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Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva's Walls?

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Dr. Hans-Joachim Priess and Dr. Christian Pitschas

Abstract

This article discusses the different understandings of the meaning of the precautionary principle as a means to cope with public health risks. The article reviews the position of the Treaty Establishing the European Community ("EC") on this principle to assess whether, and to what extent, the EC's position conforms to the limits imposed by World Trade Organization ("WTO") law. I will examine whether the precautionary principle, as interpreted by the EC, is reconcilable with the WTO agreements and forms part of WTO law. As it stands now, other WTO members are well advised to take a cautious stance on the EC's perspective of the precautionary principle. Otherwise, the communication might turn out to be a "Trojan horse."

PROTECTION OF PUBLIC HEALTH AND THE ROLE OF THE PRECAUTIONARY PRINCIPLE UNDER WTO LAW: A TROJAN HORSE BEFORE GENEVA'S WALLS?

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INTRODUCTION

Public health is a value of eminent importance. This has long been acknowledged by the General Agreement on Tariffs and Trade 1994¹ ("GATT") and European Community ("Community" or "EC") law alike. One striking example of this is the exceptions provided in Article XX(b) of GATT² and Article 30 of the Treaty Establishing the European Community ("EC Treaty"),³ both of which justify quantitative restrictions on the trade in goods and measures having an equivalent effect if necessary for the protection of public health. The European Court of Justice (or "ECJ") has rendered a number of decisions that upheld national measures affecting intra-Community trade because they were deemed to be necessary to protect public health.⁴ A World Trade Organization⁵ ("WTO") panel recently issued a re-

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1. General Agreement on Tariffs and Trade 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter GATT].

2. *Id.* art. XX(b).

3. Treaty Establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C. 224/1(1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L. 169/1 (1987), [1987] 2 C.M.L.R.741 [hereinafter SEA]. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1(1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3(1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam, *supra*.

4. See, e.g., Ahlstrom Osakeyhtiö v. Commission, Case C-320/93, [1994] E.C.R. I-5243, ¶ 20.

5. Marrakesh Agreement Establishing the World Trade Organization, LEGAL IN-

port on the compatibility of a French ban on the import of asbestos products with WTO law.⁶ The panel for the first time in the history of GATT/WTO under the exception clause of Article XX(b) of GATT⁷ recognized the necessity of this measure to protect public health.

Increasingly, the public is exposed to health risks that are generated by new scientific developments. One example is genetically modified organisms, the use of which in the area of agriculture and the food industry has sparked a fierce debate.⁸ The emergence of such risks begs the question of how to deal with them.⁹ One suggestion, which is strongly favored by the EC, is to rely on the precautionary principle as a legal means to cope with these risks, whether it be in the field of international law or Community law. This principle made its first appearance in the area of environmental protection,¹⁰ but some also now consider it to form part of other areas, such as the protection of human health. There are, however, different understandings of the meaning of the precautionary principle. Internationally, this principle essentially relates to a scientific uncertainty regarding the existence or seriousness of a risk. According to the proponents of this view, a precautionary approach requires taking measures designed to prevent such a risk from coming into exist-

STRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

6. *European Communities—Measures Affecting Asbestos And Asbestos-Containing Products*, Report of the Panel, WT/DS135/R (Sept. 18, 2000) [hereinafter *Asbestos Case*].

7. See GATT art. XX(b).

8. The recently signed Protocol on Biosafety intends to regulate trade with genetically modified organisms. See European Report No. 2471, Feb. 2, 2000, at 10-11; see also BULL. QUOTIDIEN EUR. No. 7645, Feb. 1, 2000, at 12 (noting that EC Commissioner Margot Wallström, responsible for environment, hailed this event as “a historic moment and a breakthrough for international agreements on trade and the environment”).

9. See Horst G. Krenzler & Anne MacGregor, *GM Food: The Next Major Transatlantic Trade War?*, 5 EUROPEAN FOREIGN AFFAIRS REVIEW, 287 (2000); Sara Pardo Quintillan, *Free Trade, Public Health Protection and Consumer Information in the European and WTO Context*, 33 J. WORLD TRADE 147, 176-87 (1999). The EC Economic and Social Committee points out in its opinion on “Use of the precautionary principle” that “risk acceptability requires new types of rules . . . In western culture, the emergence of the risk concept testifies to a profound change in the relationship with danger.” See Opinion of the Economic and Social Committee on the Use of the Precautionary Principle, para. 2.1, 2000 O.J. C. 268/6.

10. G.A. Res. 37/7, U.N. GAOR, 37th Sess., Agenda Item 21, at (I)(21) U.N. Doc. A/RES/37/7 (1982) (referring to this principle for first time in so-called World Charter for Nature) [hereinafter World Nature Charter].

tence or from becoming serious, thereby protecting the environment and public health.

The EC especially has been advocating this principle in the international arena, in general, and in the WTO, in particular. The EC relied on this principle in *EC Measures Concerning Meat and Meat Products (Hormones)*,¹¹ and it recently submitted a communication on the very same principle to the WTO Committee on Sanitary and Phytosanitary Measures. The Commission also published a communication on the precautionary principle ("EC's Communication") at the beginning of this year, and the Council issued a resolution on the precautionary principle at the Nice summit.¹² Given the considerable weight of the EC within the international community and its undeniable importance for the proper functioning of the world trading system, it appears to be appropriate to review the position of the EC on this principle and to assess whether, and to what extent, its position conforms to the limits imposed by WTO law. Irrespective of the opinion of the ECJ that WTO law cannot be invoked directly in the Community legal order,¹³ the EC cannot deviate from the obligations that it has assumed in the context of the WTO. Commissioner Pascal Lamy, responsible for the external trade relations of the EC, has reiterated his call for a rule-based system more than once.¹⁴ Against this background, the question needs to be asked whether the precautionary principle, as interpreted by the EC, is reconcilable with the WTO agreements and forms part of WTO law.

11. *WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones)*, Report from the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Hormones Case*].

12. *Communication on the Precautionary Principle*, Communication from the Commission of the European Communities, COM(2000)1 final (Feb. 2, 2000), at http://europa.eu.int/comm/off/health_consumer/precaution.htm [hereinafter *EC's Communication*]. Council Resolution on the Precautionary Principle, BULL. QUOTIDIEN EUR. No. 7860, Dec. 10, 2000, at 14-17. The Council resolution endorses "the broad lines" of the EC's Communication. *Id.*, para. 1.

13. *Portuguese Republic v. Council of the European Union*, Case C-149/96 [1999] E.C.R. I-8395, para. 36-48.

14. See Pascal Lamy, *Challenges Confronting the World Trade System Today*, EUR. FOREIGN AFF. REV., Nov. 8, 2000, at http://europa.eu.int/comm/trade/speeches_articles/spla36_en.htm; see also Pascal Lamy, *Faire tomber les barrières ne suffira pas*, Market Access Conference, Brussels (Nov. 28, 2000), at http://europa.eu.int/comm/trade/speeches_articles/spla23_fr.htm.

I. THE EC'S PERSPECTIVE ON THE PRECAUTIONARY PRINCIPLE

The EC's perspective on the precautionary principle recently was summarized by the EC's Communication.¹⁵ First, the EC's Communication takes into account the legal sources at the Community and international level and concludes that (i) this principle is a "general one,"¹⁶ as far as Community law is concerned and (ii) it has become "a full-fledged and general principle of international law."¹⁷ Second, the EC's Communication describes the constituent parts of the precautionary principle as perceived by the Commission. In this respect, the Commission considers that the application of the precautionary principle "is part of risk management, when scientific uncertainty precludes a full assessment of the risk and when decision-makers consider that the chosen level of environmental protection or of human, animal and plant health may be in jeopardy."¹⁸ Third, the EC's Communication identifies general principles for the application of the precautionary principle.¹⁹

A. *Legal Basis of the Precautionary Principle*

1. Community Law

The Commission refers to two Judgements in particular to support its position: one from the European Court of Justice (or "ECJ") and one from the Court of First Instance. The ECJ ruled on the legality of the Commission's decision that temporarily banned the export of all bovine animals and all beef and veal or derived products from the UK to other EC Member States or to

15. EC's Communication, *supra* note 12. For a recent discussion of the precautionary principle in the Community context, see Hans-Werner Rengeling, *Bedeutung und Anwendbarkeit des Vorsorgeprinzips im Europäischen Umweltrecht*, DEUTSCHES VERWALTUNGSBLATT, 1473-1478 (2000).

16. See TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 32-38 (1999) (describing the status and role of general principles within Community legal order).

