See, e.g., Stephen Charest, “Baysian Approaches to the Precautionary Principle,” *Duke Environmental Law and Policy Forum* 12 (Spring 2002): 265, where the author comments on the ambiguity of the Principle: “[d]espite the apparent increase in its application, the Precautionary Principle remains ill-defined.” See also, Giandomenico Majone, “What Price Safety? The Precautionary Principle and its Policy Implications,” *European University Institute*: 2, accessed on September 20th 2005: available from <http://www.polisci.berkeley.edu/Faculty/bio/permanent/Ansell,C/FoodSafety/majone-pp.pdf> where the author states that the “precautionary approach is deeply ambiguous, and ... this ambiguity is abetted by a lack of clear definitions and sound logical foundations.” The precautionary principle remains an ill defined concept. Initially defined to meet environmental challenges, it has been re-adapted to an endless array of situations and issues, with the wording modified to fit the particular issue at hand. The *Rio Declaration* has merely added a new twist to the congestion and confusion. The literature dealing with the precautionary principle provides ample evidence of a continuing debate, with no indication that a widely accepted definition is soon to arise.

⁴⁴ For a discussion of the Precautionary Principle and its changing characteristics, particularly related to its impact on administrative law in Canada, see, e.g., Geneviève Cartier, “Le principe de precaution et la déference judiciaire en droit administratif” (2002), 43, no. 79 *Les Cahiers De Droit* 80-101.

of a warning for politicians and policy gurus, it may end up as a loose guideline, but it will very likely be replaced by risk assessment and risk management.

C The Precautionary Principle and International Law

The Precautionary Principle has nearly as many definitions as it has advocates and critics. This paper will present some of the definitions of the Principle to demonstrate the variances in the approach and in the wording, and what it means in terms of advancing its use and acceptance at the international level. There is no question that ‘declarations’, ‘protocols’ and other such agreement outside the so-called ‘treaty’ classification, are relative light-weights in the overall hierarchy of international law. The intent is merely to show that the ‘precautionary principle’ has received, over the last 35 years, considerable interest in a variety of international instruments, even though many are far from possessing the legal force of the traditional ‘treaty’ document, such as the internationally recognized agreements that provide the WTO with its authority in matters of international trade. For brevity, only a few have been included in this paper.

We have already looked at the text of the 1992 *Rio Declaration*, where it states that,

[i]n 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 degradation⁴⁵.

Of particular interest are the expressions ‘according to their capabilities’ and ‘cost-effective measures’. There is no clear definition for either of those expressions. Although related to environmental issues, the *Rio Declaration* can be applied to other threats, as for example bird-flu. Who decides whether a country has the capabilities to implement precautionary measures? What does the term ‘capabilities’ comprise? Are the capabilities purely economic in nature? Are they of an intellectual nature? Are they related to other factors, as for example the country’s position in the international arena? Also, what is the meaning of ‘cost-effective measures’, and who decides whether the measures are cost-effective, or not.’ If the measures are not cost-effective, does it mean that no action should be taken when a national government is confronted, for example, with a bird-flu epidemic? While seemingly authoritative, the *Declaration* has not been the object of any deliberations in the four SPS decisions. There is also no evidence the *Declaration* has advanced the use and progress of the Principle.

On another front, the *Barcelona Convention* states:

[I]n order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall apply, in

⁴⁵ *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Annex I, princ. 15, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874, 879.

accordance with their capabilities, the precautionary principle, by virtue of which 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.⁴⁶

Again, we find limiting expressions, or words that will narrow the field for the consideration of the Precautionary Principle. When an important document forming part of international law contains wording like ‘in accordance with their capabilities’, there is an obvious gap through which a large number of excuses can flow unhindered. In essence, the spirit of the document is diminished as many countries, including some industrialized countries, could find refuge within those words. In parallel, the expression ‘cost-effective measures’ leaves ample room for deliberations and interpretation, as these simple and seemingly harmless words, can easily attenuate the spirit of the Precautionary Principle. In the absence of an international body mandated to rule on the meaning of these words, who will then give meaning to ‘in accordance with their capabilities’ and ‘cost-effective measures’? Who determines the ‘capabilities’ of a nation-state to apply the Principle, and who will evaluate whether measures are ‘cost-effective’ or not? The absence of an international, recognized, and authoritative governance structure, mandated to arbitrate the interpretation and application of such authoritative documents, is

⁴⁶ *Convention for the Protection of Marine Environment and The Coastal Region of the Mediterranean (The Barcelona Convention)*, available at <http://www.oceanlaw.net/texts/uneppmap.htm>

clearly absent, leaving the field wide-open for the implementation of measures for avoiding the spirit of the Convention.

The *Cartagena Protocol on Biosafety*, another authoritative document of international law, in Article 6 states:

[L]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of living modified organism in question ..., in order to avoid or minimize potential adverse effects.⁴⁷

The same limitations are found in this Protocol. What is meant and what are the contours of the expression ‘insufficient relevant scientific information and knowledge’? The first part of the expression, namely ‘insufficient relevant scientific information’ limits the field considerably. Not only does the relevancy qualifier apply to ‘scientific information’, but it extends to include an even more specific qualifier, namely ‘scientific knowledge’. How can the ‘relevancy of scientific knowledge’ be accurately and fairly assessed, and who will conduct the assessment exercise? Furthermore, the words ‘as appropriate’ provide

⁴⁷ *Cartagena Protocol on Biosafety to The Convention of Biological Diversity (The Cartagena Protocol)*, Montreal 2000, signed in Rio de Janeiro on 5 June 1992 United Nations Conference on Environment and Development (UNCED), available at <http://www.biodiv.org/doc/legal/cartagena-protocol-en.pdf>.

the subject with another off-ramp to circumvent the objectives of the Protocol. Who determines the appropriateness of the action or inaction?

The 1991 *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* states that;

[e]ach Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter-alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions.⁴⁸

While the Contracting Parties only have to make an *effort* to ‘strive to adopt and implement’, the wording of this 1991 document is nevertheless trivially more precise. Substituting the words ‘strive to adopt and implement’ with ‘the parties *will* adopt and implement’ would infuse the document with a more robust regulatory context. The original words instead, provide the parties with an exit strategy from

⁴⁸ *Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 29 January 1991, 30 I.L.M. 775 (1991), art. 4(3)(f) [hereinafter *Bamako Convention*].

the terms and objectives of the Convention, by merely allowing the parties to simply make an effort, or to strive “to adopt and implement’ precautionary measures. The words may appear inoffensive at first glance, but further analysis soon reveals a large gapping hole that will allow the involved parties to avoid the regulatory aspects of the convention.

The European Commission’s (EC) *Communication from The Commission on the Precautionary Principle* is considerably more precise and provides the Party with relatively detailed processes to follow in the adoption of precautionary measures. It states that:

[o]nce the scientific evaluation has been performed as best as possible, it may provide a basis for triggering a decision to invoke the precautionary principle. The conclusions of *this* evaluation should show that the desired level of protection for the environment or a population group could be jeopardised. The conclusions should also include an assessment of the scientific uncertainties and a description of the hypotheses used to compensate for the lack of the scientific or statistical data. An assessment of the potential consequences of inaction should be considered and may be used as a trigger by the decision-makers. The decision to wait or not to wait for new scientific data before considering possible measures should be taken by the decision-makers with a maximum of transparency. The absence of scientific proof of the existence of a cause-effect relationship, a

quantifiable dose/response relationship or a quantitative evaluation of the probability of the emergence of adverse effects following exposure should not be used to justify inaction. Even if scientific advice is supported only by a minority faction of the scientific community, due account should be taken of their views, provided the credibility and reputation of this faction are recognized.⁴⁹

The EC's communication on the Precautionary Principle is ponderous and interlaced with conditions. Nevertheless, it clearly provides more direction in the application of precautionary measures. It directs the undertaking of assessment exercises regarding scientific uncertainty and an identification of the criteria or hypotheses used in the assessment. It further directs that an assessment of consequences be carried out to evaluate the course of action or inaction, and that decision makers should decide in an atmosphere of transparency. While the *Rio Declaration* is often referenced, the EC's support for the Precautionary Principle is more extensive, and inclusive through its reference to cause-effect and dose/response relationships, and the conduct of qualitative and quantitative assessments of the adverse effects and consequences. While *Rio* targets an international audience, the EC's support of the Precautionary Principle is more limited, as it applies to its members over which more discipline and monitoring can be exercised by the governance structure of the European Union.

⁴⁹ European Commission, *Communication from the Commission on the Precautionary Principle* (Brussels: European Commission, 2000), 10, at http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf; accessed on May 2nd 2005.

Without specifically referencing risk assessment and risk management, the Communication does covertly lean towards these more precise and adaptable conventions.

A significant advance was made by the EC in its recognition of a minority opinion: 'due account should be taken of their views (*views of the minority opinion*)', but the qualifier is 'provided the credibility and reputation of this fraction are recognized.' Is this objective attainable? The minority opinion will be recognized if two conditions are met - the individuals, scientists, or experts must be credible and their reputation must be recognized. Not only must the dissenting opinion be credible, but the opinion must also be from individuals recognized in their field, as possessing the knowledge, experience, and education to formulate an opinion against the majority. Who determines the credibility, using what criteria, and who is qualified to recognize the reputation of those voicing a minority opinion, is not defined in the Communication document. What if an old experienced layman, not in possession of the educational background, but instead holding an enormous amount of real life experience and knowledge about a particularly dangerous situation expressed an opinion? Would he be credible and would he be recognized in voicing a minority opinion, in spite of the fact that the information he has acquired, if accepted, could and very likely would prevent the development of a dangerous situation? The objective of recognizing the minority opinion is commendable, but the conditions are nearly impossible to attain.

Article 5(7) of the *SPS Agreement* projects good intentions but the conditions are equally difficult to attain. It states that,

[w]here relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.⁵⁰

For example, ‘where relevant scientific information is insufficient’ is not qualified as to the process for establishing ‘relevancy’, nor is the process for determining ‘insufficiency’ defined. Similarly, the phrase, ‘on the basis of available pertinent information’ is silent on the methods and processes used in determining whether or not the information is pertinent. In addition, the phrase ‘members must seek to obtain additional information’ does not define the processes one must consider in seeking to obtain more information. Who decides that the Members have or have not sought to obtain additional information? Finally, the expression ‘within a reasonable period of time’ does not define what constitutes a ‘reasonable period of time’. It is as ambiguous as another common bureaucratic expression, often found in legislation, stating

⁵⁰ *SPS Agreement, supra*, note 17.

‘from time to time’. The length of the time gap covering from ‘time to time’ is never specified or quantified. Similarly, what constitutes ‘a reasonable period of time’ and who decides using what criteria that a ‘reasonable period of time’ has elapsed? The *SPS Agreement* is silent.

In concluding, the Precautionary Principle has been inserted in numerous treaties and international agreement since its appearance in the latter part of the twentieth century, and the examples above are by no means a comprehensive list. Of particular interest are the variances in the wording, all apparently worded in support of the Precautionary Principle. The *Rio Declaration* introduced, in reference to nation-states, ambiguous and debatable expressions such as, ‘according to their capabilities’ and ‘cost-effective measures’. The *Barcelona Convention* parallels Rio with minor differences in the wording as its focus is the Mediterranean Ocean area. The *Barcelona Convention* uses the command ‘shall strive’ which in military terminology denotes a command or a directive. In spite of this, the *Convention* is silent on the governance envelope within which the command or directive could be activated. The *Cartagena Protocol* introduces ‘shall not prevent that Party from taking a decision, as appropriate’. What does ‘as appropriate’ mean? These two words denote considerable latitude in the interpretation and application – so wide is the meaning that the overall statement may be rendered null and void. The *Bamako Convention* introduces nearly unattainable objective, specifying that the ‘Parties shall co-operate with each other in taking the appropriate measures.’ Under the rubric of air pollution, how long can it take for the

Parties to co-operate towards an understanding for the application of the Precautionary Principle? There is no specification of any time allotment. Negotiations could go on for years before an agreement would be finally reached, allowing the creep of pollution to continue along its destructive course.

In analyzing these declarations of the Precautionary Principle, one immediately questions the intent. Is the intent truly targeting 'precaution' and the protection of society, or is it written to protect the interests of particular sectors of society? With the exception of the EC's communication, why do documents that form part of international law, allow for wide off-ramps for use by offending parties? It leaves one to question the level of support accorded to the objectives and intent of the Precautionary Principle.

Each and every document of international law reviewed in this paper, all extolling the Principle, lend support through their words, to the opening quote from Justice Joseph C. Hutcheson. In handing down their rulings on trade related matters, are courts, tribunal, Panels and Appellate Bodies, left with the notion of the 'hunch' or the 'jump spark' connection between question and decision' to resolve complex issues in international trade law?

D The Precautionary Principle: History and Development

In the age of globalization where products move across the planet over a period of hours, the Precautionary Principle can be compared to a dancer performing the 'Dance of the Seven Veils'. During the

performance of this classic dance, the observer peers through each of the veils for an appreciation of the ‘illusions that separate (him) from knowledge, understanding, and wisdom. The dropping of the veils, one at a time, is merely a device in which we can focus on different aspects of the overall illusions and weird paradigms’.⁵¹ There is considerably more evidence at the end of the twentieth and the beginning of the twenty-first century, that the Precautionary Principle is much like a dancer dropping each of the veils one at a time and exposing the different interpretations and the contradictory paradigms – paradigms that represent the ‘assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them ...’ Precautionary measures will often reflect local customs, traditions and cultures, and the exact epoch in which it is applied. A single definition and interpretation cannot accommodate all nations, nor can it accommodate all situations.

We will now look at the historical development of the Precautionary Principle in light of some examples that will illustrate its application. Precaution is not an invention of the twentieth century. It has existed since the beginning of life and continues to be part of everyday life. Everyday we look at possible risks and we take precautionary measures to avoid or lessen the impact of those risks. For instance, we know there are risks that our home will be damaged by storms, by wind, or by fire, and as such, we buy insurance, in spite of the fact that the risks have a low probability of occurrence, and when

⁵¹ Library of Halexandria – Dance of the Seven Veils , at <http://www.halexandria.org/dward388.htm>; accessed on October 5th, 2005: Internet.

the risks do materialize, we know the expected losses will, in all probabilities, be high. We also have a precautionary attitude towards new technologies. Some technologies are feared while others are reluctantly accepted. The introduction of the computer is a prime example of this interplay between fear and acceptance. We fear the unknown, and we approach the associated risks with precaution, unlike using insurance coverage against risks that are known. We also exaggerate the impact of the unknown, and the exaggerations are seldom supportive of the contemplated activity or initiative. These exaggerations are well illustrated in the following chronicles.

In 1825, a Bill was introduced to approve the construction of the Liverpool-Manchester railway, but it soon suffered an early defeat. The defeat was concocted by a handful of individuals who identified the railway with nothing short of a source for disasters of all kinds. The opponents had concluded that the railway would “prevent cows grazing and hens laying. The poisoned air from the locomotives would kill birds as they flew over them and render the preservation of pheasants and foxes no longer possible. There would no longer be any use for horses; and if the railway extended, the species would become extinguished, and oats and hay would be rendered unsaleable commodities. Boilers would burst and blow passengers to atoms”.⁵² When it was suggested that the train would travel at speeds exceeding twenty miles per hour, even the proponents of the Bill considered this to be a ‘preposterous fantasy.’ On the second attempt, the Bill was successful and the Liverpool-

⁵² Matt Ridley, *Acid Test*, (1999); available at <http://www.gene.ch/genteech/1999/Jul-Aug/msg00169.html>; accessed on September 28th, 2005: Internet.

Manchester railway saw the light of day. The exaggerations proved wrong and the benefits soon proved the decision of policymakers to proceed with the railway had been a wise one. Had the Bill been confronted by demands of the Precautionary Principle, there is little doubt the railway would have been constructed, at least not in 1825, but possibly many years later, when the benefits of railways would have been borne out and proven in more daring municipalities of the U.K. or in more daring nations.

The example illustrates that, when confronted with the unknown, people will create preposterous scenarios, most of which are designed to arrest, or even contain the introduction of unknown products and technologies. Without realizing it, we instinctively activate precautionary measures towards new technologies, or new products, or the unknown. We tend to approach the unknown with precaution as we feel threatened by its prospects.

Taking risks does not mean dispensing with responsibility. In other words, you act responsibly when confronted with a possible risk. As individuals we are accountable for our actions and for the risks we take, and for the precautionary measures we implement faced with those risks. Bungy jumping might sound interesting to many, but should one undertake this risky activity as a father with three young children in his care? To act responsibly means slowing down when confronted with icy road conditions, to avoid risking accidents and injury, and to cross railway crossings with due diligence. Next, we look

at two examples demonstrating the relationship between precaution and responsibility.

