If in Doubt, Leave it Out? EU Precaution in WTO Regulatory Space

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This article reviews the way in which the concept of precaution, as commonly referenced in EU law, is received in the WTO. It argues that precaution is not a principle, but one facet of a principle of making rational judgments based on available information, the other facet of which is "that risk is worth taking". Systematically pursuing high cost measures in response to low risks is not a balanced approach, and has probably contributed to the scepticism with which the concept is viewed in the WTO. However, this article goes on to argue that, without needing to be a principle, precaution is the determining legal feature in the SPS Agreement, because, unlike in the European Union, there is no legislative harmonisation of SPS measures at international level, WTO Members being free to set their own appropriate level of protection. In fact, the concept of precaution is relevant in the context of many other WTO provisions and is in some respects quite close to the concept of subsidiarity. Notwithstanding this, the first WTO SPS cases, driven by regulatory exporters and an interventionist WTO, have excessively emphasised scientific issues, masking policy judgments that the WTO has neither the legal nor the political authority to sustain. The article concludes that the proper way forward necessitates closer political, legal and administrative links between the WTO and other relevant international organisations, and a move away from consensus in the latter.

I. Introduction

"If in doubt, leave it out" my father used to say to me as a teenager. Of course, like most teenagers, I took risks anyway, sometimes getting away with it, sometimes not, but in any event living to tell the tale. I guess it's inevitable that parents often give that advice, having so much to lose; and equally inevitable that teenagers disregard it, being so curious about what they are missing. The point is that risk taking is necessarily political (what is more quintessentially political than the generation gap?), that is, it is a matter of personal choice, whether expressed in legislative terms through the ballot box, or when reading the labels in the supermarket. Fundamentally, that explains why we all feel so uneasy about John Gummer, the United Kingdom Agriculture Minister during the BSE crisis, publicly attempting, apparently unsuccessfully, to feed a British beef burger to his young daughter;[1] or drugs companies conducting trials amongst illiterate and impoverished popula-

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1 BBC News, *Gummer Enlists Daughter in BSE Fight*, 16 May 1990, available on the Internet at http://news.bbc.co.uk (last accessed 1 January 2010).

tions. What bothers us is the lack of informed consent.[2]

Sometimes I have the impression that the whole concept of risk, which is in truth largely a straightforward matter of common sense (what is the risk, what might I gain, what might I lose), in respect of which every citizen has both the ability and the right to make up their own minds, has been kidnapped by scientists, politicians, lawyers and academics. Perhaps it exercises a strange allure for these professions precisely because it is prospective and therefore almost impossible to satisfactorily apprehend, and thus in some sense mysterious. Each class invents and applies its own vocabulary and launches itself into an interminable debate, and the unfortunate citizen is drowned in a sea of words. Granted, some complex issues must necessarily be entrusted to examination by persons specialised in the relevant discipline, but these institutions or structures must always ultimately be accountable to citizens for the necessarily political choices they make.

Much of the controversy in this area arises, as is so often the case in disputes, because the same term (precaution) is being used by different people to mean different things. This is particularly occurring because of the difficulty of distinguishing between a risk that is quantified but remote; and a risk that is unquantified. In fact, in the real world, many risks are very difficult or even impossible to quantify. And even if one part of the risk can be quantified (such as the risk of a particular illness developing in a rat if a particular type and level of exposure occurs) another equally important part of the risk (such as the risk of human error) might remain unquantifiable. This explains why the Appellate Body has observed, correctly in my view, that the risk does not need to be quantified.

Thus, the trade advocates tend to see a given problem through the prism of Article 5.1 of the SPS Agreement. They look at the available information (including the science); think of it as essentially complete (the risk essentially quantified or at least crystallised); do not see why they might have the burden of adding to it; and, reflecting their underlying economic interest, find the balance struck between the trade interest and the SPS interest disproportionate (Article 5.6 of the SPS Agreement). They tend to forget that the importing Member sets its own ALOP, so that, as long as there is a spit of science or rationality in the recipe, that is capable of being enough, at least as a matter of law. If this is precaution, they denounce it as non-scientific and political, by which they essentially mean disproportionate in their view – again, forgetting that the (necessarily political) balancing decision is reserved to the importing Member.