17. EC's Communication, *supra* note 12, para. 3-4. The Council is somewhat more cautious in its resolution, stating that the precautionary principle is "gradually asserting itself as a principle of international law in the fields of environmental and health protection." *Id.* para. 3.

18. EC's Communication, *supra* note 12, para. 5.

19. See EC's Communication, *supra* note 12, para. 6; see also Council Resolution, *supra* note 12, para. 17-20. These principles include proportionality, non-discrimination, consistency, a benefit/cost analysis, and the examination of scientific developments. *Id.*

third countries, on the premise that a risk of transmission of Bovine Spongiform Encephalopathy ("BSE") to humans could not be excluded.²⁰ The English National Farmers' Union challenged the decision of the Commission, arguing, *inter alia*, that it breaches the principle of proportionality. The ECJ rejected this argument. The ECJ acknowledged that the principle of proportionality mandates that recourse must be to the least onerous measure when there is a choice between several appropriate measures and the disadvantages caused by the recourse must not be disproportionate to the aims pursued.²¹ The ECJ, however, held that "[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent."²²

The Court of First Instance ruled on the application for interim relief against the withdrawal of an antibiotic from the list of authorized feedingstuffs.²³ The Court dismissed the application by relying on the above-cited statement of the ECJ. Moreover, it noted that "[t]here can be no question but that the requirements of the protection of public health must take precedence over economic considerations."²⁴

It is interesting to note that the ECJ made this statement in connection with the principle of proportionality. Although the ECJ relied on Article 174(2) of the EC Treaty to justify its approach, it refrained from invoking the precautionary principle. Instead, the ECJ relied on the principle of "preventive action." Irrespective of the relationship between these two principles,²⁵

20. *The Queen v. Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmer's Union, David Burnett and Sons Ltd*, R.S. Case C-157/96, [1998] E.C.R. I-2211 [hereinafter *Fisheries Case*].

21. *Id.* para. 60.

22. *Id.* para. 63. The Court reiterated this statement in *United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities*, Case C-180/96 [1998] E.C.R. I-2265 para. 99 [hereinafter *U.K. Case*].

23. *Alpharma Inc. v. Council of the European Union*, Case T-70/99 R, [1999] E.C.R. II-2027.

24. *Id.* para. 3. This statement was reiterated in *Pfizer Animal Health SA/NV v. Council of the European Union*, Case T-13/99R, [1999] E.C.R. II-1961 para. 171. In this respect, the Court relied, *inter alia*, on a judgment of the European Court of Justice ("ECJ"). See *Affish BV v. Rijksdienst voor de keuring van Vee en Vlees*, Case 183/95, [1997] E.C.R. I-4315 para. 43.

25. Article 174(2) speaks of the precautionary principle and of the principle "that preventive action should be taken." A textual interpretation therefore indicates that

the aforementioned statement of the ECJ is nonetheless significant with respect to the precautionary principle. The ECJ holds that "protective measures" may be taken in situations where the existence or extent of risks to human health is uncertain. Scientific uncertainty that precludes a full assessment of risk is one of the prerequisites for the precautionary principle to apply. By establishing a link between scientific uncertainty, on the one hand, and preventive measures in reaction to such uncertainty, on the other, the ECJ seems to have acknowledged that the precautionary principle forms part of Community law in the area of public health.

The ECJ's statement, however, is inconclusive with respect to the content and scope of the precautionary principle. First, scientific uncertainty poses two questions: whether something needs to be done to protect against a feared risk and what conditions must be met before any action is taken. Scientific uncertainty, however, does not answer these questions.²⁶ Second, the ECJ's belief that protective measures may be taken without waiting until the reality and seriousness of those risks become fully apparent is not entirely satisfactory. Provided that the existence or extent of risks is uncertain, it is unclear whether the perceived risk is real and, if so, whether it is serious. The assumption underlying the ECJ's statement, however, appears to be that further scientific evaluation of the risk in question will reveal that it is real and/or serious.²⁷ This assumption, however, presupposes

both principles have different functions. Some commentators believe that the principle of preventive action is designed to avoid (imminent) dangers, whereas the precautionary principle aims to reduce risks so that no danger will appear. See CHRISTIAN CALLIES & MATTHIAS RUFFERT, *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG* art. 174, para. 28-30 (1999). Nonetheless, it is also argued that both principles may overlap to some degree in a given case. See SIEGFRIED BREIER & HENDRIK VYGEN, LENZ, *EG-VERTRAG, KOMMENTAR* art. 174, para. 13 (2d ed. 1999).

26. Admittedly, the Court recognized the following in its judgment:

The decision was adopted as an emergency measure 'temporarily' banning exports . . . Moreover, the Commission acknowledges in the preamble to the decision the need for the significance of the new information and the measures to be taken to be subjected to detailed scientific study and, consequently, the need to review the contested decision following an overall examination of the situation . . .

Fisheries Case para. 65.; see also *U.K. Case* para. 101. This seems to imply that protective measures are subject to at least three conditions: (i) they may only be taken on a provisional basis, (ii) the scientific evaluation of the situation must continue, and (iii) the provisional measures must be reviewed in the light of new scientific evidence.

27. This assumption is expressed even more clearly in Jan H. Jans, *Communication*

what still needs to be established.

Contrary to the ECJ's judgment, the aforementioned order of the Court of First Instance referred specifically to the precautionary principle, which was invoked by the applicant. The broad statement that the requirements of the protection of public health must take precedence over economic considerations, therefore, must be seen in this context. This axiomatic statement implies and presupposes a high level of protection of public health, but, as noted before, whether this protection demands recourse to the precautionary principle is by no means a foregone conclusion. Hence, the said statement of the Court of First Instance does not shed more light on the content and scope of the precautionary principle than that of the ECJ, since it does not clarify under which circumstances it is justified to take preventive measures, based upon a precautionary approach.

In light of the above, the Commission's claim that the case law confirms the status of the precautionary principle as a general principle in Community law must be viewed with caution. The case law indicates that this principle does exist. Furthermore, the case law supports the Commission's assertion that the precautionary principle extends to the protection of human health as well. One can deduce from the case law also that the precautionary principle may apply in situations when it cannot be established with sufficient certainty that there is a risk to human health or, if there is a risk, that it is serious. The case law, however, is rather vague concerning the content and scope of the precautionary principle and the conditions for its application. The case law does not precisely specify (i) under which circumstances this principle applies and (ii) which steps must be respected when applying this principle.²⁸ Therefore, one cannot help but agree with the following statement of the Economic and Social Committee expressed in its opinion on the use of the precautionary principle:

At the European level, the Economic and Social Committee notes that there are as yet few legal bases for a precautionary

on the Precautionary Principle: Is It Really Necessary?, 27 LEGAL ISSUES ECON. INTEGRATION 115, 115 (2000) (stating that "[i]t means that if there is a strong suspicion that a certain activity may have harmful consequences, it is better to act before it is too late rather than wait until scientific evidence is available which incontrovertibly shows the causal connection").

28. See Rengeling, *supra* note 15, at 1477-1478.

principle and that case law is still in its infancy. Explicit and implicit allusion to this principle does not provide a solid base, and the Economic and Social Committee would ask the Commission to submit a concrete, viable case soon.²⁹

2. International Law

Even though the precautionary principle had been mentioned in the so-called World Nature Charter of 1982³⁰ and twice in non-binding declarations relating to the protection of the North Sea,³¹ it only became prominent upon conclusion of the U.N. Conference on Environment and Development in Rio de Janeiro in 1992.³² The precautionary principle was embodied in principle 15 of the so-called Rio-Declaration (or "Declaration") in the following terms: "In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Although principle 15 uses the word "shall" in the second sentence, thereby seemingly indicating a mandatory force of the precautionary approach, two factors militate strongly against such a mandatory force. First, the aforementioned principle uses the word "should" and restricts the application of the precautionary principle to the "capabilities" of the States. Thus, no real obligation is imposed on the States. Second, principle 15 is part of the Rio-Declaration. The latter is not a binding treaty, but a non-binding declaration that recites some guidelines that the States participating in the Rio-Conference consider helpful, but not necessarily mandatory, in resolving environmental problems. Also, the participation of numerous States in the Rio

29. *Use of the Precautionary Principle*, Own-Initiative Opinion of the Economic and Social Committee para. 4.1.1-2, at http://www.ces.eu.int/en/docs/fr_docs_op_July.htm [hereinafter *Opinion*].

30. See generally, World Nature Charter, *supra* note 10.

31. See *Ministerial Declaration of the Second International Conference on the Protection of the North Sea* (Nov. 1987), at <http://odin.dep.no/md/html/conf/declaration/london.html>; see also *Ministerial Declaration of the Third International Conference on the Protection of the North Sea* (Mar. 1990), at <http://odin.dep.no/md/html/conf/declaration/hague.html>.