In 1927, following the death of Nathan Goodman at a railway crossing, his widow brought a suit against the railway for having caused her husband's death. Mr. Justice Holmes, delivering the opinion of the Court, stated that 'when a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him.'⁵³ It is evident that any driver upon hearing or seeing an approaching train will either stop, or if his vehicle is already stalled on the railroad, the driver will be expected to get out in the absence of extenuating circumstances. 'It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault and he did not reduce his speed earlier or come to a stop.'⁵⁴

Similarly, in *Pokora v. Wabash Ry. Co.*, a 1934 decision of the U.S. Supreme Court, also involving a train/vehicle accident at a level crossing, Justice Cordozo stated:

We do not now inquire into the existence of a duty to stop, disconnected from a duty to get out and reconnoitre. The inquiry, if pursued, would lead us into the thickets of conflicting judgments. Some

⁵³ *Baltimore & Ohio RR Co. v. Goodman*, 275 US 66 (1927) at 69. Available from FINDLaw at <http://laws.findlaw.com/us/us/66.html>.

⁵⁴ *Ibid.*

courts apply what is often spoken of as the Pennsylvania rule, and impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side. Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury.⁵⁵

In both cases, Goodman and Pokora should have exercised greater judgment in approaching the train crossings. They should have acted responsibly and exercised precaution. Very few crossings are at a 90 degree angle rendering viewing an approaching train more difficult. A double crossing adds more complexity, but the onus is nevertheless on the vehicle owner. As Justice Holmes stated in *Goodman*, 'the driver should realize he must stop for the train and not the train for him.' The Precautionary Principle invokes similar measures. In the world of international trade, the duty to abide by its intent is the responsibility of the nation-state, and the circumstances surrounding the transaction may influence the degree of application of protective measures, as for instance, invoking the relevant articles of the *SPS Agreement* for the protection of human, plant, and animal health. Depending on the nature of the circumstances, nation-states may institute certain trade restrictive and protective measures that give rise to disputes between trading partners. It is those disputes which the WTO must arbitrate

⁵⁵ Pokora v. Wabash Railway Co., 292 U.S. 98 (1934) at 103. Available from U.S Supreme Court Centre at <http://www.justia.us/us/292/98/case.html>.

and in the process, determine if the facts and the actions taken are in keeping with the intent expressed in the body of law or rules that assign to the WTO the mandate to interpret and enforce trade rules.

Precautionary measures may at times require expeditious application in light of rapidly unfolding events. Events may be specific, they may be local, national, trans-boundary, and may at times occur at the international level, as for example, the Chernobyl incident in Russia. Chernobyl was simultaneously local, national, trans-boundary, and international.

The case of the Air France accident referred to earlier, also illustrates that very point. Not all large passenger aircraft crews will react identically under similar conditions, in spite of the rigorous training. Not all crews will interpret rapidly developing scenarios using the same judgment calls. In the case of Air France flight 358, while the Transportation Safety Board will investigate the accident and a final report will be published in the near future, one can superimpose on the incident relatively objective assumptions, against which the Principle was applied at the time of landing. A paradigm was rapidly developed by the crew taking into consideration a series of factors earlier mentioned combined with assumptions, practices, and proven concepts related to the performance of the aircraft under similar conditions, all of which allowed the cockpit crew to view the rapidly developing reality – the shedding of the veils - from their perspective, thereby arriving at a decision to land. Unlike courts and tribunals where the risks and the

application of the Precautionary Principle can be carefully appraised, the cockpit crews of passenger airlines are at times called upon to make expeditious decisions against a rapidly unfolding reality. The guidance offered by the Precautionary Principle, including the conduct of a full risk assessment and risk management exercise, may at times be compressed within very short timeframes.

The derailment of a CN merchandise train near Lake Wabamum, 65 kilometers west of Edmonton, on August 3rd 2005, and the spillage of 700,000 liters of heavy bunker oil and wood preservatives in the lake, is another incident where the Precautionary Principle required expeditious application due to the urgency of the case. The nature of the incident operated against the conduct of a rigorous risk assessment and risk management exercise, further complemented by a lack of definitive scientific evidence pertaining to such incidents. SARS, and the Mad Cow disease outbreak, are examples where expeditious action was required on the part of governments and policy makers. But not all governments will react in the same fashion. Industrialized nations will take measures that less-developed and poor nations cannot afford. In the case of Mad Cow, not all nations, particularly the poor and the less-developed, have access to the knowledge and expertise found in the experts and the files of the Canadian Food Inspection Agency.

In essence, precaution is a standard of conduct for individuals, but we often avoid making appropriate decisions as evidenced by the weekend highway fatality reports for instance. While the Principle does

entail a standard of conduct for the individual, where the standard is relatively clear and understood by most rational human beings, at the international level, does it entail a similar conduct by nations? Are nations similarly and individually responsible for implementing precautionary measures designed to mitigate the risks on their populations?

But risks are ubiquitous and very few activities are risk free. If no risk had been taken by the Wright brothers, airplanes would have never seen the light of day, and the Air France incident in Toronto would have never occurred. Why do we take risks? If no one had taken the risk of leaving earth on board a rocket with the relative confidence of returning safely, space travel would have never occurred, and the technological advances that resulted from the research in the Space Program, would have never profited mankind. We take risks in order to try new gadgets for our entertainment such as new types of sports cars, faster motorcycles and speedboats. We engage in parachuting exercises for purely entertainment value, or we climb Mount Everest for the personal challenge. We take risks by merely going to work everyday, and while we drive to work, we guard against the dangers of accidents, with other inattentive or careless drivers, with road obstacles such as deer and moose, or against our own lack of attention or carelessness. But we nevertheless take the risk by leaving the home. Life is full of risks, and without our ancestors having taken risks, our society would never have attained the comforts and technological advances we currently enjoy.

The second part of this paper will look at the issue of risks and how nations react when confronted with such risks that may or may not impact their national territory. A fundamental responsibility of any nation is to protect its population from the entry of disease, pests, and other afflictions. This paper will look at four disputes involving the SPS, and will describe the actions taken by nations to protect their territory and their population, including the reasons for the actions taken. It will also study the treatment of the Precautionary Principle in each of the four Panel decisions, cases, and the final rulings of the WTO appeal decisions.

II THE SANITARY AND PHYTOSANITARY (SPS) AGREEMENT DISPUTES

The second part of this paper will begin with a definition of the *Sanitary and Phytosanitary Agreement* (*SPS Agreement*) with the objective of defining the SPS and its basic goals in the international trade equation. Part B outlines the first dispute to be addressed by the new trade organization, namely the famous *EC Measures Concerning Meat and Meat Products (Hormones)*⁵⁶ commonly referred to as the *Hormones* case. The second case, namely *Australia – Measures Affecting Importation of Salmon*⁵⁷ was a dispute between Canada and Australia pertaining to the importation of salmon from Canada. The product under dispute was fresh, frozen and chilled salmon that had not been subjected to precautionary measures to protect Australian industry. Canada contended that the measures implemented by Australia were against obligations laid out in the *General Agreement on Tariffs and Trade (GATT)*, and particularly against the *SPS Agreement*. Part D, the third dispute involves a dispute pertaining to the importation of agricultural products from Japan, namely *Japan - Measures Affecting Agricultural Products*.⁵⁸ Part E, the forth and final dispute, namely *Japan – Measures Affecting Importation*

⁵⁶ See, *Hormones*, WT/DS48/R/CAN and WT/DS48/AB/R, note 3.

⁵⁷ See, *Salmon*, WT/DS18/R and WT/DS18/AB/R, note 5.

⁵⁸ See, *Japan – Agricultural*, WT/DS76/R and WT/DS76/AB/R, note 6.

of *Apples*⁵⁹ centered on Japanese concerns related to the importation of apples, where the transmission of ‘fire blight’, an apple disease found in U.S. orchards, had a high probability of infecting Japanese orchards.

A The Sanitary and Phytosanitary Agreement (SPS) – An Overview

The *SPS Agreement* is an important agreement forming part of the legal framework administered by the WTO⁶⁰. Its basic objective is to articulate the measures aimed at the protection of animal or plant life or health within the territory of WTO members, from real or perceived risks arising from the entry of disease, pests, or other organisms,

⁵⁹ See, *Japan – Apples*, WT/DS245/R and WT/DS245/AB/R, note 7.

⁶⁰ Following the end of the Second World War, the World was looking for stability, not only in relations between nations, but also stability in the international monetary system. To bring about stability, in July 1944, 730 delegates representing 44 allied countries met in the town of Bretton Woods, New Hampshire to set a governance structure and rules to regulate and stabilize commercial and financial relations as it mostly applied to the more developed nations. The outcome of the United Nations Monetary and Financial Conference created two institutions, international in scope, and responsible for administering the rules, regulations, procedures and institutions for the benefit of the international monetary system. Hence, the International Bank for Reconstruction and Development (IBRD), and the International Monetary Fund (IMF) were the offspring of the conference. With the creation of the World Bank in late 1945, this new organization became an umbrella for five related agencies, one of which was the IBRD. The predecessor to the World Trade Organization (WTO), created in 1994 as part of the Uruguay Round, was the General Agreement on Tariffs and Trade (GATT). Negotiated in 1947, the Agreement was to be merged within the Charter of a third institution, namely the International Trade Organization (ITO). Proposed in 1944, it was slated to become the third member of the trinity known as the Bretton Woods Institutions that included the IMF, and the IBRD that was later folded under the umbrella of the World Bank. The three institutions were predominantly designed to regulate the international economic order during the postwar period. But the ITO never saw the light of day. Without its ratification by the U.S. Congress, other industrialized economies did not venture to push for its existence. During the development of the ITO Charter, the GATT had been negotiated, under the leadership of the U.S., as a first attempt towards a multilateral trade arrangement. Since the ITO never came into existence, the GATT continued for nearly fifty years to regulate the international exchange of goods. The GATT of 1947 has been amended and is now known as the GATT of 1994. While the GATT did contribute significantly to the multilateral trading system since the late nineteen forties, by 1997 trade had grown 14 times the 1950 level. Trading nations were looking for a new arrangement and the World Trade Organization came into force on January 1, 1995. The GATT fell under the umbrella of the WTO Agreement along with many other trade-related Agreements and it continues to this day, although revised, to play an important and crucial role in public international trade law. As of December 2005, the WTO comprised about 149 nations, with close to 30 awaiting admission. The member nations also represent 97% of transactions in the world trading system.

whether disease-carrying or disease-causing.⁶¹ It also applies to protection from risks arising from contaminants, additives, toxins or disease-causing agents potentially found in food, beverages, and feed. Finally, the SPS applies to the protection of human life or health within a national boundary, from risks or perceived risks arising from diseases carried by animals, plants or other products, and from the entry, establishment, and spread of pests or disease. Should such occur, one of the goals of the SPS is to contain, where possible, or to limit the damage and the spread of such disease or pest-carrying agents.

As part of its legal framework, the *SPS Agreement* recognizes the right of members to establish their own level of protection for human, animal, and plant health, and to ensure that these levels of protection are scientifically based, and that they do not masquerade as restrictions on international trade relations. While the SPS encourages members to abide by internationally approved standards, it nevertheless allows members to adopt measures that exceed the levels of protection specified in international agreements. This permission is regulated by a caveat, obliging members to demonstrate that such measures are scientifically based, and that the rationale is defensible at the WTO.

Without the words being specifically mentioned in the *SPS Agreement*, namely ‘precautionary principle’ or ‘precautionary approach’, or even ‘precautionary measure’, there is nevertheless

⁶¹ World Trade Organization, SPS Training Module, available at http://www.wto.org/english/tratop_e/devel_e/train_e/train_e.htm; accessed on January 5th, 2006: Internet.

reference to 'precaution' in the preamble of the *SPS agreement* and within the text of Articles 3.3 and 5.7.⁶² Article 3.3 allows members to implement SPS measures that are more stringent than those specified in international standards, while Article 5.7 'allows members to take provisional measures when sufficient scientific evidence does not exist to permit a final decision on the safety of product or process.'⁶³ Notwithstanding this permission, members must ensure the following. First, the provisional measure will be reviewed within a reasonable period of time, in spite of the fact that no set time is specified in the agreement; the measure must consider available pertinent and related information; and the Member must continue the process of seeking new, or related information that could result in the termination of the measure should the new information eradicate the initial reasons for the implementation of the protective measure.⁶⁴

Trebilcock and Howse argue that the increase in international trade as a result of the lowering of tariffs on agricultural products will result in a rise in SPS related disputes, as consumer countries take measures to protect their own producers.⁶⁵ For instance, European farmers receive large subsidies for most domains of agriculture. Under domestic pressure to protect its farmers, was the initiation of the *Hormones* case by the European Union truly related to banning the use of scientifically unproven hormones, or was it related to the protection of domestic consumers and beef producers? That answer remains an

⁶² See SPS Agreement, *supra*, note 17.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995), 113.

area of intense debate. Because of the possibility that the state will exercise its right to protect domestic consumers, Trebilcock and Howse argue that this situation:

[u]nderscores the need for a legal framework which can address the fundamental issue of whether a measure validly exists to protect consumers or is merely a sham to protect domestic producers. ... SPS measures are a highly controversial area of regulation as they concern for the most part the safety of a nation's food supply and consequently have been the focus of intense NGO lobbying efforts. Central SPS issues such as scientific justification and allowable risk are difficult to arbitrate and lie at the heart of a country's sovereignty.⁶⁶

It is against this background that the four SPS disputes will be described and analyzed starting with the first dispute, namely the *Hormones* case. It should be noted that the various dispute settlement mechanisms activated through the establishment of a panel and possibly an appellate body, have been carefully constrained by the terms of the *Vienna Convention*, and particularly by the various agreements that form the legislative framework of the WTO.

B EC Measures Concerning Meat and Meat Products (Hormones)

The *Hormones* case has been extensively analyzed since the publication of the Panel report in 1997 and, the release of the Appellate

⁶⁶ Ibid., at 145.

Body report in 1998.⁶⁷ Since then, it has remained a source of considerable discourse in the journals of international trade and international trade law. While an overview of the decision is nevertheless called for, it will be limited to the more salient facts of the case, but it will not engage in a full analysis of the Panel and Appellate Body reports. Scholarly analyses have already been published by recognized experts covering many facets of the *Hormones* decision, from analyzing the developing jurisprudence of the WTO, to matters pertaining to and affecting international trade law.⁶⁸

The complainants were Canada and the United States, and separate, but very similar Panel and Appellate Body reports were prepared for each country. The respondent was the European Communities. Representations also involved Australia, New Zealand, and Norway. A formal 'request for consultation' was submitted on the 28th of July 1996, followed by the circulation of the Panel report on the

⁶⁷ See, *Hormones*, WT/DS48/R/CAN and WT/DS48/AB/R, *supra*, note 3.

⁶⁸ For an analysis of the *Hormones* case, see, e.g., Lila Antonopoulou and Philip van Meurs, "The Precautionary Principle within European Union Public Health Policy – The Implementation of the Principle Under Conditions of Supranationality and Citizenship," *Health Policy* 66 (2003) at p.189, where the authors discuss the publication of the Panel Report in May 1997 and its conclusions where the Panel "charged the EU with violation of the rules of the 'Codex Alimentarius' in its banning the use of six hormones in the production of beef and in its banning imports into EU territory of meat, which had been treated with hormones. The European Union ought to have produced, and failed to do so, according to the panel, scientific evidence proving that the restrictive measures it imposed on EU and American beef producers were stricter than those already available – were necessary for human health protection." Following the imposition of American sanctions against EU products such as Roquefort cheese, mineral water, etc, the EU maintained its commitment to the precautionary principle and shortly thereafter established 17 research programs where it was concluded that the hormone oestradiol 17B was definitely carcinogenic. Nevertheless, the United States and other beef producing countries continued to insist that the EU's reliance on the precautionary principle was an avenue leading to greater protection of its meat-producing sector. See also, Jim Puckett, "When Trade is Toxic: The WTO Threat to Public and Planetary Health," *Asia Pacific Environmental Exchange (APEX)*, Basel Action Network (BAN) at p. 12. Commenting on the reports of the Panel and the final decision of the Appellate Body, the author states that the "immediate real world result of this decision is that the democratic wishes of millions of Europeans who preferred not to be guinea pigs with respect to the effects of artificial hormones, has been denied. This democratic wish was illustrated dramatically by a 366-0 vote of the popularly elected European Parliament."