As the same time the SPS advocates tend to see the same problem through the prism of Article 5.7 of the SPS Agreement. They look at the available information (including the science); think of it as essentially incomplete (the risk unquantified or unknown); tend to think that the trade interest has the burden of completing it; and, reflecting their underlying SPS interest, find the (necessarily political) balance struck between the trade interest and SPS interest proportionate, at least until the information is complete. This is their precaution, and they see is as fundamentally justified, not least on the basis of some notion of informed consent.

Given that, in the long run, we are all dead, the distinction between the definitive Article 5.1 perspective and the temporary Article 5.7 perspective should not, in my view, be mechanistically applied. Recalling that time is money, the real questions are: how long is it reasonable to keep looking (this depends on the case); and, critically, who should pay (a question left open by Article 5.7). Some think that the taxpayers in the importing Member should pay for any additional research necessary to conclude that the product in question is safe. Others think that the would-be exporters (and thus ultimately consumers) should pay (as in the case, for example, of pharmaceuticals). My own view is that the latter approach is more rational and efficient, because the amount would-be exporters are willing to pay will be a function of the profits in view (so market forces will be at play); and because consumer concerns will internalise otherwise potentially exogenous costs. The former approach would leave taxpayers footing the bill regardless of whether or not they are interested in the product, and regardless of whether or not there is any economic potential (for anyone) in the product.

2 A further nice illustration of the necessarily political or value laden aspect of the process is the position with respect to pests. Thus some poor unfortunate creatures are so classified, the general assumption being that they should be wiped off the face of the planet as bad for business. One does not generally hear anyone sticking up for the pest. And yet, one Member's pest might be a vital part of another Member's critical ecosystem. In other words, the notion of pest is entirely anthropocentric, value laden and thus 'political'.

II. Mad cows and Englishmen: precaution lifts off

Thinking back to the BSE litigation in the CJEU,[3] which was really the first major case in which the notion of precaution came to the fore, it is easy to forget the circumstances. Notably, in that case, the relevant political authority (the Commission) had exercised its judgment as to how best to balance the competing trade and public health interests. Inevitably it was always going to be difficult for the judges to second guess that decision, properly incorporating as it did not only a scientific but also a political assessment. I mean here politics in the good sense of the word, that is, in the sense of deciding on the balance been different and incomparable interests; not in the sense of "ganging up" against one Member State. Further, the Commission had acted provisionally, in response to an emergency situation (that is, on the basis of precaution). That factor also necessarily contributed to the sense that the Court would be reluctant to rule that the Commission had exceeded its margin of appreciation. In addition, the United Kingdom sought interim relief (and the substantive outcome of the case was very largely determined in the ruling on that interim application). Again, it is hard to imagine the Court provisionally reversing the Commission's provisional decision. Finally, and critically, the financial consequences were substantially shared at Union level through the operation of various aspects of the common agricultural policy. Thus, this was not a case of "our health" *versus* "your trade"; but a case of balancing our health and our trade.

Against this backdrop, even the less evident aspects of the measure, such as its wide material scope, the ban on exports to third countries, and the ban on exports of meat from the United Kingdom deemed fit for consumption in the United Kingdom, survived judicial review, and understandably so. At the end of the day the case was just as much about credibility as anything else. I particularly remember one judge, who was concerned about the ability of the United Kingdom authorities to trace the origin of cattle, asking the United Kingdom Attorney General (who appeared in the court proceedings on behalf of the United Kingdom) a question that sounds rather like the introduction of a joke: suppose I was walking down the road and saw three cows in a field, would I be able to tell which one came from England, which one from Scotland and which one from Wales? The Attorney General turned to consult with his Queen's Counsel, who turned to consult with his junior, who turned to consult with his instructing solicitor, until eventually the equivocal response came back that he could not be certain, at which point the entire bench (consisting of the full court) almost imperceptibly moved slightly back in their seats. Case closed.[4]