32. *Report of the U.N. Conference on Environment and Development*, U.N. GAOR A/CONF.125/126 (1992).

conference, thus supporting the Rio-Declaration, does not qualify the Declaration as international customary law. This could only be assumed if the Declaration was merely declaratory, merely restating norms of customary international law. This, however, is not the case, since the precautionary approach was a rather new concept at the time of the Rio-Conference. Therefore, this Declaration can only be seen, if at all, as a starting point for the evolution of international customary law.³³

Since the Rio-Declaration, the precautionary principle has made its way into several international conventions on the protection of the environment. Most of these treaties, however, do not oblige their parties to adhere to the principle. Rather, the principle is framed in non-binding terms. For example, the principle is contained in the Preamble of the 1992 Convention on Biological Diversity.³⁴ The Preamble, in part, states that “lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”³⁵

The Preamble resembles principle 15 of the Rio-Declaration, and again the word “should,” instead of “shall,” is used. Moreover, a Preamble usually does not include obligations for the contracting parties. Rather, the Preamble may play a role when interpreting specific treaty obligations in their context with the rest of the treaty.³⁶ The principle is also contained in Article 3 of the 1992 Framework Convention on Climate Change.³⁷ As far as the precautionary principle is concerned, however, this provision is framed in a way that makes it quite clear that the principle is non-mandatory, as evidenced by the use of the word “should” throughout the text of this provision.

On the other hand, there are examples where the precautionary principle has been phrased in strict terms. Article

33. See 1 R. JENNINGS & A. WATTS, *OPPENHEIM'S INTERNATIONAL LAW* § 16 (9th ed. 1996) (discussing contribution of declarations of international bodies to crystallization of customary international law).

34. Convention on Biological Diversity, pmbl. (June 5, 1992), available at http://www.biodiv.org/chm/conv/cdb_text_e.pdf.

35. *Id.*

36. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(2), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For an example of such an interpretation see *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Case*].

37. Framework Convention on Climate Change art. 3, (May 9, 1992), available at http://www.unfccc.de/resource/conv/conv_005.html.

2(2)(a) of the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic³⁸ refers to the precautionary principle and speaks of preventive measures that “are to be taken.” More recently, Article 10(6) of the Cartagena Protocol on Biosafety, in part, states:

[L]ack of 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 . . . in order to avoid or minimize such potential adverse effects.³⁹

Do these examples sufficiently establish the precautionary principle as “a full-fledged and general principle of international law,” as asserted by the Commission in its EC’s Communication? It is submitted that this is not the case.⁴⁰ First, the notion “principle” is somewhat vague. Admittedly, it has been used by many to an almost inflationary extent in the context of international law. In accordance with Article 38(1)(c) of the ICJ-Statute, however, one can speak of a general principle of (international) law only if it can be derived from the municipal laws of different

38. Convention for the Protection of the Marine Environment of the North-East Atlantic art. 2(2)(a) (Sept. 22, 1992), available at <http://www.ospar.org/eng/html/wel-come.html>.

39. Cartagena Protocol on Biosafety (Feb. 23, 2000), available at http://www.jiwl.com/contents/Cartagena_Protocol.htm. The so-called Miami group (Argentina, Australia, Canada, Chile, United States, and Uruguay) had opposed the incorporation of this principle into the protocol, demanding that decisions should be based on established scientific evidence, see EURO. REP., No. 2470, Jan. 29, 2000, at 13. It is believed that the application of the precautionary principle as regards trade in genetically modified organisms on the basis of the Cartagena protocol—once it has entered into force—will be tested in the WTO forum, due to the unclear relationship between the protocol and the SPS Agreement. See *Biosafety Protocol Agreed in Montreal, but Does it Provoke More Questions Than Answers for Potential Trade Disputes*, WORLD TRADE AGENDA, Feb. 14, 2000, at 7-9; see also Barbara Eggers & Ruth Mackenzie, *The Cartagena Protocol On Biosafety*, 3 J. INT’L ECON. L. 539-40 (2000); Peter W.B. Phillips & William A. Kerr, *Alternative Paradigms, The WTO Versus the Biosafety Protocol for Trade in Genetically Modified Organisms*, 34 J. WORLD TRADE 63 (2000); Fiona MacMillan & Michael Blakeney, *Regulating GMOs: Is the WTO Agreement on Sanitary and Phytosanitary Measures Hormonally Challenged?*, 4 INT. T. L. R. 131 (2000).

40. See *US Challenges Europe’s Food Safety Stance*, FIN. TIMES, Mar. 31, 2000 (stating that the United States also challenged the Commission’s claim in response to the EC’s Communication).

legal systems.⁴¹ The Commission did not demonstrate in its Communication that the precautionary principle can be distilled from the municipal laws of different legal systems as a general principle.

The only remaining possibility, therefore, is that the principle may have obtained the status of international customary law. Pursuant to Article 38(1)(b) of the ICJ-Statute, customary international law is established by two requirements: (i) the actual behavior of states and (ii) the belief that such behavior is legally required (*opinio iuris*).⁴² The fact that some of the aforementioned treaties attach mandatory force to this principle is not sufficient to conclude that the principle has in the meantime acquired the status of customary international nature. As the ICJ highlighted in its decision on the *North Sea Continental Shelf*, such a process is perfectly possible and does occur from time to time.⁴³ The ICJ, however, also stressed that this process has several preconditions: (i) the provision must be of a fundamentally norm-creating character, (ii) participation in the convention in question must be widespread and representative, and (iii) there must be State practice, including that of States whose interests are specially affected. This State practice must confirm the content of the invoked provision and must be extensive and virtually uniform.⁴⁴ Regardless of whether the first two requirements are met, the third certainly is not as far as the precautionary principle is concerned. It is, therefore, not surprising that the Commission did not attempt to show in its Communication that these conditions were met with respect to the precautionary principle. Therefore, all that can be said with respect to this principle at the present state of international law is that it has acquired the status of soft, but not of hard law.⁴⁵

41. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (5th ed. 1998); VERDROSS & SIMMA, UNIVERSELLES VÖLKERRECHT 383-84 (3rd ed. 1984).

42. See MALCOLM N. SHAW, INTERNATIONAL LAW 58 (4th ed. 1997).

43. *North Sea Continental Shelf*, 1969 I.C.J. 3 para. 71.

44. *Id.* para. 73-74.

45. Brownlie, *supra* note 41, at 285-86 (speaking of "emergent legal principle"). Wolfgang Graf Vitzthum, in his book VÖLKERRECHT (1997), rejects the idea that the precautionary principle may have obtained the character of customary international law. *Id.* at 487-88. See also *Hormones Case* para. 123. The Appellate Body in the *Hormones Case* stated:

The precautionary principle is regarded by some as having crystallized into a general principle of customary *environmental* law. Whether it has been widely accepted by Members as a principle of *general customary international law* ap-

B. *Triggering Factors and Application of the Precautionary Principle*

The Commission identifies the following constituent parts of the precautionary principle and establishes guidelines for its application.

1. Precautionary Principle as Part of Risk Management

The Commission notes that the precautionary principle is relevant only in the event of a potential risk.⁴⁶ Thus, recourse to the precautionary principle presupposes (i) identification of potentially negative effects resulting from a phenomenon, product, or procedure and, subsequently, (ii) a scientific evaluation of the risk that is as objective and complete as possible.⁴⁷ Recourse is available under the precautionary principle only if it is impossible to determine with sufficient certainty the risk in question due to the insufficient, inconclusive, or imprecise data. In this respect, the Commission notes that 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.⁴⁸

The Commission, therefore, maintains that the precautionary principle is not part of the risk assessment, which is an integral part of the scientific evaluation.⁴⁹ Rather, according to the Commission, the precautionary principle is part of risk management when scientific uncertainty precludes a full assessment of the risk and decision-makers find that environmental protection

pears less than clear. . . . We note . . . that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.

Id.

The Appellate Body also noted that the ICJ, in its judgment in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Sept. 25 1997), available at <http://www.icj-cij.org/idocket/ins/ihsjudgment/ihsjudg.html>, did not identify the precautionary principle as one of the new norms in the area of environmental protection referred to by the ICJ. *Id.* para. 123, n.93.