18th of August 1997, and the Appellate Body report on the 16th of January 1998.

The European Communities had earlier approved Council Directive 81/602/EEC that specifically prohibited

[t]he administering to farm animals of substances having a thyrostatic action or substances having an oestrogenic, androgenic or gestagenic action; the placing on the market or slaughtering of farm animals to which these substances have been administered; the placing on the market of meat from such animals; the processing of meat from such animals and the placing on the market of meat products prepared from or with such meat.⁶⁹

The Canadian claim against the EC and Directive 81/602/EEC was:

[t]hat the EC measures were governed by the SPS Agreement and that the European Communities, by banning the importation of meat and meat products from animals to which [hormones] had been administered for purposes of promoting the growth of animals, had acted inconsistently with the SPS Agreement, in particular Articles 2, 3 and 5. The EC measures were not based on an appropriate risk assessment; failed to take into account international standards, guidelines and recommendations in the absence of scientific justification; were used, in part, as a means to control domestic production; and were more restrictive than required to

⁶⁹ See, *Hormones*, WT/DS48/R/CAN, *supra*, note 3, at ¶ 2.2, p.8.

meet their appropriate level of protection.⁷⁰

The *SPS Agreement* does allow members to implement measures aimed at protecting human, animal and plant health. The Chapeau of the SPS states: ‘that no members should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health’,⁷¹ as long as the measures are not applied with the intent of restricting trade to the advantage of the initiating nation. In its introductory article, the Agreement specifically ‘reaffirms’ that members may impose protective measures against the possibility of pests, diseases, or disease-carrying or disease-causing organisms on its territory. There is no linkage of this clause to any other condition or any other clause, nor is there any evidence of such linkages in any of the four SPS decisions dealt with in this paper. While the Panel does affirm the right of countries to implement protective measures, such measures must be based in science and cannot be based on the whim or preferences of bureaucrats. Articles 2.2 and 5.7 specify the requirement for SPS measures to be founded on relevant scientific evidence. If sufficient scientific evidence is not available, members may impose protective measures, but efforts must be maintained to obtain and confirm the findings of science ‘within a reasonable period of time’.

The reasoning of the Panel on the issue of international standards is somewhat ambiguous. In its findings, the Panel stated: ‘[w]e find, therefore, that international standards exist with respect to the EC

⁷⁰ See, *Hormones*, WT/DS48/R/CAN, *supra*, note 3, at ¶ 3.1, p. 18.

⁷¹ See SPS Agreement, *supra*, note 17.

measures in dispute, to the extent they relate to five of the six hormones at issue'.⁷² Further, the Panel stated '[w]e thus find that the EC measures in dispute (except to the extent they relate to the hormone MGA) result in a different level of sanitary protection than would be achieved by measures based on the relevant Codex standards and are, therefore, not based on existing international standards as specified in Article 3.1'.⁷³ There is a definite understatement on the part of the Panel that international standards, at least Codex standards, are mandatory and may not be overruled by member nations. Leaving aside the fact that standards do exist for five of the six hormones in dispute, and assuming that such standards are based on indisputable scientific evidence, the Chapeau of the *SPS Agreement* 'reaffirms' the right of members to adopt, and enforce sanitary and phytosanitary measures deemed appropriate, as long as such measures do not overtly or covertly restrict international trade. The WTO does not reconcile the incongruity between the mandatory aspects of the CODEX standards, and the rights of members to adopt appropriate measures outlined in the Chapeau of the *SPS Agreement*.

The Panel further commented on two exceptions. The first exception is embedded in the footnote to Article 3.3. In spite of the fact that Article 3.3 links itself to the whole of Article 5, the footnote states '[f]or the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis on an examination and evaluation of available scientific information in conformity with the relevant

⁷² See, *Hormones*, WT/DS48/R/CAN, *supra*, note 3 at ¶ 8.73, p. 218.

⁷³ *Ibid.*, at ¶ 8.79, p. 220.

provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection'.⁷⁴ In essence, the requirement for a scientific justification will be satisfied, through the examination of the applicable scientific information and the evaluation of that information with the relevant provision of the SPS. Once the exercise is completed, and the member determines that more stringent measures are warranted, the text of the footnote leads one to conclude that linkages to other provisions of the SPS are not required, and the member is justified in imposing more stringent measures. But the second sentence of 3.3 specifies that in spite of the results of the first sentence, the measures must not be 'inconsistent with any other provision' of the Agreement.

The EC rested the defense of its decision on the Precautionary Principle, by arguing that no discrimination or disguised barriers to trade were to be gleaned from the text, and the intent of the decision. The EC 'maintained that its measures were no more trade restrictive than required to achieve its appropriate level of sanitary protection and applied in exactly the same way to all animals treated with the hormones and meat from such animals.'⁷⁵ It further maintained that the decision to apply sanitary or phytosanitary measures were country dependent and not the object of a review of the community of nations. But, the SPS Agreement imposed no requirement to establish a scientific basis for the chosen level of protection because the choice was

⁷⁴ See SPS Agreement, note 17.

⁷⁵ See, *Hormones*, WT/DS48/R/CAN, *supra*, note 3 at ¶ 3.6, p. 19.

not a scientific judgement.’⁷⁶ The Agreement defines “appropriate level of sanitary or phytosanitary protection” as ‘the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.’⁷⁷ Further supported by the Chapeau of the *SPS Agreement*, namely ‘that no member should be prevented from adopting or enforcing measures necessary to protect human, animal and plant life or health,’⁷⁸ the EU felt entitled to implement health protection measures solicited from its population. The EC further argued it placed more emphasis on the establishment of precautionary measures, and this greater emphasis was derived from its conviction the Principle had attained a full standing in the journals of public international law. This point will be further expanded in section III .

The Panel nevertheless recognized the existence of the Precautionary Principle in Article 5.7 of the *SPS Agreement* by stating that the Principle ‘could be considered as part of customary international law *and* be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law ...’.⁷⁹ Having reached this conclusion, the Panel did not feel the Principle overruled its earlier findings as

‘the EC import ban of meat and meat products from animals treated with any of

⁷⁶ Ibid., at ¶ 4.85, p 45.

⁷⁷ See, *SPS Agreement*, *supra*, note 2 and note 17.

⁷⁸ Ibid., *supra* note 2, Chapeau; *Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.

⁷⁹ See, *Hormones*, WT/DS48/R/CAN, *supra*, note 3 at ¶ 8.160, p.241.

the five hormones at issue for growth promotion purposes, in so far as it also applies to meat and meat products from animals treated with any of these hormones *in accordance with good practice*, is, from a substantive point of view, not *based on* a risk assessment.’⁸⁰

During the appeal, the EC argued the Panel had erred in concluding that the Precautionary Principle is subservient to Article 5.1 and 5.2, and in the Panel’s observation, that the Principle was possibly in conflict with 5.1 and 5.2. Articles 5.1. and 5.2 are silent on the type of risk assessment to be conducted, by simply listing the factors to be taken into consideration, such as ‘relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases and pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.’⁸¹

Canada reaffirmed its conviction that the Precautionary Principle is not within the compilations of public international law, but is instead, ‘an *emerging* principle of international law, which may in the future crystallize into one of the “general principles of law recognized by civilized nations”, within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.’⁸² Using similar reasoning, Androno states that “even maintaining that it is not yet born as a general principle of international law, we are obliged to recognize that it is at

⁸⁰ Ibid., at ¶ 8.160, p.241.

⁸¹ See, SPS Agreement, *supra*, note 17, art.2.3.

⁸² See, *Hormones*, WT/DS48/AB/R, *supra*, note 3 at p.26.

least *in statu nascendi*”⁸³ The U.S. conceded Article 5.7 may be characterized as a “precautionary approach’ but the intent of 5.7 is normally applied on a case-by-case basis. As such, while the EC does invoke the Principle, there is a clear absence of a risk assessment having been conducted, and furthermore, the use of the Principle does not in itself satisfy the “sufficient scientific evidence” requirement, especially where such evidence is weak or is non-existent.

The Appellate Body did come very close to recognizing the Precautionary Principle, by conceding the presence of considerable academic and legal debate as to its status.

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental

⁸³ See, Andorno, *supra* note 10, at 18.

law, still awaits authoritative
formulation.⁸⁴

The decision of the Appellate Body, to abstain from establishing a firm position regarding the Precautionary Principle, is highly questionable, but understandable in light of the legal enclosure within which a panel or an appellate body must operate. With the World Trade Organization responsible for establishing a corpus of international trade law, through the dispute settlement mechanisms at its disposal, it should have used the occasion to protect and extend the progress of the Principle from environmental issues to international trade. While conceding the presence or the 'reflection' of the Principle in Article 5.7 and the rationale for its use by responsible and representative governments, and in spite of the wording contained in the *Rio Declaration*⁸⁵ accepted six years earlier, the Appellate Body refused to extend the reach of the Principle within the jurisdiction of international trade law, and the reasoning is so important that it is quoted at length.

It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the

⁸⁴ See, *Hormones*, WT/DS48/AB/R, *supra*, note 3, at ¶ 123, p. 47.

⁸⁵ See, *Rio Declaration*, *supra*, note 10.

SPS Agreement. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*.⁸⁶

In the end, the Appellate Body supported the Panel decision in denying any authority to the Precautionary Principle in overriding

⁸⁶ See, *Hormones*, WT/DS48/AB/R, *supra*, note 3, at ¶ 124, p.48.

Article 5.2 and 5.3 of the *SPS Agreement*, thereby overriding the desires of Europeans to consume hormone-free products.

C Australia – Measures Affecting Importation of Salmon

This trade dispute was the result of Australia's prohibition of the import of salmon originating from Canada. The Canadian position was founded on the assumption that the prohibition of Canadian imports, and the quarantine regulations on which the prohibition was based, were inconsistent with the intent of the Sanitary and Phytosanitary Agreement. The quarantine measures in effect blocked the export of fresh, chilled and frozen salmon from entering the Australian market.

The complainant was Canada and the respondent was Australia. Representations also involved the European Communities, India, Norway and the United States. A formal 'request for consultation' was submitted on the 5th of October 1995, followed by the circulation of the Panel report on the 12th of June 1998,⁸⁷ and the Appellate Body report on the 20th of October 1998⁸⁸.

Although the dispute does not reference the Precautionary Principle, it is nonetheless based on Articles 2, 3, and 5 of the *SPS Agreement*. The issue focused on "Quarantine Proclamation 86A" ("QP86A"), a 1996 decision⁸⁹ enacted by the Australian Parliament to regulate the importation of salmon, and mandated that Salmonidae

⁸⁷ See, *Salmon*, WT/DS18/R, *supra*, note 5.

⁸⁸ See, *Salmon*, DS/DS18/AB/R, *supra*, note 5.

⁸⁹ See, *Salmon*, WT/DS18/R, *supra*, note 5, p.143. Quarantine Proclamation 86A or QP86A is the delegated authority under which the Director of Quarantine issues decisions, requirements and proclamations. All references to the term 'proclamation' includes 'guidelines', 'conditions' and 'decisions' referenced in this dispute.

products be subjected to heat treatment ‘to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals, or plants’.⁹⁰ Australia countered the Canadian allegations by asserting the regulation merely specified the basis for the admission of Salmonidae products, and where imports did meet the words of the Proclamation, such products were considered as safe imports for the Australian market. As such, the Proclamation was not an import prohibition, but exclusively focused on the specification of mandatory conditions that were to be met prior to entry.

The burden of proof approach was maintained per the precedent set in the *Hormones* case, where the complaining party was required to establish a prima facie case, following which the respondent was given the opportunity to refute the allegations. In the Appellate Body report in *United States – Measure Affecting Imports of Woven Wool Skirts and Blouses from India*, the burden of proof issue was clearly stated. Reworded for this case, ‘if Canada “adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to [Australia], who will fail unless it adduces sufficient evidence to rebut the presumption”’.⁹¹ Canada’s justification for challenging the Proclamation was contingent on Articles 3.1 and 3.3, Articles 5.1, 5.2, 5.5 and 5.6, and Articles 2.2 and 2.3 of the *SPS Agreement*.

The linkage of Article 2.2 and 5.1 and Article 2.3 and 5.5 was maintained from the *Hormones* decision. In that case, the Appellate Body stated that “the more general Article 2 imparts meaning to and is

⁹⁰ Ibid., at ¶ 8.10, p.143.

⁹¹ Ibid., at p.152.

part of the context of the more specific Article 5 and that both Articles should constantly be read together.”⁹² In the present case, the Panel stated:

For these reasons, we consider, more particularly, that Articles 5.1 and 5.2 - in the words of the Appellate Body in *EC - Hormones* when dealing with the relationship between Articles 2.3 and 5.5 - "may be seen to be marking out and elaborating a particular route leading to the same destination set out in" Article 2.2. Indeed, in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such finding can be presumed to imply a violation of the more general provisions of Article 2.2. We do recognize, at the same time, that given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2.⁹³

Contrary to the findings found in the *Hormones* case, the Panel elected to start its evaluation of the Canadian claim, by first assessing Article 5.1. Although the Panel referenced the findings of the Panel in the *Hormones* case, namely that Article 2 gives meaning to Article 5, the Panel reversed the order and found that Australia's proclamation was

⁹² Ibid., at p.154.

⁹³ Ibid., at p.155.

not 'based on an (*risk*) assessment (italics added by author), as appropriate to the circumstances' as specified in Article 5.1 of the SPS Agreement. Having deprived Article 5.1 of its requirements, Australia's proclamation nullified Article 2.2. In light of this, the Panel clarified the requirements of what constitutes a risk assessment⁹⁴ exercise.

When we refer hereafter to the risk related to a disease, this risk thus includes the risk of entry, establishment or spread of that disease as well as the biological and economic consequences associated therewith. We further note that, in our view, three elements are contained in this definition of risk assessment:

- (1) the definition of risk assessment implies that the Member imposing the sanitary measure first has to *identify* the disease(s) whose "entry, establishment or spread" within its territory it wants to prevent as *well as* the "associated potential biological and economic consequences";
- (2) the definition then requires an "*evaluation of the likelihood*" of entry, establishment or spread of these diseases *and* of the associated potential biological and economic consequences"; and
- (3) the definition further requires that the evaluation of the likelihood of entry, establishment or spread of these diseases

⁹⁴ A risk assessment exercise is one designed to identify the possible impacts of introducing a new chemical, a new drug, a new process, etc. The following steps are applicable in the conduct of any risk assessment exercise, namely (1) look for the hazards; (2) decide who might be harmed and how; (3) evaluate the risks and decide whether the existing precautions are adequate or whether more should be done; (4) record your findings; and (5) review your assessment and revise it if necessary. For more information on risk assessment refer to the following Internet address for HSE books, available at <http://www.hse.gov.uk/pubns/indg163.pdf> [accessed on January 3rd 2006].

be conducted "*according to the sanitary ... measures which might be applied*".⁹⁵

In the 1996 report prepared by Australia, a list of 24 diseases was identified as posing a possible risk to Australia with 'potential biological and economic consequences'. The Panel ruled against Australia and confirmed that the requirements of Article 5.1, namely 'an assessment, as appropriate to the circumstances' were not satisfied. The reasons for the ruling were that Australia had conducted a blanket assessment of the 24 identified diseases, and in conformance with the conclusions of the *Hormones* decision, an assessment was required for each of the diseases. In addition to the assessment, while Australia had identified possible risk on a disease-by-disease basis, it had not '*evaluated or assessed*' each risk for each disease, and unquestionably, the exigencies of a risk assessment exercise were not met. The Panel stated:

... we find that for the measure at issue in this dispute, a risk assessment - in accordance with Article 5.1 and paragraph 4 of Annex A and taking into account the risk assessment techniques developed by the OIE - not only has to state that there is a *possibility* of the diseases of concern being introduced into Australia when imports of the salmon products further examined would be allowed, but also needs to provide some evaluation or estimation of the likelihood or probability, expressed either qualitatively or quantitatively, of these diseases thus being introduced and of the associated biological and economic consequences then occurring. In our view,

⁹⁵ See, *Salmon*, WT/DS18/R, *supra*, note 5, p.162.

the SPS Agreement does not require that such evaluation needs to be done quantitatively. Moreover, we consider that this requirement on *how* a risk assessment should *evaluate* risk does not at all imply that a risk assessment in accordance with Article 5.1 needs to demonstrate a certain magnitude or threshold *level* or *degree* of risk (expressed either quantitatively or qualitatively).⁹⁶

The 1996 Final Report, prepared by Australia, clearly stated in the Executive Summary the possibility, albeit low, ‘that up to 20 disease agents exotic to Australia may be present in Pacific salmon products’.⁹⁷ In its conclusion the report emphasized ‘[t]he potential for pathogenic exotic organisms to enter Australia via imports of salmon from Canada, and the United States is a risk and for some of the disease agents under consideration it is probable that if commercial quantities of product were imported some of the exotic agents would be introduced with the product.’⁹⁸ In essence, a risk did exist although the Australian authorities had not quantified the probability of the risks materializing. In light of this, the Panel ruled that Australia’s proclamation was in contravention of Article 5.1 and the contravention extended to Article 2.2.