III. Sticking to one's principles

Following the BSE case both the CJEU and the Court of First Instance (now the General Court) have had further opportunities to opine on the nature of precaution.[5] However, sometimes when one considers the various statements that have been made, particularly out of the context of a particular case, one wonders if they really constitute an operational basis for going about daily life, having in mind the types of risks that citizens generally voluntarily assume.[6] The concept is of course embedded in the EU treaty provisions relating to the environment,[7] and the Commission itself has been active in this area, adopting a communication that refers to the precautionary principle.[8] One can only hazard a guess as to why the

3 Case C-180/96 R, *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, Order of the Court of 12 July 1996 [1996] ECR I-3903.

4 See *Failure to Trace Cattle Causes Alarm*, Independent, Thursday 20 June 1996.

5 For a relatively recent summary, see Alemanno, Alberto, *The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty*, Bocconi Legal Studies Research Paper No. 1007404. Available at SSRN: http://ssrn.com/abstract=1007404 (last accessed 1 January 2010).

6 Article 5.5 of the SPS Agreement indicates the need to "take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.". See also Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 187; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, page 31: "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever changing ebb and flow of real facts in real cases in the real world."

7 Treaty on the Functioning of the European Union, Article 191.

8 Communication from the Commission on the Precautionary Principle, COM(2000)01 final, 2.2.2000.

policy emphasis seems to have shifted so far to one end of the spectrum. Perhaps it reflects a misreading of the BSE case and all the attendant circumstances. Perhaps it is politically easier to champion health (and the environment) rather than trade. Perhaps the policy apparatus has been temporarily hijacked by market-reactionary influences. Perhaps alliteration adds to the attractiveness of the proposition.[9]

In my view, and having regard to the preceding observations about the different ways in which people use the term "precaution", the use of the term "principle" is inappropriate, at least in the WTO. Given the controversy, it is very difficult to think of "precaution" as a neutral legal principle allowing one to determine the outcome of otherwise finely balanced cases, one way or the other. It is rather in the nature of a one-sided slogan consistently invoked by the risk averse. Thus, in my view, it may be better to think of "precaution" as describing one possible *outcome* of a consideration of what course of action (or inaction) to take, the other possible outcome being "that risk is worth taking". Together these may be thought of as two facets of a single "principle" of making a rational decision based on available information. One can identify this idea, for example, in Annex A.5 of the SPS Agreement, which defines the notion of an "appropriate level of protection" (that being one side of the coin, which carries with it the flavour of not taking the risk) and at the same time equates that notion to the "acceptable level of risk" (that being the other side of the coin, which carries with it the flavour of taking the risk).

Thus, in the case of a seat belt, for example, given the low cost of putting it on and the high cost of an accident, clearly the only rational personal choice is to wear one. Similarly, given the relatively low cost of having them fitted to cars, and the high costs to society of medical care, clearly the only rational legislative choice is to require people to wear one. The risk is just not worth taking; precaution is the rule. On the other hand, medical products eventually have to be tested on humans. Risks exist and the consequences may be extremely serious, as a group of participants discovered to their cost a few years ago in the United Kingdom.[10] Nevertheless, the risk must be taken – after careful preparation and on the basis of informed consent – but it must be taken. Here, universal "precaution", in the sense of not taking the risk, would make all future medical advances impossible, and is not an option.

In short, the use of the term "principle" is something that has tended to give "precaution" a bad name, and has probably contributed to the scepticism with which the notion has been received in some quarters in the context of the WTO. This may also reflect the fact that, unlike in the EU jurisdiction, in the WTO jurisdiction the law never compels the adoption of an SPS measure, but limits itself to considering whether or not a given SPS measure is consistent with trade interests. Thus, proponents of precaution in the WTO might do better to drop the term "principle". Relieved of its dubious intellectual baggage (ditching its exhausted boosters), the concept would then likely have much more mileage in it, not just in the context of the SPS Agreement, but also in the TBT Agreement, and indeed in the provisions of the GATT itself.