46. See EC's Communication, *supra* note 12, para. 5.1.

47. See *id.* para. 5.1.3, 6.1.

48. See *id.* para. 6.2.

49. The EC intends to set up an independent food authority that would be entrusted with the task of risk assessment in this area. See BULL. QUOTIDIEN EUR., No. 7678, Mar. 17, 2000, at 9.

or human, animal, and plant health may be in jeopardy.⁵⁰ Thus, the Commission finds that relying on the precautionary principle is the result of “an eminently political decision, a function of the risk level that is ‘acceptable’ to the society on which the risk is imposed.”⁵¹

At this point, three preliminary observations can be made. First, the Commission tries to draw a clear line between risk assessment, on the one hand, and risk management, on the other. Whereas risk assessment is a scientific evaluation that so-called risk evaluators—scientists—must make; risk management, which is not a scientific evaluation, is the responsibility of risk managers—decision-makers. By distinguishing between these two responsibilities, the Commission attempts to attribute a broad discretionary power to the community institutions whenever they act as risk managers.⁵² This is clear from its statement that any judicial review of precautionary measures must be limited to examining whether the Community institutions committed a manifest error, misuse of power, or manifestly exceeded the limits of their power of appraisal.⁵³

Second, the Commission asserts that the Community is entitled to prescribe the level of protection, notably with regards to the environment and human, animal, and plant health that it considers appropriate.⁵⁴ Hence, the choice of the desired level of protection is a political decision as well.

Consequently, if the precautionary principle is invoked, two political decisions—the level of protection and the measures necessary to achieve this level—are intertwined. This environment might lead to a situation in which arbitrary decisions are

50. See EC's Communication, *supra* note 12, para. 5. This is also the position of the EC Economic and Social Committee.

51. EC's Communication, *supra* note 12, para. 5.2.1. The Council takes the same view in its resolution, *supra* note 12, para. 12.

52. This is also the opinion of Steven Milloy, who argues that “despite the various conditions outlined in the EU's position, EU members will ultimately be able to have unfettered discretion over how they interpret the guidelines.” See Steven Milloy, *European Caution Carries Risks*, FIN. TIMES, Mar. 10, 2000, at 11.

53. See EC's Communication, *supra* note 12, para. 5.2.2. This terminology has already been used to limit the judicial review by the Court of Justice and the Court of First Instance in trade policy disputes. Cf. *NMB France Sarl v. Commission*, Case T-162/94, [1996] E.C.R. II-456, para. 71 & 73; see also *Sinochem National Chemicals v. Council*, Case T-97/95, [1998] E.C.R. II-85 para. 51.

54. See EC's Communication, *supra* note 12, para. 4; see also EC Economic and Social Committee, *supra* note 29, para. 4.1.7. & 5.4. (concurring with this view).

made⁵⁵ that purport to protect public health but whose real aim is to protect domestic industries against competition from outside.⁵⁶ The Commission seems to be aware of this danger,⁵⁷ since it highlights that “the precautionary principle can under no circumstances be used to justify the adoption of arbitrary decisions.”⁵⁸ It, therefore, sets out certain guidelines for the application of the precautionary principle at the second stage, the stage of risk management. These guidelines are dealt with later.⁵⁹

Third, the Commission does not clarify the level of uncertainty that must prevail to adopt a precautionary approach (i.e., what degree of probability of a risk must exist in order to justify preventive measures). It simply says that the potential consequences of inaction and the uncertainties of the scientific evaluation should be considered by decision-makers when determining whether to take action.⁶⁰ However, in order to determine whether the risk exceeds the chosen level of protection, the likelihood that this event may occur needs to be established. The more likely it is that the chosen level of protection will be undermined, the more it seems reasonable to resort to preventive action.⁶¹ The Commission, however, refrains from addressing this

55. See *Arguments Continue to Rage Over EU's Use of the 'Precautionary Principle,'* EURO. VOICE, Apr. 2000, at 13-19.

56. See Milloy, *supra* note 52, at 11. The author rightly fears that the precautionary principle will be used as a pretext for blocking new technologies and restricting trade. *Id.* In his view, “[t]he guidelines allow EU member countries to contain economic risks from trade, rather than risks to public health and safety.” *Id.* By the same token, there is legitimate concern that the incorporation of the precautionary principle in the Biosafety Protocol opens up a loophole for protectionism. See *Caution Needed,* ECONOMIST, Feb. 5, 2000.

57. The day after the communication was published, Commissioner Margot Wallström, responsible for the environment, sought to dispel suspicions that the EU is inclined to use the precautionary approach as a means to protect business. See Mike Smith, *Precautionary Principle Is Not Protectionist, Brussels Insists,* FIN. TIMES, Feb. 3, 2000. She said that the EU needed to ensure a high level of protection for humans, health and plant life and for the environment. *Id.* She later on reiterated this position. See BULL. QUOTIDIEN EUR., No. 7689, Apr. 1, 2000, at 7.

58. See EC's Communication, *supra* note 12, para. 5.1.

59. See Natalie McNelis, *EU Communication On The Precautionary Principle,* 3 J. INT. ECON. L., 545, 549 (2000) (claiming that these principles do not place meaningful constraints on application of precautionary principle).

60. See EC's Communication, *supra* note 12, para. 6.2.

61. See Jans, *supra* note 27, at 115. This also seems to be the underlying assumption of the call for a “strong suspicion that a certain activity may have harmful consequences.” *Id.*

topic in more detail.⁶² On the one hand, it states that recourse to the precautionary principle is justified when scientific uncertainty precludes a full assessment of the risk. This could mean that the danger for the chosen level of protection must be more likely to occur than not. On the other hand, the Commission notes that the views of a minority fraction of the scientific community should be considered, provided the credibility and reputation of this fraction are recognized.⁶³ This could mean that a lesser degree of likelihood could be sufficient to trigger preventive measures.⁶⁴

2. Limits for the Application of the Precautionary Principle

The Commission recognized that there are certain limits for the use of the precautionary principle, stating that "reliance on the precautionary principle is no excuse for derogating from the general principles of risk management."⁶⁵ These principles of risk management are proportionality, non-discrimination, consistency, cost/benefit analysis, and examination of scientific developments.⁶⁶

The principle of proportionality demands that risk reduction measures should include less restrictive alternatives that make it possible to achieve an equivalent level of protection, and the measures must not aim at zero risk. A total ban, therefore, may not be a proportional measure in a given situation, whilst in other cases it may be the sole response to a potential risk. With respect to the principle of non-discrimination, the Commission stresses that preventive measures should neither invoke the geographical origin, nor the nature of the production process. With regards to the principle of consistency, the Commission emphasizes that protective measures should be comparable in nature and scope with measures already taken in equivalent areas in which all scientific data are available (i.e., where there is no sci-

62. Milloy, *supra* note 52, at 11 (noting that "precisely how much and what type of scientific evidence is needed to comply with the principle remains unclear"); *see also* McNelis, *supra* note 59, at 550.

63. *See* EC's Communication, *supra* note 12, para. 6.2.

64. The EC Economic and Social Committee notes in its opinion that "the precautionary principle must be invoked and applied all the more frequently, not least in cases where the risk is *not* directly perceptible." *See* Opinion, *supra* note 29 para. 8.2 (emphasis added).

65. *See* EC's Communication, *supra* note 12, para. 6.3.

66. *See* EC's Communication, *supra* note 12, para. 6.3.1-5.

entific uncertainty). Moreover, the Commission believes that an examination of the benefits and costs of action, including non-economic considerations, and the lack of action must be undertaken. Furthermore, the Commission notes that preventive measures should be subjected to regular scientific monitoring, so that they can be reevaluated in light of new scientific information.

Finally, the Commission addresses the issue of the burden of proof.⁶⁷ The Commission holds that recourse to the precautionary principle may require shifting the burden of proof to the producer or importer, although it admits that such a reversal of the burden of proof cannot be systematically maintained as a general principle. Such a general reversal of the burden of proof would possibly run counter to the fundamental rights that must be respected at the Community level.⁶⁸

II. *THE PRECAUTIONARY PRINCIPLE AND WTO LAW*

The Commission asserts that its Communication does not evade obligations arising from the WTO agreements. It emphasizes that the envisioned use of this principle complies with these obligations.⁶⁹ According to the Commission, a WTO member is entitled to determine the level of environmental or health protection that it deems appropriate and, therefore, may apply precautionary measures that lead to a higher level of protection than provided for in the relevant international standards or recommendations.⁷⁰ According to the Commission, Article 5(7) of the Agreement on the Application of Sanitary and Phytosanitary Measures⁷¹ ("SPS Agreement") clearly sanctions the use of the precautionary principle.⁷² The Commission adds that the precautionary principle must be duly addressed at the international

67. See EC's Communication, *supra* note 12, para. 6.4.

68. See Rengeling, *supra* note 15, at 1479-1480.

69. See EC's Communication, *supra* note 12, para. 2. Some commentators understand this message to mean that "the Community has not accepted defeat in the Hormones debate yet!" See Jans, *supra* note 27, at 117.