While the Appellate Body did support the Panel decision and its final ruling against the Australian proclamation, it reversed the Panel’s ruling relative to the inconsistency found in Article 5.1, and by

⁹⁶ Ibid., at p.162.

⁹⁷ Ibid., at p.167.

⁹⁸ Ibid., at p.168.

collusion, Article 2.2 of the *SPS Agreement*. In arriving at the conclusion, the Appellate Body ruled the rationale of the Panel ought to have been based on the ‘import prohibition’ stipulations of the Proclamation rather than the ‘heat-treatment’ proviso.⁹⁹

The Appellate Body released its decision less than a year following the release of the *Hormones* Appellate Body report. Yet, despite evidence of the possibility of ‘pathogenic exotic organisms’ entering Australia, and the admission of the probability that ‘if commercial quantities of product were imported some of the exotic agents would be introduced’, the Appellate Body did not give any consideration to ‘precaution’. Nor was there any mention of the Precautionary Principle, in spite of the references to the Principle expressed less than a year earlier, in the *Hormones* decision. Why was the appeal report silent on the Principle? That question will hopefully be answered in the next chapter.

D Japan - Measures Affecting Agricultural Products

In *Japan – Measures Affecting Agricultural Products*¹⁰⁰, the complainant in this case was the United States and the respondent was Japan. Third party representations involved the European Communities, Brazil, and Hungary. A formal ‘request for consultation’ was submitted on the 7th of April 1997, followed by the circulation of

⁹⁹ See, *Salmon*, WT/DS/18/AB/R, *supra*, note 5, p. 91.

¹⁰⁰ See, *Japan – Agricultural*, WT/DS76/R and WT/DS76/AB/R, note 6.

the Panel report¹⁰¹ on the 27th of October 1998, and the Appellate Body report¹⁰² on the 22nd of February 1999.

The dispute centered on a disagreement on the part of the United States relating to the methods used by Japan, to allow a lifting of its ban on products that could potentially carry codling moth.¹⁰³ Japan had reserved the right to lift the ban on the variety tested, if the exporting country could demonstrate the efficiency of the quarantine measure.

In keeping with its responsibility as a sovereign state, Japan enacted on May 4, 1950, the Plant Protection Law. The law prohibited the importation of varieties of products, such as apricot, cherry, plum, pear, quince, peach, apple and walnuts imported as fresh fruit. The prohibition was based on the possibility that such varieties could potentially carry the hosts of codling moth. Exemptions had been granted on a variety-by-variety basis, and the United States had received such exemptions. The ban was lifted once the exporting country proposed measures deemed equivalent or better than those recommended in the import prohibition. The onus of proof clearly rested with the exporting country to demonstrate the efficiency of the proposed control measures.

The dispute was not one challenging the rights of Japan to implement measures aimed at protecting, as a sovereign nation, its

¹⁰¹ See, *Japan – Agricultural*, WT/DS76/R, *supra*, note 6.

¹⁰² See, *Japan – Agricultural*, WT/DS76/AB/R, *supra*, note 6.

¹⁰³ The codling moth larva is one of the very destructive pests introduced from Europe by settlers. For more information on the codling moth, refer to Rick Bessin, *Coddling Moth* (University of Kentucky Cooperative Extension Service, 2003); available from <http://www.uky.edu/Ag/Entomology/entfacts/pdfs/entfa203.pdf>; Internet.

agricultural industry. Instead, the issue of contention centered on an approach that was largely based on a variety-by-variety basis. Japan agreed that the issue was an SPS issue, and as such it fell under the aegis of the *SPS Agreement*. On the other hand, the United States did not challenge the testing requirements, the efficiency of the recommended control measures, nor the requirement that an alternative measure must clearly demonstrate that it meets or exceeds the established conditions.

On the matter of burden of proof, both the United States and Japan referred to, and accepted the precedent established in the Appellate Body Report on *EC – Measures Affecting Meat and Meat Products (Hormones)*.¹⁰⁴ In the case at hand, and following the precedent set in the *EC – Hormones*, the onus of proof clearly rested with the United States to demonstrate a *prima facie* case against each of the SPS measures referenced, and to demonstrate that the Japanese measures were inconsistent with the intent of the SPS. Following this, Japan was free to counter and to quash the allegations of the inconsistency of its measures with the applicable terms of the *SPS Agreement*.

On the case submitted by Japan, the United States contended that while ‘the risk to be addressed in this case is the risk of introduction of codling moth *in the absence* of the varietal testing requirement’¹⁰⁵, the most powerful argument made by Japan was that ‘it is *possible* there may be variation in the efficacy of disinfestations if the same quarantine

¹⁰⁴ See, *Hormones*, WT/DS48/AB/R, *supra*, note 3.

¹⁰⁵ See, *Japan – Agricultural*, WT/DS76/R, *supra*, note 6, at ¶ 4.1, p. 30.

treatment is applied to different varieties.¹⁰⁶ In essence, Japan demanded that each product or each variety was to be subjected to individual control measures of disinfestations, meaning that within the ‘apples’ category, each type of apple, Golden Delicious, Macintosh, Granny Smith, etc, would have to be subjected to testing requirements instead of conducting a singular test for each product category. Scientific experts and evidence did not support the demands of Japan for varietal testing within each product line. In commenting on expert advice, the Appellate Body stated that none of the experts submitted

any additional comments or information which could enlighten us as to the existence or relevance of variety differences for the four products for which no specific studies are before us. After careful examination we do not consider, therefore, that there is sufficient evidence before us to extend our finding in paragraph 8.43 also to apricots, pears, plums and quince. We only find that Japan maintains the varietal testing requirements without sufficient scientific evidence with respect to apples, cherries, nectarines and walnuts.’¹⁰⁷

Next, the Panel dealt with the issues raised by Article 2.2 and 5.7 of the SPS. There is no doubt that 2.2 and 5.7 are linked, and the Panel recognized that should Japan’s varietal testing requirements meet the exigencies of 5.7, then 2.2 could not have been jeopardized. Japan contended that, as new information is submitted regarding the

¹⁰⁶ Ibid., at ¶ 4.1, p. 30.

¹⁰⁷ See, *Japan – Agricultural*, WT/DS76/AB/R, note 6, at p. 121.

testing of a single variety within a product line, that information is cumulative, in the sense that ‘the new data will be accumulated on the effects of the treatment approved for that variety in order to reach a sufficient level of confidence as to the broader applicability of that treatment to other varieties.’¹⁰⁸ Until a sufficient level of confidence is reached, Japan maintained the right to retain the import prohibition.

Japan further maintained that the obligation under 5.7 to ‘seek to obtain the additional information necessary for a more objective assessment of risk and review the ... phytosanitary measure accordingly within a reasonable period of time’, was satisfied through the documentation prepared by exporting countries – documentation aimed at convincing the importing country to lift the import restrictions for each variety within each product line. According to Japan, its obligations under 2.2 and 5.7 were fulfilled. On this point, the Panel ruled that ‘the studies these countries provide are designed and carried out to *comply* with the varietal testing requirement. They do not examine the appropriateness of the requirement itself.’¹⁰⁹ Again, resort to a precedent was made, namely the *Hormones* case, and the Panel ruled that the information must be appropriate and specific, and information destined for a different objective does not qualify under article 5.7, nor does it qualify as ‘pertinent information.’ The Panel further highlighted that ‘the issue of varietal testing, and the question as to whether it can be scientifically justified, has thus been around for

¹⁰⁸ See, *Japan – Agricultural*, WT/DS76/R, *supra*, note 6, p.123.

¹⁰⁹ *Ibid.*, p.124.

almost 30 years and, with respect to the specific products and pest at issues, for 20 years. During this period of time Japan has been in a position to obtain further information on varietal differences and their relevance to quarantine efficacy.’¹¹⁰

Pertaining to the relationships between the sub-parts of Article 5.7, the Panel ruled, and thereby set an important precedent, in concluding that the first sentence of 5.7 was constrained by the second sentence. The first sentence of 5.7, dealing with ‘cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary and phytosanitary measures applied by other Members.’¹¹¹ The wording of the second sentence, in spite of the fact that the conditions of the first sentence have been met, imposes additional limitations in stating ‘in such circumstances, Members *shall seek to obtain* (italics for emphasis) the additional information necessary for a more objective assessment of risk and review the sanitary and phytosanitary measure accordingly within a reasonable period of time.’¹¹² As such, the first sentence of 5.7 cannot be separated from the second, and section 7 of article 5 operates as one article with its components inseparable. The Panel stated:

therefore, even if we were to assume that the varietal testing requirement is a phytosanitary measure provisionally adopted in accordance with the first

¹¹⁰ Ibid., p.125.

¹¹¹ See, SPS Agreement, *supra*, note 17.

¹¹² Ibid.

sentence of Article 5.7, i.e., even if we were to assume that in this case “relevant scientific information is insufficient” *and* there is “available pertinent information” before the Panel on which Japan can base the varietal testing requirement, the second sentence of Article 5.7 obliges Japan to ‘seek to obtain the additional information necessary for a more objective assessment of risk “*and to*” review the ... phytosanitary measure accordingly within a reasonable period of time.’¹¹³

This ruling by the Panel represents an important interpretation of Article 5.7 and sets an important precedent for future disputes involving the SPS and article 5.7.

The report of the Appellate Body (AB) in *Japan – Measures Affecting Agricultural Products*¹¹⁴ ruled on the earlier Panel report. The nexus of the Appellate Report focused on Article 2.2 and 5.7 of the *SPS Agreement*. The United States maintained that Japan’s arguments did not support the conclusion that the relevant scientific evidence was insufficient as specified in Article 5.7. The U.S. maintained that while Japan’s obligations dated to the creation of the WTO, on January 1, 1995, the quarantine measures imposed by Japan had been in place for nearly 30 years. To argue that the measures were imposed due to the absence of relevant scientific information was to negate the intent of Article 5.7.

The Appellate Body attempted to clarify the meaning of the phrase ‘maintained without sufficient scientific evidence’ found in Article 2.2 of

¹¹³ See, *Japan – Agricultural*, WT/DS76/R, *supra*, note 6, at ¶ 8.2, p.124.

¹¹⁴ *Ibid.*

the *SPS Agreement*, with particular emphasis on the word ‘sufficient’. ‘The ordinary meaning of “sufficient” is “of a quantity, extent, or scope adequate to a certain purpose or object”.’¹¹⁵ From this, we can conclude that “sufficiency” is a relational concept. “Sufficiency” requires the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence’.¹¹⁶ In clarifying the word “sufficient”, the Appellate Body arrived at an interesting conclusion, where the Appellate Body stipulated that the phrase “maintained without sufficient scientific evidence” in Article 2.2, also included Articles 5.1, 3.3 and 5.7. Having in essence set a precedent, the Appellate Body concluded that Articles 2.2, 3.3, 5.1, and 5.7 are knitted together as interdependent articles, and as such, invoking one will automatically activate the other. In its ruling, the Appellate Body extended the conclusions in the Appellate Body report in *European Communities – Hormones* by including Article 5.7 and Article 3.3. In *Hormones* it had concluded:

... Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligations set out in Article 2.2 impart meaning to Article 5.1.¹¹⁷

On the issue of Article 5.7, the Appellate Body reiterated the link between 5.7 and 2.2. ‘Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible

¹¹⁵ See, *Japan – Agricultural*, WT/DS76/AB/R, note 6, at p.23.

¹¹⁶ *Ibid.*, at p.23.

¹¹⁷ See, *Hormones*, WT/DS48/AB/R, *supra*, note 3, p.180.

interpretation of that obligation would render Article 5.7 meaningless.¹¹⁸ In addition, the Appellate Body supported the analysis of Article 5.7 provided by the Panel, wherein both parts of the first sentence of 5.7 are directly linked to both parts of the second sentence. ‘The four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.’¹¹⁹ The Appellate Body clearly asserted that the assumption that the first sentence of 5.7 gave rise to an exemption to the obligations specified in 2.2 is a wrong assumption, because ‘Article 2.2 refers to Article 5.7 as a whole and Article 5.7 links the first and second sentence with the words “[I]n *such* circumstances” (emphasis added).’¹²⁰

Although the SPS is silent on the Precautionary Principle, the Appellate Body took exception to Japan’s argument that the requirements of Article 2.2 should ‘be interpreted in light of the precautionary principle.’ Referencing its report in *European Communities – Hormones*, the Appellate Body confirmed that the Precautionary Principle, while reflected in the words of the preamble to the SPS, and in the text of Articles 3.3 and 5.7, was not written within the text of the SPS so as to prevent the justification of ‘SPS measures that are inconsistent with the obligations of Members set out in particular provisions of that Agreement.’¹²¹

¹¹⁸ See, *Japan – Agricultural*, WT/DS76/AB/R, note 6, at ¶ 8, p.27.

¹¹⁹ Ibid., at ¶ 4, p. 29.

¹²⁰ Ibid., at ¶ 5, p. 30.

¹²¹ Ibid., at ¶ 7, p. 32.

On the issue related to the obtainment of additional information found in Article 5.7, the Appellate Body advised that nowhere in the SPS can one find clarifications as to what constitutes the prerequisites for collecting additional information or direction on the method of collection. What must be ascertained is that ‘the information sought must be germane to conducting such a risk assessment, i.e. the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied.’¹²² As to what constitutes a “reasonable period of time”, the AB ruled the criteria have ‘to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining information necessary for the review *and the* characteristics of the provisional SPS measures.’¹²³

The Precautionary Principle was raised by Japan in its objection to the Panel’s conclusion that an ‘actual causal link’ was required ‘between the differences in test results and the presence of varietal differences’.¹²⁴ The use of the ‘actual causal link’ test versus the use of the ‘rational relationship’ test resulted in quashing the intent of the Precautionary Principle. In its response, the Appellate Body reasserted the obligatory link between the SPS measure implemented by a Member and the scientific evidence on which the measure is predicated. The determination on

[w]hether there is a rational relationship
between an SPS measure and the scientific

¹²² Ibid., at ¶ 6, p. 31.

¹²³ Ibid., at ¶ 7, p. 31.

¹²⁴ Ibid., at ¶ 4, p. 7.

evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure and the quality and quantity of the scientific evidence.¹²⁵

Does the Appellate Body in essence, override the intent of the Precautionary Principle? Is it reasonable to oblige Member countries to establish scientific evidence for each species of fruit or vegetable that could potentially be attacked, and ravaged by pests, such as the codling moth? The paper will return to this question in the next chapter.

E Japan – Measures Affecting the Importation of Apples

The complainant in this case was the United States with Japan as the respondent party. Third party representations involved the European Communities, Australia, Brazil, China, Chinese Taipei, and New Zealand. A formal ‘request for consultation’ was submitted on the 1st of March 2002, followed by the circulation of the Panel report on the 15th of July 2003¹²⁶, and the Appellate Body report on the 26th of November 2003¹²⁷.

The issue of the case *Japan – Measures Affecting the Importation of Apples* involved action on the part of Japan to protect the apple industry against the introduction of fire blight (*Erwinia amylovora*¹²⁸).

¹²⁵ Ibid., at ¶ 12, p. 28.

¹²⁶ See, *Japan – Apples*, WT/DS245/R, note 7.

¹²⁷ See, *Japan – Apples*, WT/DS245/AB/R, note 7.

¹²⁸ Fire blight, caused by the bacterium *Erwinia amylovora*, is a common and very serious bacterial disease. The disease is also referred to as blossom blight, spur blight, fruit blight, twig blight, or

In 1994, Japan applied quarantine measures on U.S. apples as a precautionary measure. The quarantine “included, *inter alia*, the prohibition of imported apples from orchards in which any fire blight is detected, the requirement that export orchards be inspected three times yearly for the presence of fire blight, the disqualification of any orchard from exporting to Japan should fire blight be detected within a 500-metre buffer zone surrounding the orchard, and a post-harvest treatment of exported apples with chlorine.”¹²⁹ On May 7th 2002, the United States submitted a formal request to the Dispute Settlement Body (DSU) of the World Trade Organization (WTO) for the establishment of a panel to investigate allegations that Japan violated the *Sanitary and Phytosanitary Agreement (SPS)* through imposition of nine prohibitions on U.S. apples. The U.S. alleged that the nine requirements¹³⁰ should be viewed as separate infractions of the SPS as all nine are maintained without sufficient scientific evidence.

rootstock blight – depending on the plant part that is attacked. Reference Report on Plant Disease, RPD No. 801 June 2005, *Fire Blight of Apple*, Department of Crop Sciences, University of Illinois at Urbana-Champaign, College of Agricultural, Consumer and Environmental Sciences. Internet: http://web.aces.uiuc.edu/vista/pdf_pubs/801.pdf.