IV. Getting into orbit: precaution in the SPS Agreement

From the point of view of WTO law, that precaution is not a principle does not however matter, because it still has a determinative role to play in the WTO. That is because, unlike, for example, the SPS system within the European Union, the WTO SPS Agreement does not require full international harmonisation: Members remain free to set their own appropriate level of protection (ALOP), which may be zero.[11] Reconciling the fact that the importing Member sets its own ALOP with the proportionality disciplines of Article 5.6 is one of the key challenges at the heart of the SPS Agreement. The legal rules simply frame a policy conflict which, requiring as it does a choice

9 For a recent enthusiastic re-statement of the concept as a "principle", see de Sadeleer, Nicolas, "The Precautionary Principle as a Device for Greater Environmental Protection: Lessons from EC Courts", *Review of European Community and International Environmental Law (RECIEL)*, Volume 18, Number 1, April 2009, pp. 3–10.

10 BBC News, *Six taken ill after drug trials*, 15 March 2006, available on the internet at http://news.bbc.co.uk (last accessed 1 January 2010).

11 SPS Agreement, sixth recital, Articles 3.3, 5.6 and Annex A, paragraph 5; Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, para. 523; Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, paras. 523, 534 and 685; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 125. At the same time, the science supporting the measure cannot be non-existent or purely theoretical (Appellate Body Report, *EC-Hormones*, above n. 6, para. 186).

between incomparable imponderables, is eminently political, and thus essentially amenable to legislative but not judicial resolution. The judge can still address procedural issues, but addressing the substance of the matter in legal terms is very difficult. This may suggest that if the measure is the least trade restrictive possible to achieve the desired ALOP, it should be WTO consistent.[12] This is a problem that the European Union has itself experienced within its own single market, when the CJEU has been called upon to rule on similar questions as yet unregulated by Community legislation.[13] All of the SPS disputes to-date[14] have avoided this problem by focussing, excessively, on the science requirements of the risk assessment under Article 5.1, often at the expense of Article 5.7, which is said to embody an expression of precaution. This approach has generated a different set of problems about how judges deal, or can deal, with science. This imbalance has recently been corrected by the Appellate Body in principle.[15] It remains to be seen whether or not the next cases processed by the system faithfully reflect this correction.[16]

Trade advocates sometimes complain that if the notion of precaution is given too much weight, then the SPS Agreement would be effectively eviscerated. I don't think that is true, given all the other disciplines that are there, notably in Article 5.5 (arbitrary distinctions) (a particularly important provision in my view) and (to a lesser extent) Article 5.6 (proportionality). It is clear that the SPS Agreement does not mandate international harmonisation. The *incentive* to adopt SPS measures that conform to international standards is clearly provided for in Article 3.2 of the SPS Agreement. They are (irrebuttably) deemed to be necessary and (rebuttably) presumed consistent with the SPS Agreement and the GATT. At the same time the right to depart from international standards is also clearly provided for in Article 3.3. Thus, if one asks oneself the question: who won the SPS negotiation, the trade advocates or the SPS advocates – the fair response is that it was essentially a draw, with the task of international harmonisation being left to Codex and the other bodies referenced in the SPS Agreement; and the political prerogative of fixing the ALOP being left to the importing Member. Unfortunately, one can hardly recognise this balanced compromise in the subsequent case law.

In this respect, I think it is particular interesting to consider the context of Article XXI of the GATT, which contains the "security exceptions" that immediately follow the "general exceptions" set out in Article XX. Article XXI of the GATT repeatedly uses the term "which *it considers* contrary to its essential security interests" and "which *it considers* necessary". Here, the language that refers expressly to the consideration of the Member is widely assumed to indicate that WTO judges have little to say on such matters.[17] One can hardly imagine a WTO judge refusing to accept the invocation of Article XXI on the grounds that the explanation provided is not "specific" enough. For similar reasons, the comparable security exceptions in the EU treaties have relatively infrequently been tested administratively or in litigation.[18] And yet, even if one does not find such language in Article XX, it is this very same type of language that one finds in Annex A.5 of the SPS Agreement: it is the level of protection *deemed appropriate by the Member*. True, one might suppose that some aspects of security are closer to the hearts of some "sovereign" WTO Members than the average SPS measure. But is that always the case and might it not depend on the Member? Perhaps some Members have few if any security issues. Perhaps, on

12 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007.