70. See EC's Communication, *supra* note 12, para. 4.

71. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter SPS Agreement].

72. EC's Communication, *supra* note 12, para. 4. The Council observes in its resolution that "WTO rules do basically allow account to be taken of the precautionary principle," *supra* note 12, para. 4.

level because of its growing role in international law, notably in the WTO agreements.⁷³

As evidenced from this statement, the Commission wants to transpose the precautionary principle, as defined in its Communication, to the level of WTO law, in particular the SPS Agreement. The Commission asserts that this is compatible with the standards set by the relevant WTO agreements. This assertion is questionable.

A. *The Place of the Precautionary Principle in WTO Law*

Article XX(b) of GATT and the SPS Agreement are the primary instruments that protect public health within the WTO framework.⁷⁴ Both shall be examined to determine whether they accommodate the precautionary principle.

1. Article XX(b) of GATT

a. Double Standard: Chapeau and Particular Exception

Article XX of GATT is the general exception clause to the obligations contained in GATT.⁷⁵ It enables WTO members to deviate from the rules of GATT, in particular those involving the most-favored nation obligation, the national treatment obligation, and the prohibition of quantitative restrictions, provided that certain requirements of public interest are met. The life and health of humans, animals, and plants are some of the public interests sought to be protected.⁷⁶

Article XX(b) of GATT sets forth two standards, both of which must be satisfied by a national measure adopted by a WTO

73. EC's Communication, *supra* note 12, para. 4.

74. For a discussion of other WTO agreements relating to the protection of public health, especially the TBT Agreement, see Carlos M. Correa, *Implementing National Public Health Policies in the Framework of WTO Agreements*, 34 J. WORLD TRADE 89, 97-108 (2000).

75. GATT art. XX.

76. Article XX(b) of GATT with the pertinent part of the introductory clause of Article XX reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . . (b) necessary to protect human, animal or plant life or health.

Id. art. XX(b).

member. This has been explained by the Appellate Body as follows:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.⁷⁷

In the case of Article XX(b) of GATT, this two-tiered approach has the following consequences: first, it must be determined whether the national measure concerned is “necessary to protect human, animal or plant life or health.” If this is the case—and only if this is the case—it must next be established whether the national measure at issue (i) arbitrarily or unjustifiably discriminates between countries where the same conditions prevail or (ii) constitutes a disguised restriction on international trade. In this respect, it has to be pointed out that the introductory clause of Article XX of GATT, the so-called “chapeau,” does not really address the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.⁷⁸

Irrespective of the fact that Article XX(b) of GATT does not mention the precautionary principle and assuming for a moment that Article XX(b) of GATT does not hinder the precautionary principle, recourse to this principle by a WTO member, such as the EC, when having resort to a protective measure, could have implications for both the particular exception in paragraph (b) and the introductory clause of Article XX of GATT. Nonetheless, if the application of the precautionary principle in a specific instance pays tribute to the principles outlined by the EC’s Communication, in particular the principles of proportionality and non-discrimination, which are intended to prevent an “arbitrary or unjustifiable discrimination” or “disguised restriction on international trade,” the use of the precautionary princi-

77. *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Gasoline Case*]; see also *Shrimp Case* para. 118-19.

78. *Gasoline Case*, at 22; *Shrimp Case* para. 115.

ple is more likely to be a matter of the particular exception in paragraph (b) of Article XX of GATT. A WTO member taking protective measures that are inspired by a precautionary approach would primarily have to demonstrate that these measures are indeed "necessary to protect human . . . health."⁷⁹

b. The *Asbestos Case* and its Significance for the Precautionary Principle

The *Asbestos Case* sheds some light on the question of whether Article XX(b) of GATT actually allows a WTO member to invoke the precautionary principle, although the EC did not expressly rely on this principle in the case. The *Asbestos Case* involved a French regulation that prohibits the production, marketing, importation, and exportation of all varieties of asbestos fibers or any product containing asbestos fibers for public health reasons. Canada exported more than two-thirds of France's needs for a specific asbestos fiber, chrysotile fiber. Canada maintained that the ban violated WTO rules. The panel concluded that the French ban was contrary to Article III(4) of GATT.⁸⁰ It, therefore, examined whether the French measure was consistent with Article XX(b) of GATT. Whereas the EC argued that asbestos fibers and products containing such fibers are a proven hazard for human health, Canada contended that chrysotile fiber enclosed in a matrix of high-density cement does not constitute a detectable risk to human health.⁸¹ There was thus disagreement as to the existence of a risk.

The panel noted that paragraph (b) of Article XX of GATT implies the existence of a health risk.⁸² It then turned to the criterion of "necessity" and noted that previous panels had concentrated on the question of whether there were alternative

79. *Gasoline Case*, at 22-23. As was noted by the Appellate Body with respect to the burden of proof in *United States—Measures Affecting Imports of Woven Shirts and Blouses from India*, Panel Report, WT/DS33/AB/R (Apr. 25, 1997):

The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

Id.

80. *Id.* para. 8.158.

81. *Id.* para. 8.162-164.

82. *Id.* para. 8.170.

measures consistent or less inconsistent with GATT, in the light of the health objective pursued.⁸³ In these instances, however, the parties to the dispute agreed on the existence, and extent, of the health problem associated with the product in question. By contrast, in the *Asbestos Case*, the panel faced a situation where the parties did not agree on the existence of a risk to human health. Therefore, the panel considered it appropriate to examine first whether chrysotile fibre and chrysotile-cement pose a risk to human health and, provided that there is one, whether the measure was necessary to contain this risk.⁸⁴ Before embarking on this exercise, though, the panel emphasized that it would not call into question the level of protection that France wishes to achieve, as it had long been established that WTO members are free to set the level of protection of their choice for their populations.⁸⁵

i. Sufficient Scientific Evidence for the Existence of a Risk to Human Health

The *Asbestos Case* panel stressed that its role was to determine whether there is sufficient scientific evidence to conclude that there exists a risk to human health.⁸⁶ In this respect, the panel noted that the carcinogenicity of chrysotile fibers had

83. *Id.* para. 8.172. The panel cited the report *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Panel Report, DS10/R-37S/200 (Nov. 7, 1990) para. 75. Already in United States—Section 337 of the Tariff Act of 1930, the panel held:

[A] GATT Contracting Party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a Contracting Party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

See Tariff Act of 1930, BISD 36S/345, para. 5.27 (amended 1989); see also Correa, *supra* note 74, at 96. Correa criticizes that:

[T]he exception under Article XX(b) of the GATT, as interpreted, has in practice left States with little room to design and implement public health measures . . . [t]here is no room for national autonomy in determining what the adequate public health measures are. The application of the 'necessary' test limits the options available to the States.

Id.

84. See *Asbestos Case* para. 8.175 – 8.176.

85. *Id.* para. 8.179.

86. *Id.* para. 8.182.

been acknowledged for some time by international bodies and that experts consulted by the panel confirmed this view.⁸⁷ It thus concluded that it had sufficient evidence for the existence of a risk to human health associated with the inhalation of chrysotile fibers. With regards to chrysotile encapsulated in a cement matrix, the panel noted that the evidence “tends to show that handling of chrysotile-cement products also constitutes a risk to health rather than the opposite.”⁸⁸ Consequently, the panel concluded that the EC established a *prima facie* case for the existence of a health risk in connection with the use of chrysotile and that Canada had not presented evidence to rebut this finding.⁸⁹

Already this starting point of the panel’s examination of the French import ban for asbestos fibres shows that the precautionary principle is not applicable in the context of Article XX(b) of GATT, at least not with regard to the initial question of whether a measure for which Article XX(b) of GATT is invoked falls within the range of policies designed to protect human health. This result occurs because the precautionary principle is relevant only if there is scientific uncertainty concerning the existence or seriousness of a risk. The panel made it quite clear, however, that Article XX(b) of GATT requires sufficient evidence of a risk.

The opposite could be true only if the principles on risk assessment embodied in the SPS Agreement, in particular in Article 5(7), also were applicable in the context of Article XX(b) of GATT. In this respect, it is interesting to note that the panel explicitly refrained from relying on the SPS Agreement, despite the fact that recital 8 of the Preamble to the SPS Agreement expressly refers to Article XX(b) of GATT and states that the provisions of the SPS Agreement elaborate on the former. The panel said that the Appellate Body also had not sought to extend the principles of the SPS Agreement to the examination of the measures for which Article XX(b) had been invoked.⁹⁰

This approach is legally sound. The panel rightly noted that the SPS Agreement contained “more detailed provisions”

87. *Id.* para. 8.188.