¹²⁹ See, *Japan – Apples*, WT/DS245/R, note 7, at ¶ 8.1, p.148.

¹³⁰ Ibid., at ¶ 8.1, p.148. The nine requirements are a) the prohibition of imported apples from US states other than apples produced in designated areas in the states of Oregon and Washington; b) the prohibition of imported apples from orchards in which any fire blight is detected on plants or in which host plants of fire blight (other than apple trees) are found, whether or not infected; c) the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500-meter buffer zone surrounding such orchard; d) the requirement that export orchards be inspected three times yearly (at blossom, fruitlet, and harvest stages) for the presence of fire blight for purposes of applying the above-mentioned prohibitions; e) a post-harvest surface treatment of apples for export with chlorine; f) production requirements, such as chlorine treatment of containers for harvesting and chlorine treatment of packing facility; g) post-harvest separation of apples for export to Japan from fruits destined to other markets; h) certification by US plant protection officials that fruits are free of fire blight and have been treated post harvest with chlorine; and i) confirmation by Japanese officials of the US officials’ certification and inspection by Japanese officials of disinfection and packaging facilities.

To counter the U.S. position, Japan argued its measures were precautionary in nature and the approach taken was a “systemic approach”.

‘The systems approach consists of approving only those apples produced in environmental conditions that will not allow the presence of fire blight bacteria, both outside and inside of apple fruit, at various stages from blossom to growth, harvest and shipment. ... As a whole (the requirements) are, in Japan’s view, cumulative, inseparable and integral parts of a single measure.’¹³¹

Referencing the precedent set in *Australia – Salmon*, the Panel deliberated whether Japan’s requirement should be treated as one or separately. The Panel agreed that ‘the concept of “measure” is not defined in the DSU, even though the term “measures at issue” is found in Article 6.2 regarding the establishment of a Panel. The use of the term “measures at issue” in plural suggests that a matter brought before the DSB may refer to several “measures”.’¹³² In the end the Panel agreed that the requirements are cumulative and together, the requirements constitute the measures applied by Japan against the importation of US apples. ‘Treating the requirements at issue as one measure is, therefore, especially in the context of Article 2.2 of the *SPS Agreement*, provided that we determine that the measure as a whole is – or is not – compatible with the *SPS Agreement*.’¹³³

¹³¹ Ibid.,

¹³² Ibid., at ¶ 8.1, p.150.

¹³³ Ibid., at ¶ 8.6, p.151.

The Panel then focused on the Article 2.2 of the SPS, specifically the expression “sufficient scientific evidence”, and identified the elements required for consideration. The Panel stated:

First, the very notion of ‘scientific evidence’ seems to exclude elements of information that cannot be considered as “evidence”. The same notion also seems to exclude any evidence that is not “scientific”.

Second, the term “sufficient” seems to address not only the quantity and quality of the evidence as such, but also the “causal link” between the phytosanitary measure at issue and the scientific evidence establishing a phytosanitary risk and justifying the measure.¹³⁴

The Panel’s clarification will most certainly be referenced in future disputes involving the *SPS Agreement*, but the clarification seems to negative the Precautionary Principle, at least the definition found in the *Rio Declaration*. If elements of information cannot be considered as “evidence”, then where does *Rio* stand with its words, “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?”¹³⁵ In adopting a strict definition of the word “scientific”, the Panel stated that

in accordance with the general principle of interpretation of public international law, we must give full meaning to the term

¹³⁴ Ibid., at ¶ 8.4, p. 165.

¹³⁵ See, *Rio Declaration*, *supra* note 10.

“scientific” and conclude that, in the context of Article 2.2, the evidence to be considered should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method.¹³⁶

In defining the term “evidence”, the Panel stated that the term must be given full meaning. In reference to the negotiators in the dispute, the Panel agreed the

negotiators could have used the term “information”, as in Article 5.7, if they considered that any material could be used. By using the term “scientific evidence”, Article 2.2 excludes in essence not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis.¹³⁷

The Panel was open to the admission of circumstantial evidence, but held any evidence had to be founded in science. ‘We will consider all relevant evidence that can be considered “scientific”, and do not exclude *a priori* that “indirect” evidence may be pertinent to our assessment, provided that it is scientific in nature.’¹³⁸ Again, the statement appears to negate the wording of the Precautionary Principle, specifically the ‘lack of full scientific certainty shall not be used’ to postpone the adoption of preventative measures. Although the US does concede the possibility of fire blight entering Japanese territory, it states that in the event that it should enter Japan, it could

¹³⁶ See, *Japan – Apples*, WT/DS245/R, note 7, at ¶ 8.2, p.167.

¹³⁷ Ibid., at ¶ 8.4, p.167.

¹³⁸ Ibid., at ¶ 8.10, p.169.

be easily eradicated as was the experience in Norway and Australia. It leaves one to wonder why the Panel ruled against Japan, using as a basis that the scientific information provided by Japan was insufficient. The ruling in fact contravenes the intent of the Precautionary Principle. The Principle is activated at the possibility of adverse affects, and the possibility does not require to be based on sufficient scientific evidence. The Principle can also be activated by the presence of a minority opinion in spite of overwhelming scientific evidence to the contrary.

To shed light on the meaning of the word “sufficient” in the expression “sufficient scientific evidence”, the Panel referenced *Japan – Agricultural Products II* where the Appellate Body in its clarification of “sufficient” stated:

The ordinary meaning of ‘sufficient’ is ‘of a quantity, extent, or scope adequate to a certain purpose or object’. From this, we conclude that ‘sufficiency’ is a relational concept. ‘Sufficiency’ requires the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence.’¹³⁹

Referencing the same decision, the Panel also agreed with the Appellate Body that ‘Article 2.2, includes Article 5.1, and well as Articles 3.3 and 5.7 of the *SPS Agreement*.’

The Appellate Body (AB) report upheld the findings of the Panel and maintained a relatively consistent approach found in the *Australia – Salmon* case. The Appellate Body affirmed ‘that Japan’s 1999 Pest

¹³⁹ Ibid., at ¶ 8.12, p.169.

Risk Analysis' was not pertinent to the demand of a full risk assessment exercise. In essence, Japan had failed to 'evaluate the likelihood of entry, establishment or spread of'¹⁴⁰ fire blight on its territory, and since such an evaluation was absent, the final decision did not favor the Japanese argument.

In terms of the Precautionary Principle, the subject had been raised only once in the Panel Report, but a more generous reference was accorded to it in the Appellate Body report. The need, for the consideration of precautionary measures, was initially raised by Japan who argued the Principle should have been accorded more weight in light of expert advice that a cautionary approach should be considered, in spite of the fact that those same experts had not definitely identified a path along which the disease could travel. By the Appellate Body not considering the intent of the Principle in arriving at its conclusions, the evidence was inconsistent 'with the Panel's duty to make an "objective assessment of the facts of the case" under Article 11 of the DSU.'¹⁴¹ The US concluded that neither, the wording of the Principle (the US did not specify which version of the Principle it was referring to) nor the test of the *SPS Agreement*, compelled the Panel to deduce from the text of the Agreement that a possible pathway could exist for the propagation of the disease, in spite of overwhelming scientific evidence to the contrary.

While Japan did not advocate the consideration of the Precautionary Principle detached from the *SPS Agreement*, it was nevertheless emphatic on the point where greater consideration should

¹⁴⁰ See, *Japan – Apples*, WT/DS245/AB/R, note 7, at ¶ XI (d), p. 112.

¹⁴¹ *Ibid.*, at ¶ 4, p.26.

have been awarded to prudence as expressed by various experts. ‘Based on what Japan understands to be the experts’ recognition that the risk of harm from the introduction of fire blight results in a “general need [for] prudence”, Japan argued that the Panel “should have recognized the risk of completion of the pathway from infected apple fruit.”’¹⁴²

While serious discussions and some significant progress was made towards recognizing the Principle in the *Hormones* decision, such was not the case for the next three cases, nor was the definition and application of the Principle further enhanced. In essence, the dispute settlement regime of the WTO rested its argumentation on the text of the *SPS Agreement* with no evident effort for rationalizing the nature of the dispute with the general intent of the Agreement, and in the process avoiding doing violence to the words of the document.

¹⁴² Ibid., at ¶ 1, p.106.

III TO BE RECOGNIZED, OR NOT TO BE RECOGNIZED? THAT IS THE QUESTION.

On November 7th, 2005, the Ontario Cattlemen Association (OCA) electronically issued a document entitled *Cattle Stories for November 4th, 2005*. The document is a collection of events occurring throughout the World pertaining to agriculture, such as new findings in the identification of animals, agreements between agricultural organizations in two or more countries, and other information related to the cattle industry, particularly the production of food for human consumption.

Of particular interest is the number of information items dedicated to developing events directly or indirectly impacting the food supply chain. In addition, the headlines contained in the OCA document raise the necessity of a more aggressive effort, in defining and implementing the objectives, and the intent of the Precautionary Principle in international trade matters, particularly in the trade of consumable products with their potential negative impact on importing nations. Furthermore, efforts should be made towards defining those objectives and intents within the more precise and adaptable concepts of risk assessment and risk management. What is particularly alarming about the OCA communiqué is the relatively short period of time during which the events took place, and of greater concern is that all of the

incidents occurred in developed nations where the technology, inspections of facilities, and other infrastructural components should have decreased the number of such incidents. Of greater concern to the consumers of developed economies, all of the incidents were generated within the food chain of highly industrialized nations. One can only imagine the health issues that occur within the less-developed countries, many of which are actively involved in the supply of food-related products to developed nations.

The first item, dated November 3rd 2005, stated that the Brazilian agriculture ministry had identified 41 municipalities at risk for an outbreak of foot-and-mouth disease. The news immediately caused 47 countries to discontinue the import of Brazilian beef, leaving the industry with a projected loss of meat exports estimated at \$1.7 billion. On October 28th, 2005, a case of mad cow was found in an Austrian slaughterhouse. On October 31st, 2005, the New York State Health Department issued an e-coli alert after three people had developed symptoms following the ingestion of beef patties produced by Philly-Gourmet Meat Company. On the same day, the U.S. Department of Agriculture's Food Safety Inspection Service caused Chef's Delight Packing Company of Brooklyn, New York, to recall 2,263 pounds of ready-to-eat beef products due to a possible contamination with *Listeria monocytogenes*. *Listeria* may cause high fever, severe headaches, neck stiffness and nausea. It may also be the cause of miscarriages and stillbirths. It may also be fatal for infants and the elderly, especially those with a weakened immune system, and for individuals with HIV or

undergoing chemotherapy. On November 1, 2005, a Pennsylvania-based company, Quaker Maid Meats Inc. voluntarily recalled 94,400 pounds of frozen ground beef due to the possibility of e-coli contamination. On November 2nd, 2005, the French supermarket chain Leclerc noticed that 3,600 pounds of frozen hamburgers had been sold to Portugal – the same batch had been the source of sickness in sixteen children and two adults in France. The brand had also been sold to supermarkets in other countries of the European Union. On November 2nd, 2005, the Dallas Morning News reported that the progeny of an infected Texas cow had reached the human food supply chain. The cow was infected with mad cow disease, but the record keeping at the farm and the traceability of the animal from farm-to-fork was problematic. It is estimated that 350 out of 413 animals that had been in contact with the infected cow, had been sent to slaughter and had likely been consumed by the time the incident had been detected and all progeny traced.¹⁴³

Food safety and food law are on the rise and both are receiving justifiable attention, and globalization has exacerbated this rising problem. The highly integrated global food chain has rapidly accelerated the impact of food safety and food policy failures. The first part of this chapter will analyze the role of the World Trade Organization (WTO) in the four decisions reviewed in Chapter II, and

¹⁴³ Loader and Hobbs have also pointed out the susceptibility of European and American consumers to food related issues. See Rupert Loader and Jill E. Hobbs, "Strategic Responses to Food Safety Legislation" (1999), 24 *Food Policy* 24, 671 at 686.

particular attention will be devoted to the treatment of the Precautionary Principle by the ‘dispute settlement’ regimentation of the WTO. In the second part, the paper will speculate as to some possible scenarios as to why the Panel recognized the Principle in the *Hormones* case, and why the Dispute Settlement body made no mention of the Principle in the very next SPS dispute, namely the *Australia - Salmon* case. In *Japan – Agricultural Products* and *Japan – Apples*, the precedent set in the *Hormones* case is acknowledged, but in spite of the nature of the threat from two pests, fire blight and codling moth, the Panel and the Appellate Body engaged in a textualist¹⁴⁴ approach to the wording of the *SPS Agreement* rather than looking at its general intent. Next, we will speculate as to why the Principle is not receiving warranted attention in the domain of food regulation and in

¹⁴⁴See, e.g., Caleb Nelson, *What is Textualism*, 91 Virginia Law Review, 348 (2005) (commenting on the ongoing debate between ‘textualists’ and ‘intentionalists’ schools in statutory interpretation and defining each camp as follows: “The most common way of distinguishing textualism from its principal judicial rival, “intentionalism,” purports to identify a basic disagreement about the proper goal of statutory interpretation: intentionalists try to identify and enforce the “subjective” intent of the enacting legislature, while textualists care only about the “objective” meaning of the statutory text”). See also Scott Fruehwald, *Pragmatic Textualism and The Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 Wake Forest Law Review, 973 (2001) (where the author states that “... courts use a variation of textualism, called pragmatic textualism, to help alleviate the disarray that currently exists in statutory interpretation. Pragmatic textualism determines a statute’s meaning based on legislative intent as expressed in its text. It looks mainly at a statute’s text, but recognizes that a text may have more than one meaning or may be vague”). See also Grundfest and Pritchard where the authors comment on the use of ambiguity by legislatures along with the purposes legislative ambiguity may serve. Joseph A. Grundfest and A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stanford Law Review, 628 (2002) (commenting on the use of ambiguity in statute construction,

“[a]mbiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among other strategies, “obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish.” Legislative ambiguity reaches its peak when statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible”).

establishing itself firmly in the *opinio juris* of public international law, except in the case of the EC, where the Principle is entrenched in the *Maastricht Treaty* under Article 130r dealing with the environment.¹⁴⁵

Laetitia DeJaegher, an environmental lawyer stationed in Brussels, commenting on the Precautionary Principle in 2005, stated:

Only an open system will give the decisions the necessary credibility for the public to accept it. Dealing with such a complex environment implies a holistic model that comprises a scientific, technical, political, social, ethical, cultural and legal assessment of a problem in one process that will help decision-makers in their task. Such a system implies an interdisciplinary approach combined with an organic management and a strategic vision relying on communication as a tool.¹⁴⁶

According to John Quiggin, of the University of Queensland, Australia, the 'precautionary principle must necessarily be considered as

¹⁴⁵ *Maastricht Treaty – Provisions Amending the Treaty Establishing the European Economic Community With a View to Establishing the European Community*, TITLE XVI Environment ARTICLE 130 r

1. Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment; - protecting human health;
- prudent and rational utilization of natural resources;
- promoting measures at international level to deal with regional or world-wide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies. In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.

¹⁴⁶ Laetitia DeJaegher, *Management of Uncertainty and the Balance Between Precaution and Innovation: Towards New Strategies for a Sustainable Risk Management* [book on-line] (Brussels: Lawtext Publishing, 2005, accessed on August 20, 2004); available from http://www.netram.net/pdf/man_unc.pdf; Internet.

a heuristic check on formal decision-making procedures rather than as a rule to be applied within a given formal framework.’¹⁴⁷ Before proceeding further, it is opportune to revisit the four SPS decisions with the objective of tracking the presence of the Precautionary Principle in the decisions of the trade dispute settlement repertoire of the WTO, and to look at the contours of each decision.