13 For a classic formulation, see Case 174/82 *Sandoz* [1983] ECR 2445, paras. 18 and 19. For a more recent example of deference to the Member State even in the presence of Community legislation, see Case C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland* [1998] ECR I-4473.

14 *EC-Hormones*, *Australia-Salmon*, *Japan-Agricultural Products*, *Japan-Apples*, *EC-Biotech*.

15 Appellate Body Report, *US-Continued Suspension*; Appellate Body Report, *Canada-Continued Suspension*, above n. 11.

16 For the time being, the European Union and the United States have concluded a provisional agreement in the *Hormones* dispute; there are pending disputes in *Australia-Apples*, *US-Poultry*, *EC-Poultry* and *Korea-BSE*; and there is some discussion about how cloning techniques being developed particularly in the United States will be received in the European Union.

17 See, for example, GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, unadopted.

18 See, for example, Case 13/68 *Salgoil* [1968] ECR 453; Case 222/84 *Johnston* [1986] ECR 1651; Case C-273/97 *Sirdar* [1999] ECR I-7403; Case C-285/98 *Kreil* [2000] ECR I-69; Case C-414/97 *Commission v Spain* [1999] I-5585; Case C-414/97 *Commission v Spain* [1999] ECR I-5585; Case C-61/03 *Commission v United Kingdom* [2005] ECR I-2477; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635; Case C-337/05 *Commission v Italy* [2008] ECR I-2173; Case C-157/06 *Commission v Italy* [2008] ECR I-7313; Case C-239/06 *Commission v Italy*, judgment of 15 December 2009 (not yet reported in the ECR).

the contrary, they have acute concerns about the integrity of their territory in terms of protecting their citizens or certain aspects of their environment, or for that matter the global commons. There is no question that a trade restrictive measure applied to counter biological weapons would benefit from Article XXI with little if any judicial scrutiny. Does it really make that much difference if food, beverage or feed is the vehicle for the biological threat? Is terrorism a more pressing imperative that global warming? Who is making that judgment call and setting the agenda accordingly?

V. Exploring another system: precaution in the TBT Agreement

Once it is understood that precaution is not a principle finding expression uniquely in Articles 3.3 and 5.7 of the SPS Agreement, but one half of a more general principle; and that the concept is embedded in the rule that the importing Member sets its own ALOP – a rule that colours the entire constellation of the SPS Agreement – then it is not difficult to find precaution in the TBT Agreement. Thus, the sixth recital of the TBT Agreement states expressly that the importing Member is entitled to take the necessary measures, "at the levels is considers appropriate". The seventh recital of the TBT Agreement refers to a country's "essential security interest", cementing the relationship between Articles XX and XXI explored above. Consistent with this, Article 2.2 of the TBT Agreement goes on to refer to a "legitimate objective", including national security requirements and the protection of human, animal or plant health; and Articles 2.10 and 5.7 refer to the possibility of action in urgent circumstances. Thus, it seems clear that, when adopting technical regulations within the universe of the TBT Agreement, an importing Member is entitled to engage in precisely the same type of balancing and risk assessment that takes place under the SPS Agreement. It seems equally clear that the importing Member sets its own ALOP, which may be zero. Further, it would be entirely reasonable to distinguish in broad terms between definitive measures, and provisional or temporary measures adopted in circumstances where there is a paucity bordering on an absence of science or other pertinent information. Indeed, it seems clear that the "science" or "objective justification" requirement is much weaker in the TBT Agreement compared to the SPS Agreement. In fact, given that the process of standardisation is to some extent inherently arbitrary, it seems that a TBT measure might itself also be, in essence, arbitrary. Some things are just not worth harmonising or even subjecting to equivalence. The classic example of that is the electrical plug. Most countries require electrical goods sold on their territory to be equipped with a plug that will fit the standard electrical socket required in that country. There is generally no recognition of equivalence, and even if there would be, consumers would effectively demand the correct plug. There may be no particular reason why one plug design is better than another – it's just the way that things have evolved. Could one imagine WTO litigation between all the WTO Members with different types of plug, backed up by "scientific experts" explaining why their type of plug was the best and least trade restrictive, leading to a WTO determination as to which is the correct type of plug? Of course not. This is "policy space" *par excellence*, and in that policy space, if one can even be arbitrary, then there is obviously plenty of room for "precaution" to play a role in the formulation of domestic technical regulations. The conclusion would be that precaution is alive and well in the TBT Agreement.[19]