88. *Id.* para. 8.193.

89. *Id.* para. 8.194.

90. *Id.* para. 8.180.

than Article XX of GATT.⁹¹ Moreover, the Appellate Body acknowledged in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*⁹² that whenever GATT and another agreement in Annex 1A to the WTO Agreement appear to apply to a measure in question, this measure should be examined on the basis of the agreement that “deals specifically, and in detail,” with measures of this kind.⁹³ However, as far as the relationship between Article XX(b) of GATT and the SPS Agreement is concerned, it must be pointed out that, pursuant to Article 1(1) of the SPS Agreement, the latter applies only to sanitary and phytosanitary measures, as defined in Annex A to the SPS Agreement. Since the French measure is not a sanitary or phytosanitary measure within the meaning of the SPS Agreement, Article XX(b) of GATT was applicable to this measure.

ii. Necessary for the Protection of Human Health

Canada argued that there are alternatives less inconsistent with GATT than the import ban. Controlled use based on international standards would be such a measure. Although the EC did not dispute this, the EC felt that controlled use would not allow France to achieve its public health objectives. The panel did not object to this line of reasoning. It reiterated that it could not question France’s objective and further stated that controlled use based on international standards would not make it possible to achieve the French objective.⁹⁴ The panel, in part, concluded: “We therefore find that a decision-maker responsible for establishing a health policy might have reasonable doubts about the possibility of ensuring the achievement of France’s health policy objectives by relying on controlled use”⁹⁵

Does this open the door for the precautionary principle? Undoubtedly, we are faced with the question of risk management that is portrayed by the EC Commission as the right place for the application of the precautionary principle. Also, the EC Commission pointed to the relationship between a high level of protection and the precautionary principle. Nonetheless, we are

91. *Id.*

92. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (Sept. 9, 1997).

93. *Id.* para. 204.

94. *Asbestos Case* para. 8.210.

95. *Id.* para. 8.211.

not confronted with the usual situation of the application of the precautionary principle by decision-makers. In such a situation, it is unclear whether the chosen level of protection is at risk due to insufficient, inconclusive, or imprecise information. The French decision-makers were not faced with such a situation. Instead, they had sufficient information that asbestos fibres, including chrysotile fibre and products containing it, pose a risk to public health. Therefore, they had to decide which protective measure would reduce or eliminate this established risk as much as possible. The question is then whether the decision-maker in question should have had recourse to an alternative measure. In order to answer this question properly, the panel examined whether controlled use as an alternative measure is "sufficiently effective in the light of France's health policy objectives."⁹⁶ In other words, the panel sought to determine whether France reasonably possessed other measures that were less trade restrictive, but as effective as the import ban with respect to the chosen level of protection.⁹⁷ This determination is part of the principle of proportionality, even though the panel did not expressly refer to this principle. This principle also is relied upon by the ECJ when considering whether a measure of a EC Member State that restricts intra-Community trade in goods is justified by Article 30 of the EC Treaty, a provision whose structure is copied from that of Article XX(b) of GATT.⁹⁸

c. Conclusion

The panel report in the *Asbestos Case* demonstrates that the precautionary principle has no place in the context of Article XX(b) of GATT. This provision requires the establishment of sufficient scientific evidence that the relevant policy objectives,

96. *Id.* para. 8.208.

97. Admittedly, the principle of proportionality is said to also determine the application of the precautionary principle. The Commission stresses that "risk reduction measures should include less restrictive alternatives which make it possible to achieve an equivalent level of protection." See EC's Communication, *supra* note 12, para. 6.3.1. Nonetheless, the principle of proportionality would then be resorted to on the basis of evidence *insufficient* to determine with certainty the existence of a risk, i.e., as an element of the precautionary principle, as opposed to a situation—which is present in the *Asbestos Case*—where there is *sufficient* information on the existence of risk and thus no uncertainty. In the latter case, the principle of proportionality stands on its own.

98. See, e.g., Commission of the European Communities v. Federal Republic of Germany, Case 274/87, [1989] E.C.R. 229, para. 6.

such as human health, are at risk. This differs from the triggering factor of the precautionary principle, which is thought to be scientific uncertainty. For the same reason, the examination of whether a WTO member's measure is necessary to protect the policy objectives, such as human health, in accordance with the chosen level of protection does not leave room for the precautionary principle either. This is because the search for alternative measures that are equally effective in reducing or eliminating the established risk is guided by the principle of proportionality—not as part of the precautionary principle, but in its own right.

2. SPS Agreement

a. Use of Harmonized Sanitary and Phytosanitary Measures

The SPS Agreement deals with sanitary and phytosanitary measures ("SPS measures"), as defined in Annex A, which may, directly or indirectly, affect international trade.⁹⁹ Its intention is to create, as far as possible, an equilibrium between the need to protect human, animal, or plant life or health, on the one hand, and the desire to prevent arbitrary and discriminatory interference in the trade of goods, on the other. To achieve this result, the SPS Agreement emphasizes the use of harmonized SPS measures, based on international standards, guidelines, and recommendations developed by relevant international organizations (e.g., the World Health Organization and the Food and Agriculture Organization). Article 3(1) of the SPS Agreement, therefore, calls on the WTO members to have recourse to such international standards, guidelines, and recommendations, without implying that these international standards, guidelines, and recommendations are obligatory.¹⁰⁰ If the WTO members base their SPS measures on these standards, they benefit from a presumption, albeit rebuttable, that their measures are in line with the SPS Agreement, pursuant to its Article 3(2).¹⁰¹

Nonetheless, the WTO members are entitled to determine the level of sanitary and phytosanitary protection that they deem

99. See Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 112-13 (1998) (explaining this two-part test).

100. See *Hormones Case* para. 165.

101. *Id.* para. 170.

appropriate, even if this level exceeds the level that would be achieved by measures based on the relevant international standards, guidelines, and recommendations. This freedom, however, is not unlimited. In the *Hormones Case*, which concerned an EC prohibition of the sale and import of meat and meat products derived from cattle to which certain kinds of natural or synthetic hormones had been administered for growth promotion purposes,¹⁰² the Appellate Body underlined that “the right of a Member to define its appropriate level of protection is not . . . an absolute or unqualified right.”¹⁰³

Article 3(3) of the SPS Agreement makes the determination of a higher national level of protection subject to the following condition: there must be a scientific justification for such a determination, or the determination must be made in accordance with Article 5 of the SPS Agreement. The distinction made between a scientific justification and a risk assessment according to Article 5 of the SPS Agreement is difficult to grasp,¹⁰⁴ since all measures that are not based on international standards must be consistent with any other provision of the SPS Agreement, pursuant to Article 3(3). As the Appellate Body pointed out in the *Hormones Case*, any other provision of the SPS Agreement also includes Article 5.¹⁰⁵ Regardless of whether the distinction in Article 3(3) of the SPS Agreement is more apparent than real, the WTO members do not enjoy unfettered discretion when deciding on the level of sanitary and phytosanitary protection.¹⁰⁶ They have to abide by the rules specified in Article 5 of the SPS Agreement.¹⁰⁷

102. See Quintillan, *supra* note 9, at 156-59 (explaining background of this case).

103. See *Hormones Case* para. 173.

104. See McNiel, *supra* note 100, at 124.

105. See *Hormones Case* para. 175.

106. Olivier Blin, *La Politique Sanitaire de la Communauté Européenne à l'épreuve des Règles de l'Organisation Mondiale du Commerce: Le Contentieux des Hormones*, 35 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 43, 54 (1999).

107. Correa, *supra* note 74, at 100. The author believes that “the room for manoeuvre of national policies under the SPS Agreement is more limited than under the GATT.” *Id.* He thus concludes that “how to secure that the exercise of the sovereign rights of States to adopt public health and other policies is not unduly limited by the application of trade disciplines, is still an open issue that is central to future deliberations within the WTO.” *Id.* at 112.

b. Risk Assessment and Cases of Insufficient Scientific Evidence

Article 5 of the SPS Agreement centers on the notion of risk assessment, which is defined in Annex A of the SPS Agreement.¹⁰⁸ This provision requests that WTO members base their SPS measures on a risk assessment, taking into account, *inter alia*, available scientific evidence, on the one hand, and the objective of minimizing negative trade effects, on the other. The scientific evidence used must be sufficient to establish a risk. This can be inferred from Article 2(2) of the SPS Agreement, which requires that an SPS measure is not maintained without sufficient scientific evidence, and—*argumentum a contrario*—Article 5(7) of the SPS Agreement, which refers to the situation “where relevant scientific evidence is insufficient.”¹⁰⁹ The risk assessment, however, must not establish a minimum magnitude of risk.¹¹⁰ Rather, in the words of the Appellate Body in the *Hormones Case*,

Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2. of the SPS Agreement, requires that the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake. The requirement that an SPS measure be “based on” a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.¹¹¹

108. SPS Agreement art. 5. According to Paragraph 4 of this Annex, risk assessment is the evaluation of the likelihood of entry, establishment, or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins, or disease-causing organisms in food, beverages, or foodstuffs. *Id.* para. 4.