Before undertaking a more profound analysis of the four SPS decisions, it may be wise to reference, and briefly explain the role of two important documents, the first in the field of international law, namely the *Vienna Convention on the Law of Treaties*¹⁴⁸, and the second in the field of international trade law, namely the *Understanding on Rules and Procedures governing the Settlement of Disputes*¹⁴⁹, commonly referred to as the *Dispute Settlement Understanding* or DSU. The relevant articles of both documents are central in setting the context within which the WTO Panels and Appellate Bodies function. The *Vienna Convention*, Article 31 (1), states 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’.¹⁵⁰ Article 31 (2) and (3) in turn, sets out further avenues that may assist the parties in refining the interpretive exercise, such as instruments and agreement made by the Parties in connection with the treaty, and any subsequent agreement or practice agreed to by the Parties towards the

¹⁴⁷ John Quiggin, *The Precautionary Principle in Environmental Policy and the Theory of Choice Under Uncertainty* [book on-line] (Australian Research Council Federation, 2005, accessed on September 23rd 2005); available from <http://www.biotech-info-net/undertainty.html>; Internet.

¹⁴⁸ See, Vienna Convention, *supra*, note 8.

¹⁴⁹ See, DSU, *supra*, note 9.

¹⁵⁰ See, Vienna Convention, *supra*, note 8.

interpretation of the terms of the treaty. It should also be noted that Article 32, in specifying supplementary means of interpretation, allows courts and tribunals to reference the background and preparatory work of a treaty, where an interpretation based on Article 31 ‘leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable’.¹⁵¹

The DSU in turn, specifically Article 3.2, emphasizes the need for the provision of ‘security and predictability to the multilateral trading system’¹⁵², and in its interpretations, the dispute settlement system of the WTO ‘cannot add to or diminish the rights and obligations provided in the covered agreements’¹⁵³, but must interpret and ‘clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’¹⁵⁴, thereby referencing the intent of the *Vienna Convention*.

1 – The Precautionary Principle in the *Hormones* Case

In the *Hormones* case, the Panel did concede that the Precautionary Principle was reflected in Article 5.7 of the SPS Agreement and that it was further recast in the Agreement’s preamble and in Article 3.3. The Panel also agreed with the European Communities that Article 5.7 ‘does not exhaust the relevance of a precautionary principle’ and it further affirmed the right of nations to apply measures designed to address the concerns of their population.

¹⁵¹ See, Vienna Convention, *supra*, note 8.

¹⁵² See, DSU, *supra*, note 9.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

But it is in the last sentence, where the objectives and the intent of the Precautionary Principle are neutralized. The Appellate Body ruled that in the absence of a ‘clear textual directive’ or a clear definition, the dispute settlement machinery of the WTO must resort to the wording of the SPS, and any deviation from the wording is not to be contemplated. Panels and Appellate Bodies are not relieved from ‘applying the customary international law principle of treaty interpretation’ in constructing their decisions regarding the *SPS Agreement*.

Why would the WTO adopt such a strict and narrow interpretation? Why did the WTO adopt a textualist approach, in its interpretation of the *SPS Agreement*, for such an important issue – an issue of great relevance and concern for the finicky European consumer? While the interests of the North American beef producer were part of the equation, those interests are based on economics, unlike the consumer where his interests are based on health issues. There are two possible answers to that question. First, hormones are used in many North American feedlots for one specific purpose – to have animals gain more weight over a shorter period of time, resulting in less feed consumption. It is not that hormones are good for the animal, or that hormones contribute to meat cuts that are markedly more tender or less fattening or even better-tasting. “American, Canadian, and other beef producers used hormones to accelerate growth that reduced costs and yielded higher quality (leaner) meat.”¹⁵⁵ The purpose of hormones is

¹⁵⁵ David G. Victor, “The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years” (2000), 32 *International Law and Politics* 865 at 898. There is no concrete evidence that hormones yield leaner meat. Lean meat is the result of a combination of factors,

mainly to achieve weight gain in the shortest time possible. If a hormone-treated animal spends two weeks less on a feedlot while achieving the same amount of gain as an animal having received no hormone treatment but spending two weeks more on the feedlot to attain the same weight, the economic savings are significant. The issue of hormones is an issue of pure economics. There are no identified health benefits to consumers eating hormone-treated meat, nor are there benefits to animals other than gaining weight through an abnormal chemical pathway. Furthermore, the evidence of harm to both animals and humans is the object of continuing debate among the scientific establishment. It is relatively safe to conclude that hormone-treated animals, once consumed by humans will in all likelihood result in adverse effects on humans. For every study supporting hormones, one can find another study against their use.

Faced with this dilemma, the Panel and Appellate Body may simply have adopted a textual approach in order to force the formulation of a position by the Ministerial Conference. Had the *Hormones* decision favored the EU and the application of the Precautionary Principle, it is highly probable the WTO would have been criticized for infringing on responsibilities of nation-states, and hormone producers would have lobbied their governments for action against the decision. One could speculate that in adopting, a narrow and textualist approach, as demanded by the *Vienna Convention*¹⁵⁶, and

some of which are related to the breed, others are related to the diet of the animal or the finishing diet, others are related to the age of slaughter, etc.

¹⁵⁶ See, Vienna Convention, *supra*, note 8.

by the DSU, the dispute settlement system of the WTO, washed its hands of the issue, and covertly turned the problem over to the signatories of the *SPS Agreement* for eventual resolution. Using as a basis, Article 32 (b) of the *Vienna Convention*¹⁵⁷, one could easily conclude that a decision in support of the use of hormones in meat, was ‘manifestly absurd and unreasonable’ confronted with a highly volatile source of scientific opinion. Furthermore, having ruled against the prohibition in the use of hormones in meat, the WTO would have been faithful to Article 3.2 of the DSU as the ‘rights and obligations provided in the covered agreements’ would not have been compromised in any form. But, the dispute settlement system of the WTO chose not to use Article 32 (b), in spite of the fact that the scientific community was far from unanimous on the effects of hormones in meat, where the meat was destined for human consumption.

The second reason for adopting a textualist approach may be related to the words of Justice Hutcheson where the dispute settlement apparatus, “after canvassing all the available material at (*its*) command, and duly cogitating upon it, give(s) (*its*) imagination play, and brooding over the cause, wait(s) for the feeling, the hunch – that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way (*italics added by the author*).”¹⁵⁸ The issue may have been perceived as so complex and polemical, that it produced a decision largely based on

¹⁵⁷ Ibid.

¹⁵⁸ See Hutcheson., *supra* note 1.

intuitive reasoning, where the bureaucratic inclinations of the dispute settlement machinery of the WTO, to obscure the corpus of an issue trumped the judicial responsibility to adopt an ‘intentionalist’¹⁵⁹ approach in interpreting the *SPS Agreement*. An ‘intentionalist’ approach would not have deviated from the meaning of Article 3(2) of the DSU by either adding to, or diminishing the rights and obligations of the signatories, nor would the approach have weakened the intent and meaning of Article 31(1) of the *Vienna Convention*¹⁶⁰. An ‘intentionalist’ approach would have recognized the absence of agreement on the benefits of hormones, and it would have awarded some consideration to the concept of minority opinion.

2 – The Precautionary Principle in the *Salmon* Case

The Appeal report was released by the WTO in October 1998 on the heels of the *Hormones* appeal report published nine months earlier, in January 1998. In spite of acknowledging the presence, or at least the ‘reflection’ of the Precautionary Principle in Article 5.7 of the SPS Agreement, the Principle was never the object of any discussion in the *Australia – Salmon* case. The intent of the ban on fresh and frozen salmon was to “prevent twenty-four fish-borne diseases from spreading into Australia’s pristine environment.”¹⁶¹ In reading the preamble of the *SPS Agreement*, one can reasonably conclude Australia was well within its rights to implement the measures to protect its ‘sports fishing

¹⁵⁹ See, Nelson, *supra*, note 144.

¹⁶⁰ See, Vienna Convention, *supra*, note 8.

¹⁶¹ See, Victor, *supra*, note 155, at 904.

and tourism as well as a small trout aquaculture industry.¹⁶² In essence, even a remote possibility of the spread of disease would mandate some protective action on the part of Australia, and support by the WTO for resorting to the implementation of precautionary measures.

Why did the Precautionary Principle receive no recognition and no mention from the Panel or the Appellate Body? The answer lies in the fundamental contradiction at times found in cases of this nature. The contradictions become evident as the decisions of the WTO are not based on the issue of risk, nor are they based on the voice of the minority opinion of either experts in the field, or scientists cognizant of the matter. The decisions are often based on pure semantics. In the *Salmon* case, the Panel concluded that Australia's Final Report published in 1996 constituted a risk assessment exercise. The Appellate Body disagreed, but it set an important precedent by specifying a three part test for the conduct of a risk assessment. First, the disease must be identified, and an economic assessment must be presented on the consequences of the diseases entering and spreading. The second part of the test involves an evaluation of the likelihood of diseases entering the territory in question, the likelihood of the right conditions leading to the establishment of diseases, and the likelihood of their spreading. The third part of the test involves a determination as to the impact of the application of the *SPS Agreement*, particularly Article 5.1, on the likelihood of entry, establishment and spreading of the disease.¹⁶³

¹⁶² Ibid., at 905.

¹⁶³ Ibid., Victor at 906.

The three pronged test, by its very nature, points to the possibility of diseases entering and spreading, otherwise there would be no need for a test, if absolute certainty existed. Why is the test necessary if by resorting to the Precautionary Principle a solution can be found? While many experts will conclude that the Principle does not have a widely accepted definition, the *Rio Declaration* does provide a relatively clear definition against which the WTO could have based its decisions without violating the relevant articles of the *Vienna Convention*¹⁶⁴ or the DSU¹⁶⁵. The *Rio Declaration* is widely accepted, and it is a strong statement of international law, in spite of the fact that many have challenged and continue to challenge its legal stance, and its rank in international law. Even if a risk assessment had been conducted to the satisfaction of all parties involved, could it have supported a zero chance of contamination? Assuming that a possibility of a risk was present, even if the risk was very small, and without compromising *Vienna* or the DSU, could the WTO not have supported the Australian position? In other words, could the WTO have erred on the side of precaution in handing down its ruling? While the interpretation did not yield a result that was 'manifestly absurd or unreasonable' as was the case in the *Hormones* decision, the WTO did not stray from the strict application of the relevant articles of the SPS, and remained faithful to Article 31(1) of the *Vienna Convention* and to Article 3(2) of the DSU.

¹⁶⁴ See, *Vienna Convention*, *supra*, note 8.

¹⁶⁵ See, *DSU*, *supra*, note 9.

3 – The Precautionary Principle in *Agricultural Products* Case

Often referred to as *Japan Varietals* or *Japan – Agricultural Products*, again we find an in-depth and lengthy debate on the relationship of Article 2, 3, and 5 of the *SPS Agreement* with relatively no mention of the Precautionary Principle. There were no disagreements between the parties that coddling moth was a pest of quarantine significance. The issue centered on “whether the measure taken by Japan to ensure its level of protection was based on scientific principles, maintained with sufficient scientific evidence, and based on an assessment of risk.”¹⁶⁶ Article 5.7 is in essence an exemption to the obligations that arise in Article 2.2. While Article 5.7 allows members to maintain sanitary and phytosanitary measures in the absence of scientific evidence, the permission is constrained by other limitations, such as the pursuit of more meaningful or precise scientific information within a reasonable period of time. When Japan raised the issue of the Precautionary Principle, the Appellate Body referenced the *Hormones* decision, where it had conceded that the Principle was reflected in the preamble to the *SPS Agreement*, and in Article 3.3 and 5.7. It further stated that the principle:

... has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.¹⁶⁷

¹⁶⁶ See, *Japan – Agricultural*, WT/DS76/AB/R, note 6, at ¶ 4.2, p. 57.

¹⁶⁷ *Ibid.*, at ¶ 9, p.28.

This declaration appears to provide the *SPS Agreement* with precedence over the text of the *Rio Declaration*. As such, in the resolution of trade disputes relating to the sanitary and phytosanitary measures, the *SPS Agreement* stands supreme to other legal instruments of international trade law. The Appellate Body stated that the Principle was not part of the SPS, thereby denying Members the right to override their obligations specified within the *SPS Agreement*.

Again, we detect an obvious fixation limited to the text of the SPS with no evidence of deviation to other instruments of international law. The Appellate Body and the Panel should have given greater consideration to the propagation of pests, namely codling moth, in the Japanese agricultural sector. There appeared to be a superficial treatment of the possibility of the pest entering Japanese soil. In spite of deficiencies in the arguments put forth by Japan, one could reasonably assume that the WTO was under obligation, or at least should have seriously considered, requesting that Japan and the U.S. conduct joint studies, under the direction of independent scientists, to determine the probability and possibility of pests, entering and propagating themselves on Japanese soil. Were precautionary measures not warranted before a final ruling was handed down by the WTO? Once a disease or pest enters a territory, it becomes more problematic as to how it can be eradicated or controlled. To ensure the implementation of precautionary measures prior to entry is more effective at ensuring a control of the pest or disease at issue.

The WTO has in essence, killed the intent of the *Rio Declaration* and the objectives of the Precautionary Principle by clearly positioning

the *SPS Agreement* above the *Rio Declaration*. In spite of the constraints imposed by the *Vienna Convention*¹⁶⁸ and the DSU¹⁶⁹, had the WTO drifted towards a more inclusive approach, or at least one that demonstrated a more global and environmental view to the issue at hand, one could conclude that the intent set in both, *Vienna* and the DSU, would have been satisfied, and the ‘security and predictability of the multilateral trading system’¹⁷⁰ would have been protected.

4 – The Precautionary Principle in the *Apples Case*

The Apples decision possibly administered the final blow to the already fragile existence of the Precautionary Principle. The Panel had already been apprised on the seriousness of fire blight, and of its propagation on many of the World’s continents. In light of its seriousness and in light of its presence on many continents, why did the Panel and why did the Appellate Body not consider the possibility of its introduction on Japanese soil? Furthermore, in his deposition to the Panel, an expert namely Dr. Smith, set forth arguments in favor of Japan’s retaining its phytosanitary requirements.

I think that a country which opens a new trade which did not previously exist, subject to certain phytosanitary requirements, can reasonably wish to monitor the operation of what goes on during the course of such trade for a certain time to be satisfied that all the components of their phytosanitary protection is working correctly.¹⁷¹

¹⁶⁸ See, *Vienna Convention*, *supra*, note 8.

¹⁶⁹ See, DSU, *supra*, note 9.

¹⁷⁰ See, DSU, *supra*, note 9.

¹⁷¹ See, *Japan – Apples*, WT/DS245/R, *supra*, note 7, at ¶419, p.284.

Dr. Smith further stated that phytosanitary measures may be required for 10 to 20 years, at which time, it would be opportune to review the phytosanitary measures as Japanese "authorities might come to the conclusion that they are perfectly happy with the movement of apples from the United States if experience shows them that in actual fact there are never any incidents and nothing is found."¹⁷² His recommendation is for phytosanitary controls to be removed only following proof that the phytosanitary system of the exporting country has been proven efficient over an extended period of time.

Commenting on the appropriateness of science intervening in policy decision, Dr. Smith stated: "It is difficult for experts to make judgements on what should be the phytosanitary policies of countries. These policies are conditioned by concerns which go beyond those which we have been discussing and the SPS Agreement must take into account the necessity for such policies. It is not for us as scientific experts to try to make judgement on what governments should or should not do in those cases."¹⁷³ Further in his testimony, Dr. Smith equates the Precautionary Principle with prudence.

Until a particular system applied to phytosanitary security is put into place one is only trying to forecast how it operates. For that reason, when the phytosanitary system is changed it should be changed under circumstances that retain some degree of control on what is happening and not in a single step that removes control altogether.

¹⁷² Ibid.

¹⁷³ Ibid.

This is not a precautionary principle but just ordinary prudence. I am not sure this is something that has to be argued on scientific terms. It is a matter of public policy.¹⁷⁴

In spite of the concerns expressed by Dr. Smith, one can reasonably conclude that the Panel and the Appellate Body should have pushed aside their textualist addiction in favor of a holistic consideration of the possibility of fire blight's entering Japanese soil. Instead, both the Panel and the Appellate Body ignored the Precautionary Principle, and focused on a strict interpretation of the words of the *SPS Agreement*. Again, the same point can be raised. Having handed down a ruling while wearing the garments of prudence in matters of public policy, had the high priests of the Appellate Body ruled against the United States, would the terms established in the *Vienna Convention*¹⁷⁵, and in the DSU¹⁷⁶ have been stripped of their intended objectives and authority on matters of international law? One could conclude that *Vienna* and the DSU would have remained intact, their regulatory terms would not have been compromised, and the ruling would not have been perceived as an attack on the objectives, and the intent of both documents.

In the following section, the paper will speculate on possible reasons aimed at understanding, and explaining the decisions that emanate from the dispute resolution process of the WTO.

¹⁷⁴ Ibid., at ¶423, p.285.

¹⁷⁵ See, Vienna Convention, *supra*, note 8.

¹⁷⁶ See, DSU, *supra*, note 9.

5 – The Application of the Precautionary Principle

Why is a textualist approach so engrained in WTO decisions, specifically decisions related to the safety and security involving the health of humans, animals and plants? One would assume that Panel and Appellate Body members would seriously consider the most remote possibility of disease or pests, entering, establishing, and spreading on the territory of one or several nations. One could also safely assume that the dispute settlement apparatus would have also given serious consideration to any minority opinion, and that efforts would have been taken to seek such opinion. That was not the case.

Focusing exclusively on the decisions of the Appellate Body, as it is the court of last resort, as any Supreme Court, one should expect more background material, more research, more historical data, and more references to previous decisions. But, under the current governance structure, that role is not one that can be liberally assumed by the Appellate Body. While the WTO is a relatively young organization, one could expect that the Appellate Body would take measures to seek the assistance of previous national or international courts by referencing the precedents set by those courts. While clearly not a trier of facts, as that role more appropriately belongs to the panel process, the finality of any decision made by the Appellate Body on matters falling under the terms of the *SPS Agreement*, would dictate the taking of steps to ensure that the right decision is made, and that the decision is made not exclusively from a legal perspective, but also from a public policy perspective. To assume such an approach would

engender massive revisions in the international governance framework of the WTO.

From the international pedestal on which it stands, any Appellate Body, and also the various panels, are availed with an endless reservoir of legal opinion pertaining to any of the complex issues they are called upon to resolve. While reference to precedents does not have to parallel the facts of the decision being referenced, the final decision constituting the referenced precedent will often be of great assistance in charting a course for the case under consideration. There is unfortunately no evidence of any in-depth research having been conducted by any of the appeal tribunals, such as the approaches taken by the supreme courts of most developed nations, because the current governance does not allow such initiatives, and fact-finding is already one of the weak points of the appeal process. Claus-Dieter Ehlermann, a past member of the Appellate Body stated

fact-finding is one of the weakest elements of the panel process, despite the broad rights of panels to ask for information, the corresponding obligation of WTO members to provide such information, and the right of panels to draw negative inferences when information is not provided.¹⁷⁷

If the panel process, as the trier of facts, does not engage in a profound fact-finding exercise, why would the situation improve during the appeal process? The Appellate Body is in essence a 'supreme court',

¹⁷⁷ See Claus-Dieter, Ehlermann. "Six Years on the Bench of the "World Trade Court" Some Personal Experiences as Member of the Appellate Body of the World Trade Organization" (2002), 36, *Journal of World Trade*, 4 at 605.

but there is little evidence that it functions as a supreme court, at least as the traditional high court found in most advanced nations. Had the Appellate Body assumed a high court-approach in the *Hormones* case, there would undoubtedly have been more effort in understanding the factual issues raised during the panel process. First, the Appellate Body should have sought a more balanced opinion on the use of hormones in animals, and the impact of hormone-laced meat on the health of humans. There is no doubt that hormones are used purely for economic gain, and their use is not related to enhancing the quality of meat or the tenderness of meat. Why did the Appellate Body not engage in a more rigorous debate with the scientific community, both the supporters and the opponents in the hormones debate? A more robust debate does appear to be within the current mandate. Under a more liberal governance framework, the Appellate Body should have been allowed to adopt a more inquisitive approach in the use of hormones, and to bore deeper into the issue, by calling upon the knowledge of a wider range of professionals and researchers, particularly in the medical and the dietary fields. Similarly, in the *Hormones* decision, the Appellate Body should have been capable of adding more weight in the scales of justice, by giving serious consideration to the opinions expressed by the consumers of the European Community. The reason is that the current governance does not allow the WTO to instill into its final decision, a dimension of public policy. Venturing into the public policy arena would require massive revisions to the current process.

Complex issues are seldom resolved by resorting to jejune argumentation that rests on a few articles found in a single document.

The WTO, in the four cases under study, was not resolving a fence dispute between two neighbours. The Appellate Body is an international tribunal, it is an international supreme court, and when it resorts to the *SPS Agreement*, it will be dealing, in the majority of cases with issues of human, animal and plant health. The issues are serious, and the disputes ought to be resolved with considerably more robustness than simply relying on the wording of a few articles that in total add up to less than 20 sentences. There are no signs, in any of the decisions referenced in this paper, of the Appellate Body engaging in the collection of the most exhaustive evidence available with respect to either hormones, or the propagation of pests, such as fire blight or codling moth, or the spreading of highly destructive diseases, as was the case in the Australia decision. While its role may not be that of normal court of law, where evidence is submitted for the evaluation and review of the court, it should analyze international issues falling under the SPS from the perspective of public policy, or at least it should strongly influence the WTO membership to deal with public policy issues. In rendering its decisions, the Appellate Body makes consistent and persistent reliance of less than half a dozen articles of the *SPS Agreement*, and solutions to complex issues, such as the use of hormones, or the high probability of infestations, can hardly be concluded from the words of those few articles.

In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*,¹⁷⁸ the case was considerably narrower in scope than that found in the four SPS decisions, and the legal reasoning was considerably more profound, as Justice L'Heureux did not apply a purely textualist approach. While the case was national, and it exhibited a very narrow footprint, the judgement was more comprehensive than the argumentation of the four SPS decisions.

On June 28th 2001, the Supreme Court of Canada issued its judgment in the case, wherein Justice L'Heureux-Dubé stated,

to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹⁷⁹

Justice L'Heureux-Dube went further in stating that the Supreme Court also endorsed the conclusion of David Freestone and Ellen Hey, that the Principle “has been included in virtually every

¹⁷⁸ In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* the appellants were owners of landscaping and lawn maintenance companies. By the nature of their business these firms engaged in the user of Pesticides – products that were approved by the federal *Pest Control Products Act*, r.s.c. 1985, c. P-9. In addition, the appellants operated their businesses, the pesticide component, under license from Quebec's *Pesticides Act*, R.S.Q., c. P-9.3. In 1991, the Town of Hudson, located 40 kilometers west of the City of Montreal, enacted By-law 270 under the authority of the *Cities and Towns Act*, R.S.Q., c. C-19. In November 1992, the appellants were served with summons for having contravened By-law 270, following which the appellants asked the Quebec Superior Court to declare By-law 270 to be inoperative and *ultra vires* as it was outside the authority granted to the Town of Hudson by the *Cities and Towns Act*. The Superior Court denied the motion and the ruling was affirmed by the Quebec Court of Appeal. The appellants appealed to the Supreme Court of Canada for a ruling.

¹⁷⁹ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*.

recent treaty and policy document related to the protection and preservation of the environment”¹⁸⁰ Through this inclusion in treaties and policy documents, the Court hints that the Principle is either part of international law, or at least that it is standing on its doorsteps. Furthermore, the Supreme Court ventured outside the envelope in directly referencing the Precautionary Principle, and did not feel constrained by the wording of any legislation or by-laws connected to the case, as we find in the four SPS disputes where the Panel and the Appellate Body give meaning to the decision by exclusively relying on the words of the *SPS Agreement*.

Why did the Appellate Body not engage in a broader level of legal reasoning in the four decisions, particularly in the *Hormones* case, where the tone was initially set? In the vast majority of Supreme Court decisions, particularly in the decisions found in the more advanced nations in possession of a mature judicial complement, one often finds reference and application of the ‘golden rule’ of statutory construction. The *SPS Agreement* is in essence a ‘statute’, and the WTO is an international tribunal/supreme court institution responsible for resolving trade disputes between nations, and the “golden rule” of statutory construction is within its tool set. The rule is stated succinctly in *Grey v. Pearson*:

... in construing wills and indeed statutes,
and all written instruments, the
grammatical and ordinary sense of the

¹⁸⁰ David Freestone and Ellen Hey, ed., *The Precautionary Principle and International Law* (Hague: Kluwer Law International, 1996), 3.

words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further.¹⁸¹

Similarly in *TVA v. Hill* (1978), Justice Powell invokes the ‘golden rule’ of statutory construction when he stated:

If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.¹⁸²

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, Justice Powell commenting on the Occupational Safety and Health Administration Act, stated:

”Although one might wish that Congress had spoken with greater clarity, the legislative history and purposes of the status do not support OSHA’s interpretation of the

¹⁸¹ *Grey v. Pearson* (1857), 6 H.I. Cas. 61 at 104, as paraphrased in CUB 38323 (T. Benoît).

¹⁸² *TVA v. Hill*, 437 U.S. 153 (1978).

Act. It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries – or significant segments thereof – is threatened. ... I would not attribute such an irrational intention to Congress.”¹⁸³

In *Youngstown Co. v. Sawyer*, 1952, Justice Jackson commenting on presidential powers, stated:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for the Pharaoh. ...

... I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.¹⁸⁴

Why is this argumentation not found in any of the four SPS decisions, when the footprint of each decision is not local, or regional, or national, but international in impact, and where each decision rules on one or several issues related to human, animal, and plant life and health? There is a strict and almost absurd determination to adhere to the words of the *SPS Agreement* as evidenced in Section II of this paper. There is another possible answer to this question.

¹⁸³ *Industrial Union Department, AFL-CIO v. American Petroleum Institute* 448 U.S. 607 (1980), Powell.

¹⁸⁴ *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952), Jackson J. concurring.

First, it is important to analyze the experience profile of a small sample of present and past justices in some of the more prominent courts, namely the U.S. Supreme Court, the Judicial Committee of the Privy Council in the United Kingdom, and the Supreme Court of Canada. These three 'supreme courts' are representative of the majority of established superior courts in most democratic and advanced economies. The Judicial Committee of the Privy Council (JCPC) is staffed with individuals that have held positions in high judicial offices throughout the U.K. In addition, judges from the superior courts of other Commonwealth countries, who continue to retain the appeal to the JCPC as the final court of appeal, will at times serve on the Bench of this Court. In essence, the JCPC is the U.K.'s Supreme Court and it was Canada's last court of appeal until 1947, when Canada established its own Supreme Court. Unlike the Appellate Body of the WTO, the JCPC mandates that its justices arrive at this Court with a long record of experience on the Bench of a superior court.

Justices of the U.S. Supreme Court are similarly selected using the barometer of their long and extensive experience on the Bench of an appeal court or a superior court. Justice Samuel Alito Jr.,¹⁸⁵ the most recent addition to the roster of the Supreme Court, spent the last 30 years in the legal system, as a Law Clerk, as Assistant U.S. Attorney, from 1977 to 1981, as Deputy Assistant to Attorney General and up to 2006, he served as an appeal court judge, from where he was selected to become Justice of the U.S. Supreme Court in February 2006.

¹⁸⁵ OYEZ, U.S. Supreme Court Multimedia, Biography of Samuel Alito Jr., at http://www.oyez.org/oyez/resource/legal_entity/1466/biography; accessed on January 11th 2006.

Justice William H. Rehnquist¹⁸⁶ also started as a Law Clerk, he then practiced law for close to 16 years. In 1969 he became Deputy Attorney General, and he was chosen in 1972 to serve as a Justice of the U.S. Supreme Court, during which time he participated in well over 1000 Supreme Court rulings.

In spite of its relatively short span, the Supreme Court of Canada has emulated the traditions of the JCPC, and those of the U.S. Supreme Court. The Canadian court is also staffed by highly qualified individuals, with many years of service in the legal system. Justice Beverly McLachlin¹⁸⁷, the current Chief Justice, was first appointed to the County Court of Vancouver in 1981, and soon after, she was named to the Supreme Court of British Columbia. Four years later, she was appointed to the Court of Appeal, and in 1988, she was named to the position of Chief Justice of the Supreme Court of British Columbia. She was soon selected to serve as a judge at the Supreme Court of Canada, where she became Chief Justice in 2000.

Justice Robert George Brian Dickson¹⁸⁸ arrived at the Supreme Court of Canada in 1973, with an equally impressive career spanning many years in private practice, and as Professor at the University of

¹⁸⁶ OYEZ, U.S. Supreme Court Multimedia, Biography of William H. Rehnquist, at http://www.oyez.org/oyez/resource/legal_entity/100/biography; accessed on January 11th 2006.

¹⁸⁷ Supreme Court of Canada, "About the Court – Judges of the Court. The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada" (Government of Canada: Supreme Court of Canada, 2005/03/03), http://www.scc-csc.gc.ca/AboutCourt/judges/mclachlin/index_e.asp (accessed on January 12, 2006).

¹⁸⁸ Supreme Court of Canada, "About the Court – Judges of the Court. The Right Honourable Robert George Brian Dickson, P.C., C.C. " (Government of Canada: Supreme Court of Canada, 2004/03/19), http://www.scc-csc.gc.ca/AboutCourt/judges/dickson/index_e.asp (accessed on January 12, 2006).

Manitoba. In 1963 he was appointed to the Court of the Queen's Bench of Manitoba, and four years later, he joined the Manitoba Court of Appeal. In 1973, he was named as Justice of the Supreme Court of Canada, where he became Chief Justice in 1984. He served 17 years at the Supreme Court of Canada.

Looking at the experience profile of Appellate Body members since the creation of the WTO (refer to Table 2 *Appellate Body – Occupation and Educational Profile*), one is struck by the fact that the vast majority of members never acquired any experience by actively participating in the court system of their respective countries. The vast majority of members are from academia. While the U.S. Government engages in extensive deliberations in selecting judges of the Supreme Court, as is the case in most advanced nations with a mature legal framework, it is not the case for the WTO. There appear to be, at first glance, more emphasis on familiarity with international law, and economics, versus the requirement for a robust experience acquired in judgeship in a court, preferably at the highest court level, such as the Supreme Court, in Canada and the U.S. or the European Court of Justice in the case of the European Union. Why the emphasis on appointing individuals with literally no experience of the Bench, and why is it tolerated by the more advanced nations. This is of particular interest as all of the SPS disputes have involved the more developed economies. That question will not be answered in this paper, as it could be the object of a considerably more extensive study.

One can nevertheless speculate that the decisions of the WTO, particularly the Appellate Body decisions, would be very different if they were to be constructed by seasoned and highly experienced legal professionals, who arrived at the WTO with an extensive toolkit acquired through years of experience in the court system of their home countries.

Table – 1 Appellate Body – Occupation and Educational Profile

NAME	TERM	OCCUPATION	EDUCATION	COUNTRY
George Michel Abi-Saab	2000-2008	Professor – International Law	Doctorate (A)	Egypt
Luiz Olavo Baptista	2001-2005	Professor – International Trade Law	Doctorate	Brazil
Arumugamangalam Venkatachalam Ganesan	2000-2008	Public Servant	M.A. and M.Sc.	India
Merit E. Janow	2003-2007	Professor – International Economic Law & International Affairs	Lawyer Doctorate (A) ¹⁸⁹	United States
John S. Lockhart	2001-2005	Judge, Banker, Judicial Reform Specialist	Law & Arts Doctorate (A)	Australia
Giorgio Sacerdoti	2001-2005	Professor – International Law	Law and Master in Comparative Law	Italy
Yasuhei Taniguchi	2000-2007	Professor of Law	LL.M & J.S.D.	Japan
James Bacchus	1995-2003	Professor of Law & Lawyer	B.A. & M.A. Honorary Doctorate	United States
Christopher Beeby	1995-2000	Diplomat	Law Degrees Doctorate (A)	New Zealand
Claus-Dieter Ehlermann	1995-2001	Professor – International Economic Law	Doctorate (A)	Germany
Said El-Naggar	1995-2000	Professor – Economics	Doctorate	Egypt
Florentino Feliciano	1995-2000	Lawyer and Senior Associate Justice – Supreme Court	Doctorate	Philippines
Mitsuo Matsushita	1995-2000	Professor	D. Jur.	Japan
Julio Lacarte-Muro	1995-2000	Diplomat & Professor of Comparative Law	Doctorate (A)	Uruguay

¹⁸⁹ As the biography did not definitively specify the individual held a doctorate degree, the work experience did point to the conclusion that such an educational level had been attained.

Walter Mattli and Anne-Marie Slaughter identify two constraints courts will face, and as the WTO is in effect an international ‘supreme court’ responsible for the resolution of trade disputes between nation-states, the same constraints will impinge on the operations of this Court.