109. *Id.* art. 5(7). Article 5(7) reads in full:

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.

Id.

110. *Hormones Case* para. 186-87.

111. *Id.* para. 193 (emphasis added); see also McNiel, *supra* note 100, at 118 (re-

This finding is not without implication for Article 5(7) of the SPS Agreement. This provision is intended to deal with cases where relevant scientific evidence is insufficient, thereby referring to the situation that justifies the application of the precautionary principle.¹¹² The Appellate Body underlined in *Japan—Measures Affecting Agricultural Products* (“*Varietals Case*”) that Article 5(7) of the SPS Agreement operated as a “qualified” exemption from the obligation under Article 2(2) of the SPS Agreement not to maintain SPS measures without sufficient scientific evidence and that an overly broad and flexible interpretation of that latter obligation would render Article 5(7) SPS Agreement “meaningless.”¹¹³ Accordingly, the EC feels that the concept of risk assessment in Article 5 of the SPS Agreement as interpreted by the Appellate Body leaves leeway to determine the appropriate basis for a precautionary approach.¹¹⁴ The Appellate Body noted in the *Hormones Case* that the precautionary principle is reflected in recital six of the Preamble and Article 3(3) and Article 5(7) of the SPS Agreement.¹¹⁵ Nonetheless, the Appellate Body stressed 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.”¹¹⁶

Hence, the application of the precautionary principle must be consistent with the SPS Agreement (i.e., the principle may

marking that the approach of the Appellate Body “clearly indicate(s) that a WTO member maintaining a purported SPS measure must be able to adduce evidence that prominent scientists would accept as scientific”). *But see* Ryan David Thomas, *Where’s the Beef? Mad Cows and the Blight of the SPS Agreement*, 32 VAND. J. TRANSNAT’L. L. 487, 507 (1999) (alleging that “this creates an environment where a Member could fabricate a satisfactory response to these ‘minimal’ procedural requirements which is merely a pretext for a disguised restriction on international trade, yet still have ‘based’ their measure on a ‘risk assessment’ in the context of the Agreement”). *See also* *Australia—Measures Affecting Importation of Salmon*, Report of the Appellate Body, WT/DS18/AB/R (Oct. 20, 1998) [hereinafter *Salmon Case*] (stating that “for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences”).

112. *See* Thomas, *supra* note 111, at 504; *see also* Guide to the Uruguay Round Agreements (1999), at 63.

113. *Japan—Measures Affecting Agricultural Products*, Report of the Appellate Body, WT/DS76/AB/R (Feb. 22, 1999) para. 80 [hereinafter *Varietals Case*].

114. *See* EC’s Communication, *supra* note 12, para. 4.

115. *See Hormones Case* para. 124; *Varietals Case* para. 81.

116. *See Hormones Case* para. 124; *see also* Thomas, *supra* note 111, at 498-99.

not be invoked as a justification for noncompliance with the provisions of the SPS Agreement). This observation is not overridden by the finding of the Appellate Body that the SPS Agreement does not distinguish between risk assessment and risk management, since the concept of risk management had been used by the panel to sustain a more restrictive interpretation of risk assessment than results from a reading of Article 5(2), Article 8, and Annex C to the SPS Agreement.¹¹⁷

In light of the above, the requirements of Article 5(7) of the SPS Agreement must be examined in order to determine the extent to which the precautionary principle may be relied upon by a WTO member. Article 5(7) of the SPS Agreement does not relieve a WTO member from the duty to base its SPS measures on a risk assessment, whether the Member State, another WTO member, or an international organization conducted the risk assessment.¹¹⁸ This understanding is confirmed by the second sentence of this provision, which demands that “a more objective assessment of risk” is undertaken once there is additional information. A more objective risk assessment presupposes that there has already been a prior risk assessment. This is acknowledged by the Commission in its Communication, stating that a precautionary SPS measure must include an evaluation of risk.¹¹⁹

In this respect, one must note that the words “more objective assessment” cannot be interpreted to mean that the initial risk assessment can be carried out in a non-objective or—as suggested by the Commission—in a less objective way.¹²⁰ Instead, this risk assessment must be as objective as possible. The fact that scientific evidence is insufficient does not modify the manner in which the risk assessment is carried out. This is supported by the requirement in Article 5(7) of the SPS Agreement that the risk assessment must be based on available pertinent information, including that from relevant international organizations and other WTO members. Thus, the WTO member assessing the risk is under the duty to collect as much information on the risk as possible, so that the SPS measure has a scientific basis as broad as possible.

117. Hormones Case para. 181 & 206.

118. *Id.* para. 190.

119. See EC's Communication, *supra* note 12, para. 4.

120. *Id.* This contradicts paragraph 6.1 of the EC's Communication, where the Commission calls for a scientific evaluation as objective and complete as possible.

As stipulated in Article 5(7) of the SPS Agreement, the duty to collect pertinent information continues to exist after the SPS measure has been implemented.¹²¹ This is because a risk assessment on the basis of insufficient scientific evidence is necessarily incomplete. Therefore, as soon as more information is available, a new risk assessment, which takes the additional information into account, must be carried out. This is explicitly provided for in Article 5(7) of the SPS Agreement. As the new risk assessment benefits from a broader scientific basis than the previous one, it is more objective (i.e., more complete, than the first risk assessment). The consequence of a more objective risk assessment is a necessity of review of the SPS measure in question. This is also explicitly stipulated in Article 5(7) of the SPS Agreement. Such a review is only meaningful if it leads to a withdrawal or modification of the measure concerned, provided the new risk assessment reveals that there is no risk or that the level of risk is either higher or lower than formerly established. Therefore, any SPS measure taken on the basis of Article 5(7) of the SPS Agreement is provisional only.

Article 5(7) of the SPS Agreement demands that the SPS measure in question be reviewed within a reasonable period of time. The reasonableness of this period of time cannot be determined in the abstract, as pointed out by the Commission.¹²² The WTO member, however, is under an obligation to make reasonable efforts to obtain additional information as soon as possible to be able to make a more objective risk assessment which will allow to review the SPS measure. This has been confirmed by the panel and the Appellate Body reports in the *Varietals Case*.

Since a risk assessment also is required in cases where the scientific evidence is insufficient, there must inevitably be a "rational relationship between the measure and the risk assessment." Whereas the results of a risk assessment in accordance with Article 5(1) of the SPS Agreement must sufficiently warrant

121. In the *Varietals Case*, the Appellate Body held 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*, pest, according to the SPS measure which might be applied." *Id.* para. 92.

122. See EC's Communication, *supra* note 12, para. 6.3.5. In the *Varietals Case*, the Appellate Body stated that "what constitutes a 'reasonable period of time' has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure." *Id.* para. 93.

the SPS measure in question, the initial risk assessment in the cases referred to by Article 5(7) of the SPS Agreement cannot produce such results, because there is insufficient scientific evidence. Rather, the risk assessment—albeit on the basis of insufficient scientific evidence—must show a *prima facie* case for a risk. Otherwise, the required rational relationship does not exist.

Furthermore, the provisional SPS measure that is taken pursuant to an initial risk assessment on the basis of insufficient scientific evidence must observe the limits imposed by Article 5(5) of the SPS Agreement. The WTO member must avoid making arbitrary or unjustifiable distinctions in the levels of protections it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. According to the Appellate Body, a violation of Article 5(5) of the SPS Agreement is presumed if (i) certain levels of protection are adopted in different situations, (ii) there is arbitrary or unjustifiable differences in the treatment of these situations, and (iii) there is discrimination or disguised restrictions on trade resulting from the application of the measure embodying or implementing the level of protection.¹²³ The Appellate Body added that the situations, albeit different, must be comparable (i.e., they must have some common elements), since a total difference would preclude a rational comparison.¹²⁴ Furthermore, the Appellate Body stressed that the standards of the chapeau of Article XX of GATT could not be casually imported into Article 5(5) of the SPS Agreement due to the structural differences between the two.