First is the constraint of minimum fidelity to the demands of legal discourse: “the language of reasoned interpretation, logical deduction, systemic and temporal coherence.” Reasoning and results that do not meet these requirements may be challenged as “unfounded in law” or as indicative that a court is acting *ultra vires* – in excess of its mandate.¹⁹⁰

At first glance, the WTO or its Appellate Body is acting within its assigned mandate – it is acting *intra vires*. In each of the decisions, does ‘reasoning’ intersect with ‘results’? Do the objectives of the *SPS Agreement* find life in the text of the decisions? When Justice Powell states: ‘I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal,’ do his words find meaning within the decisions of the Appellate Body, or had they hit an impenetrable wall – a textualist wall reinforced by the terms and conditions of the *Vienna Convention*, and by the governance regime of the WTO? It would be difficult to conclude

¹⁹⁰ Walter Mattli and Anne-Marie Slaughter, “Revisiting the European Court of Justice” (Winter 1998), 52, 1 *International Organization* 197.

that the signatories of the SPS intended the resulting decisions to border on absurdity and inconsistency. The intent of the *SPS Agreement* in the *Hormones* decision was not, under the most exaggerated scenario, to encourage, or to passively wash its hands of the evidence that the use of growth hormones was of no consequence in the international supply chain. The same reasoning applies to the other three decisions. In the textualist approach of the four decisions, can one convincingly argue that the legal discourse is expressed in a language that demonstrates a reasoned interpretation of the words of the *SPS Agreement*, a logical deduction resulting from the interpretation, and a demonstration of a systemic and temporal coherence with the end result? A supportive argument is not possible, and a convincing argument is impossible.

The second constraint is one of 'minimum democratic accountability: the requirement that a court not stray too far from majority political preferences.' There is no doubt as to the difficulty in reaching this goal. While the courts must decide under a veil of independence from political interference, or the pressures of interest groups, they must be finely tuned to the social and temporal surroundings in which the decision will be required to survive. A court that consistently rules against the social, cultural, and temporal setting will soon lose all legitimacy and political forces will soon intervene by instituting control mechanisms on the judiciary. Law is a blunt instrument of social control but only a certain level of bluntness will be tolerated in any society. Beyond a certain point, social forces will demand political decisions to render the courts more accountable and sensitive to policy preferences.

Courts are required to walk a fine line in balancing legal reasoning with the policy preferences of a society. Mattli and Slaughter make an excellent argument, on the calculus courts are required to consider in resolving disputes.

Yet if a court is constrained by the demands of legal reasoning and discourse, how can it “choose” to decide more or less in line with majority preferences? In many cases the choice will be clear: the weight of text and precedent; the elemental requirements of precision, clarity, and determinacy in rule interpretation and application; or the potentially disastrous social, political, or economic consequences attendant on one of the proffered readings of a textual provision as compared to another leave little room for doubt as to the correct “legal” outcome. In such cases should the judicial outcome diverge from majority preferences, it is up to the legislature to change the law. In other cases, however, the sides are much more evenly matched. The text may be genuinely ambiguous, legislative intent murky, the option of a clear and determinate rule equally available on both sides, all equal prospects for creating a cascade of evils or a cornucopia of benefits however the court comes out. In these cases – hard cases, close cases, frequently very important cases – judicial outcomes that consistently or persistently stray too far from perceived majority opinion in a particular country, whether expressed through the legislature or not, are likely to trigger suspicions that

judges are substituting their own policy preferences for those of the “the people.”¹⁹¹

Why do meetings of the WTO cause such social upheaval? Why is the WTO perceived in such a negative atmosphere of suspicion, of alignment with multinationals, of being the pawns of powerful nations and powerful interests? Finally, why the widely held views that the WTO operates *ultra vires* the policy preferences of ‘the people’? If the *SPS Agreement* and all of its annexes are accepted constructs of international trade law, then one can deduce that the *Rio Declaration* is a similar and equal construct of international trade law. Consequently, the Precautionary Principle should have carried considerable weight in the SPS decisions handed down by the WTO’s appeal arm. While the text of the SPS may have been deliberately drafted with ambiguity, or with elasticity to allow some discretion in reasoning, and the intent of the signatories may also have created a murky legal mixture, it nevertheless remains the duty of the WTO ‘to adopt a permissible construction that accords with some modicum of common sense and the public weal.’¹⁹²

As already stated, the WTO is the international Supreme Court for trade disputes between the signatories of the *SPS Agreement*. To have paid lip service to the words of the *Rio Declaration* and at times to have totally ignored the intent of *Rio*, is a relatively clear and undisputed indicator that the WTO operates outside the policy preferences expressed by those it is meant to protect, and that any venture into the

¹⁹¹ Ibid., at p.198.

¹⁹² See, *TVA v. Hill*, *supra*, note 182, at 43.

public policy arena is strictly constrained by the existing governance schema. The EU had been very clear that the use of artificial growth hormones was not acceptable by the Europeans. Yet the WTO ruled against the EU by adopting a pure textualist approach in its interpretation of the relevant articles of the SPS. While the Appellate Body in all four decisions did resort to the advice of subject matter experts, there is no evidence it appealed to legal experts in the field of international law, or to any other legal circle for advice and direction. Nor is there any evidence at seeking advice from precedents already set at the high court level of member nations. Precedents cannot always reflect exact facts and situations, but they will often provide guidance in legal interpretation, especially in those hard cases, those close cases, and those frequently very important cases. The four decisions referenced in this paper are clearly categorized as such.

In closely adhering to its approved mandate, the WTO, in all four decisions, pushed the final outcome away from for the policy preferences of affected nations. The decisions strayed from the preferences of European consumers in the *Hormones*¹⁹³ decision. In the *Salmon*¹⁹⁴ decision, the final outcome strayed from the preferences of the potentially affected industries in Australia. In the *Agricultural Products*¹⁹⁵, often referred to as *Japanese Varietals* and in the *Japanese Apples*¹⁹⁶ decision, the outcome strayed from the concerns of the Japanese agricultural sector. In all cases, the WTO generated

¹⁹³ See, *Hormones*, WT/DS48/R/CAN and WT/DS48/AB/R, *supra*, note 3.

¹⁹⁴ See, *Salmon*, WT/DS18/R and WT/DS18/AB/R, note 5.

¹⁹⁵ See, *Japan – Agricultural*, WT/DS76/R and WT/DS76/AB/R, note 6.

¹⁹⁶ See, *Japan – Apples*, WT/DS245/R and WT/DS245/AB/R, note 7.

resentment in a large sector of the population in the affected nations, and in all nations, by refusing to look beyond the *SPS Agreement* and to accord a rightful place to the Precautionary Principle as expressed in the *Rio Declaration*. Having failed in the opportunity to provide the Precautionary Principle with some needed recognition at the international level, the WTO may have contributed to its eventual and highly probable relegation to the rank of a soft statement for policy guidance.

Laetitia DeJaegher may be right, in that a different and more holistic approach is required when confronted with the complex problems of the future, where the disputes involve nations with different cultures, different values, different knowledge bases, and different economic situations. Problems must be studied from a number of vantage points, hence the need for a “holistic model that comprises a scientific, technical, political, social, ethical, cultural and legal assessment of a problem in one process that will help decision-makers in their task.”¹⁹⁷ The international problems will give rise to “hard cases, close cases, frequently very important cases” that require an extensive experience in legal interpretation and in the delivery of legal decisions on the part of the WTO’s appeal mechanism.

To achieve this objective, the WTO will have to look beyond universities to staff its appellate structure. It will have to search for legal minds that have a long and proven record on the Bench of high courts, to move WTO decisions away from a textualist interpretation of

¹⁹⁷ See, DeJaegher, *supra*, note 146.

WTO statutes and to adopt a more holistic approach in the resolution of international trade disputes.

The fundamental question nevertheless remains as to the reasons why the Bench, (the Panel) and the Appeal Bench (the Appellate Body) of an international organization like the WTO, mandated to resolve international trade disputes, continues to be staffed by individuals with no or very little experience as justices or judges of a national superior court? Does the answer lie in the probability that the more advanced nations retain greater control over trade, in spite of the fact, that some decisions could go against one or the other at some point in time. With an enforcement mechanism that is complex and difficult to monitor and apply, did the four SPS decisions cause great harm to the affected industries of the losing states? Cognizant that less developed nations would have difficulty in making cases using the *SPS Agreement* – the SPS disputes all involved developed economies – was it in the interests of developed economies to structure this international supreme court, in a way that would give a semblance of fairness, while retaining an undertone that would maintain and protect the interests of the powerful nations? Those speculations will not be answered in this paper, but could be the object of further study to determine why the signatories, and particularly, why the more advanced economies, agreed to the current composition of the appeal Bench of the WTO. Why does it not function as a true supreme court?

There may be a third explanation. The WTO, in spite of its democratic undertone, continues to be largely controlled by the more developed economies. In possession of vibrant economies where quality

goods are produced in abundance, using the latest technological inventions, coupled with a highly educated workforce, equipped with a modern and efficient infrastructure, advanced economies, in the late 1970s, were in dire need of new markets. The forces of globalization set the tone for the creation of the WTO in 1995. Based on a cosmopolitan model of international governance, the more affluent participants remained convinced of the need for stability in the world economy, while simultaneously developing a more receptive standard of living for all countries, and as a consequence, generating a higher volume of goods and services for the capital intensive products of developed nations, such as machinery, technology, vehicles, aircrafts, coupled with an expansion in the knowledge transfer industry. Always omnipresent is the pervasive need for cheap labour, a vector that persistently remains an important factor in the overall equation. While the WTO was created with a cosmopolitan flavour, the nation-state and particularly the more developed nation-state, remains highly combative when confronted with a perceived attack on its political machinations in either the national or international domain. Hidden behind the veil of the WTO, one can openly speculate that this 'supreme court' may be a mere façade behind which developed economies will continue their search for new sources of manpower, new sources of natural resources, new markets for its goods and for its flourishing knowledge industry, cheap sources of agricultural and labour intensive goods for the hungry western consumers, and new avenues for the location of labour intensive mode of production.

Can the Precautionary Principle survive, or can it thrive in the new World of the twenty-first century? The new century does not appear to be fertile ground for the growth of the Precautionary Principle.

IV CONCLUSION

As part of many international treaties, declarations, and other legal instruments of public international law, the Precautionary Principle remains an illusory concept. Ill-defined, failing to meet the basic criteria identified in the definition of a 'rule', and experiencing difficulties in meeting the exigencies of a 'standard', the Principle remains on the sidelines and the markedly more normative characteristics of risk assessment and risk management are fast assuming predominance. More precisely defined, adaptable to all situations of risk, highly normative in exhibiting characteristics of both rules and standards, there is little doubt the Precautionary Principle will be replaced by risk assessment and risk management, and the Principle will gradually be relegated to the ranks of history.

This paper has analyzed four WTO decisions directly related to the *SPS Agreement*, in order to demonstrate the highly textualist approach found in the text of the decisions of the Panel and the Appellate Body. The WTO is the high court, and it is the final court in the resolution of trade disputes between nations. It is, in essence, the 'supreme court' for trade disputes. Created in 1995, and facing an increasing case load containing a wide variety of trade disputes, devoid of a profound source of precedents in international trade law, the decisions rendered by the Panels, but particularly the Appellate Body, does not demonstrate a level of profoundness, and legal reasoning found in the majority of decisions of comparative institutions. Supreme Court decisions will, in the majority of cases, exhibit a strong reliance on

precedents, on the input of legal professionals, on learned books and writings, and on the extensive experience normally held by the members of the Court. The WTO does not exhibit such characteristics. It does not have an extensive reservoir of precedents directly related to international trade law due to the relative infancy of the WTO, it does not appear to seek the advice, nor does it make extensive use of consultations with legal minds, its behaviour is indicative of a reluctance to seek the guidance offered by precedents set in the high courts of member nations, it appears to have a very strong addiction to a pure textualist approach in drafting its decisions, and it does not look at issues from a holistic perspective. The 'scientific, technical, political, social, ethical, cultural and legal assessment of a problem'¹⁹⁸ is not in the nature of the WTO. While it does consult subject matter experts, the paper has demonstrated that the Appellate Body in particular, is not staffed with individuals who have risen through the legal establishment, through a lengthy and meaningful legal practice, through the writing of legal opinions for substantive cases, through a wide experience at various levels of a low and/or mid-range court system, and at the superior court level, and finally, the paper has proven an absence of profundity in legal reasoning and legal interpretation as evidenced in the final decisions of the WTO's court of appeal. As such, and from the very start, the full force of the Precautionary Principle, as enunciated in the *Rio Declaration*, was destined to be pushed to the side by the forces of a doctrinaire textualism. Trebilcock and Howse state:

¹⁹⁸ See, DeJaegher, *supra*, note, 146.

Nevertheless, having insisted correctly that a purposive interpretation should not lead to neglect of the text, the AB (Appellate Body) has on occasion perhaps been too inclined to identify textual fidelity with literal or positivistic textual analysis. If a purposive reading does not mean disposing with textualism, textualism should not mean a neglect of inquiry into purpose and object, when *considering the exact words of the text*.¹⁹⁹

In essence, fidelity to the text may at times serve a valid purpose, but the WTO should not abdicate its responsibilities by neglecting a robust and extensive inquiry into the purpose and object of the text. The neglect of its responsibilities will often generate results that are interpreted as legal disquisitions with limited purpose and impact, but disquisitions that nevertheless give rise to highly controversial results. The WTO and particularly the Appellate Body must, in its judgments, strive “to adopt a permissible construction that accords with some modicum of common sense and the public weal”,²⁰⁰ and refrain from venturing into the marshes of doctrinaire textualism.

As the international supreme court on matters of trade disputes, and in the absence of a cohesive world government, would it not be incumbent on the WTO to assume a role more nuanced with the colours of public policy, and to dispense or loosen the tight legal harness set by the *Vienna Convention* and by its own legislative framework, particularly in matters dealing with human, animal, and plant health?

¹⁹⁹ See, Trebilcock and Howse, *supra*, note 65, at 74.

²⁰⁰ See, *TVA v. Hill*, *supra*, note 182.

The very nature of the issues presented in the four SPS cases clearly demand that the WTO look at issues from a more holistic perspective, and to partially disengage itself from the legal constraints which it perceives as limiting in its international role.

There is nevertheless a strong inclination by member nations, to make use of the SPS as a vehicle to protect its national industries and markets. The WTO is therefore caught in a delicate balancing act, where on the one hand, it must operate within the applicable framework of international law, while at the same time, taking a more holistic approach in the resolution of trade disputes. The four decisions appear to indicate a fixation on the part of the WTO to concentrate on the 'black letter' of international law, and to allow a cursory attention to issues of public policy, and the *Hormones* decision is evidence of this phenomenon. Furthermore, the very fact that the four SPS disputes involved developed nations, gives rise to further questions. Why have no developing nation made use of the SPS? It is odd that since the creation of the WTO, no developing nation has raised an SPS issue with a developed nation, nor has a developing nation raised an SPS issue with another developing nation. Due to its inherent complexity, has the SPS become an instrument largely available to the more developed economies? Is the WTO 'substituting [its] own policy preferences for those of the 'the people''?²⁰¹ These questions will not be answered in this paper, but could form part of further research.

²⁰¹ See Walter Mattli and Anne-Marie Slaughter, note 190, at p.198.

Karl Marx wrote: “[t]he ideas of the ruling class are in every epoch the ruling ideas.”²⁰² Motivated by the more advanced nations, the post-war creation of the Bretton Woods institutions represented the ‘ideas of the ruling class’. In essence, Bretton Woods was largely driven by the more developed economies. The drafting and approval of the GATT 1947, and its assimilation in 1995 by the World Trade Organization, symbolized the ‘ruling ideas of the epoch.’ All of the SPS disputes involved parties from the richer countries, namely the European Union, Canada, the United States, and Japan. The majority of the disputes are disputes between members of the rich club of nations. Has the WTO become a forum for the resolution of disputes that arise between the rich nations, and are the disputes resolved to manage and care for the interests of the global community?

In reading the text of the four decisions, one is struck by the narrow field of reasoning. The decisions also open the door to questioning the reasoning of those who sit on the ‘international supreme court’ charged with the arbitration of trade disputes. The sheer complexity of the issues, the breath of the impact of the decisions, on human, animal and plant health, should move towards demanding a considerable amount of depth and robustness in the legal reasoning leading to the final decisions. This leaves one to conclude that the words of Judge Joseph Hutcheson have retained their meaning in the high court of international trade law, and the members of the WTO’s

²⁰² See Alex Callinicos, “The Revolutionary Ideas of Karl Marx,” [book on-line] (Bookmarks: London, 2004, accessed on January 15th 2005); available from <http://www.istendency.net/pdf/revidas.pdf>; Internet..

Panels and Appeal tribunals may have resigned themselves to the same conclusion as Judge Hutcheson:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.²⁰³

²⁰³ See, Hutcheson, *supra*, note 1.

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