Moreover, the SPS measure adopted provisionally on the basis of Article 5(7) of the SPS Agreement must abide by Article 5(6) of the SPS Agreement (i.e., it must not be more trade-restrictive than required to achieve the appropriate level of protection, taking into account technical and economic feasibility). This provision also requires a three-pronged test, as is made clear by the footnote to Article 5(6) of the SPS Agreement. The three elements of this test consist of inquiring whether another SPS measure is (i) reasonably available, taking into account technical and economic feasibility, (ii) achieves the appropriate level

123. *Hormones Case* para. 214.

124. *Id.* para. 217.

of sanitary or phytosanitary protection, and (iii) is significantly less trade restrictive than the SPS measure contested.¹²⁵

c. Communication to the WTO Committee on Sanitary and Phytosanitary Measures

The EU submitted a communication on the precautionary principle to the WTO Committee on Sanitary and Phytosanitary Measures in March 2000.¹²⁶ This communication is more or less the same as the EC's Communication in the preceding month. This is somewhat surprising, since one would have expected that the communication submitted to the WTO Committee would deal more specifically with the relevant WTO agreements, in particular the SPS Agreement, than the EC's Communication. Although the WTO's communication addresses the precautionary principle also under the angle of WTO law, it does not attempt to make a thorough analysis of the pertinent reports of the WTO panels and the Appellate Body and their impact on the application of the precautionary principle in the framework of the WTO, especially the SPS Agreement. However, only such an effort could initiate a fruitful discussion with other WTO members on this topic and could be a starting point for a common methodology for the use of the precautionary principle.¹²⁷ Nonetheless, the WTO members welcomed the communication as an attempt to make the discussion on the precautionary principle more transparent, but expressed their concern that the precautionary principle as envisioned in the communication could weaken the predictability of the provisions of the SPS Agreement and could be invoked for protectionist reasons.¹²⁸

d. Conclusion

The SPS Agreement clearly differs from Article XX(b) of GATT: whilst the latter requires sufficient scientific evidence for a risk, the former specifically addresses a situation of insufficient scientific evidence in Article 5(7) SPS Agreement. Although the

125. See *Salmon Case*, *supra* note 111, at 98.

126. *EU White Paper on the Precautionary Principle*, Communication Submitted to the Committee on Sanitary and Phytosanitary Measures, G/SPS/GEN/168 (Mar. 14, 2000).

127. See EUR. REP., No. 2408, May 19, 1999, at 9 (noting that former Commissioner Sir Leon Brittan had called for development of such common methodology at the first Transatlantic Environmental Dialogue).

128. See BULL. QUOTIDIEN EUR., No. 7687, 15 (Mar. 30, 2000).

Appellate Body in the *Hormones Case* acknowledged that this provision reflects the precautionary principle, it also emphasized that the precautionary principle could not be invoked as a justification for not complying with the requirements emanating from Article 5 SPS Agreement, in particular Article 5(5), 5(6), and 5(7). These requirements are similar to some of the general principles referred to by the Commission as guiding the application of the precautionary principle. However, these requirements must be interpreted in accordance with the ordinary meaning to be given to the terms of the SPS Agreement in its context and in the light of its object and purpose.¹²⁹ The general principles as outlined by the Commission cannot influence this interpretation. As the Appellate Body pointed out: “the precautionary principle does not . . . 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.”¹³⁰

Otherwise, the finely drawn balance between rights and obligations of the WTO members under the SPS Agreement would be disregarded.

CONCLUSION

The Communication published by the EC Commission in February 2000, claims, inter alia, that the precautionary principle has become a “full-fledged and general principle of international law.” This claim is reiterated in the EC’s Communication to the WTO Committee on Sanitary and Phytosanitary Measures. The sources cited by the Commission, however, do not sustain this claim. The precautionary principle is neither a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute, nor a rule of customary international law in the sense of Article 38(1)(b) ICJ Statute. It, therefore, is not possible, as the Appellate Body in the *Hormones Case* made clear, to rely on this principle in an attempt to override or modify the obligations stemming from the WTO agreements. Rather, the scope of these obligations has to be determined in accordance with the customary international law rules of treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties. If such

129. See Vienna Convention art. 31(1).

130. *Hormones Case* para. 124.

an interpretation reveals that the relevant treaty provisions take cognizance of the precautionary principle, the latter must of course be respected, but only to the extent to which it has been actually laid down in these provisions. This rather straightforward logic tends to get blurred by the communications of the Community.

The Community points out that the envisioned use of the precautionary principle is not intended to evade obligations arising from the WTO agreements and insists that this principle constitutes an essential plank of its policy. Both communications stress that the choices made to this end will affect the EC's position at international and multilateral level. According to the communications, these choices are the result of a political decision, "a function of the risk level that is 'acceptable' to the society on which the risk is imposed."¹³¹ This political nature is further underlined by the distinction that is drawn by the Community between risk assessment and risk management—recourse to the precautionary principle is said to be part of the latter. By characterising the decision on whether or not to act as a political decision in the context of risk management, the Community attempts to limit the judicial review of such decisions. Pursuant to the two communications, such judicial review should focus on whether the institution implementing the measure manifestly exceed its discretionary powers. Although both communications only refer to decisions of the ECJ in this respect, the underlying message is that the WTO dispute settlement organs (i.e., the panels and the Appellate Body), should also adhere to such judicial restraint.

This point of view is at best partially consistent with pertinent WTO rules, as clarified by panel and Appellate Body reports. Admittedly, it is an autonomous right of each WTO member to determine the level of health protection to be achieved. This has been explicitly acknowledged by WTO panels and the Appellate Body. As these bodies have highlighted, however, this right is not absolute, neither in the context of GATT, nor in the context of the SPS Agreement. Article XX(b) of GATT and Article 5 of the SPS Agreement both restrict this right. These provisions do not take away the freedom to set the level of health protection that is deemed appropriate, even if this level of pro-

131. EC's Communication, *supra* note 12.

tection is “zero risk.”¹³² However, they restrict the way in which this level of protection can be achieved, thereby putting constraints on the recourse to the precautionary principle.

The *Asbestos Case* demonstrates that the particular exception contained in Article XX(b) of GATT demands sufficient scientific evidence for the existence of a risk, thus excluding the application of the precautionary principle, which only applies in cases where there is scientific uncertainty.¹³³ Furthermore, the examination of whether the measure in question is “necessary” to protect human health under this particular exception also does not leave room for the precautionary principle, as this examination is essentially influenced by the principle of proportionality. It is submitted that the situation under the TBT Agreement, in particular Article 2(2), is not fundamentally different.¹³⁴

The *Hormones Case* has shed light on the situation under the SPS Agreement.¹³⁵ The SPS Agreement does not make a distinction between risk assessment and risk management. Rather, to the extent that these concepts can be distinguished, they are both encompassed by the SPS Agreement. This, in itself, is no indication that the precautionary principle is embodied in the SPS Agreement. But the Appellate Body acknowledged that Article 5(7) of the SPS Agreement reflects this principle, since this provision explicitly recognises that risk assessment can be conducted also “in cases where relevant scientific evidence is insufficient.”¹³⁶ Nonetheless, the Appellate Body rightly emphasised that this does not justify reliance on this principle to explain non-compliance with the obligations emanating from Article 5 SPS Agreement, read in conjunction with Article 2 of this agreement.

The specific requirements of Article 5(7) of the SPS Agreement have been clarified by the Appellate Body in the *Varietals Case*.¹³⁷ The SPS measure concerned must be adopted on the basis of pertinent available information, thereby imposing a duty on the WTO member in question to collect as much information

132. *Salmon Case*, at 75.

133. See generally *Asbestos Case*.

134. Cf. Correa, *supra* note 74, at 103.

135. See generally *Hormones Case*.

136. *Id.* para. 17

137. *Varietals Case* para. 89.

as possible before adopting the measures. Although the *Varietals Case* did not specifically deal with the risk assessment to be made on the basis of available pertinent information, it transpires from the *Hormones Case* that insufficient scientific evidence does not relieve a WTO member from showing that there is a rational relationship between the measure and the risk assessment. Furthermore, the SPS measure must be provisional. The WTO member concerned is under the obligation to seek to obtain additional information that will enable it to make an even more objective assessment of the risk, in the light of which the SPS measure must then be reviewed.

The EC's communications do not attempt to build upon the reports of the Appellate Body in the *Hormones* and the *Varietals Cases*, insofar as they deal with WTO law. Instead, they only touch upon these issues in a cursory manner. This is, to say the least, disappointing. How can the Community seriously expect other WTO members to enter into a dialogue on the content and scope of the precautionary principle within the WTO legal order, if there is no real (i.e., thorough and legally sound), examination of this important issue? As it stands right now, other WTO members are well advised to take a cautious stance on the EC's perspective of the precautionary principle. Otherwise, the communication might turn out to be a "Trojan horse."