VI. Flying closer to the sun: precaution in Article XX of the GATT

I was somewhat surprised and puzzled to be asked recently by a panel whether or not the concept of precaution would be relevant in the application of Article XX of the GATT, and particularly Article XX(b) and the *chapeau*. To me, once the concept is properly understood not as a principle in its own

19 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, para. 178: "In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources." (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence." (footnotes omitted).

right, but as one half of a principle, it seems self-evident that this is the case. Perhaps this is most clear when one is dealing with a measure that falls within the material scope of the SPS Agreement, but which, for one reason or another (for example, extra-territoriality), is being assessed directly under Article XX.[20] However, I think it would be true for any measure.[21]

This problem has tended not to arise in the jurisprudence because the conventional wisdom for the time being (as yet untested by the Appellate Body) is that the SPS Agreement is "stand alone".[22] There is thus a threshold issue here about the relationship between Article XX and indeed the GATT generally, and the SPS Agreement, that merits further comment.

There is no doubt that even a reasonably careful reader of the SPS Agreement could be forgiven for understanding that it is entirely an elaboration of Article XX(b) (including the *chapeau*) of the GATT. This is expressly stated in the recitals, and all of the provisions of the SPS Agreement can be understood in this way. Nevertheless, the recitals do contain the words "in particular"; and Article 1.1 does state that the SPS Agreement applies to all SPS measures which may, directly or indirectly, affect international trade (it is hard to envisage an SPS measure that would not satisfy this test). It is on this latter basis that the *Hormones* panel considered the SPS Agreement to be stand-alone. However, in my view, if one steps back and considers the GATT and the SPS Agreement as a whole, this is the world turned on its head, with the slight opening of the door (through the use of the term "in particular") becoming the exclusive rule. This looks like one of those "under the radar" gambits that one finds littered across the WTO Agreement,[23] presumably designed by its various supporters to facilitate its acceptance. That sentiment is only enhanced when one observes the high level of activity of the WTO Secretariat in the SPS area, which tends to look very much like a fairly determined pursuit of international harmonisation, even for its own sake, notwithstanding the express terms of the SPS Agreement.[24]

The stand-alone approach has probably been facilitated by what happens in the area of trade remedies. To recall, for example, the Anti-Dumping Agreement implements Article VI of the GATT; and the SCM Agreement implements Article VI of the GATT with respect to countervailing duties. Without entering into an unnecessarily philosophical discussion about whether or not Article VI is to be characterised as an exception to Article II, it is clear that Article II.2(b) carves Article VI out of Article II. However, typically, complaining Members do not begin by asserting an inconsistency with Article II, and then wait for the defending Member to make an affirmative defence under the Anti-Dumping Agreement or the SCM Agreement. Rather, they proceed directly to make claims under the implementing agreements, treating them as stand alone, and ignore Article II.[25] This makes sense because there is already an administrative record (required by the implementing agreements) and also because it is just a question of maths. Essentially, if an anti-dumping or countervailing duty is not justified under Article VI, it is automatically inconsistent with Article II. The high number of trade remedy cases has probably conditioned thinking to this type of approach, with the SPS Agreement tending to follow in the wake. The legal structures, however, are not the same, because an inconsistency with the SPS Agreement does not necessarily entail an inconsistency with Article III:4 of the GATT (for example). The General interpretative note to Annex 1A of the WTO Agreement, which provides that, in case of conflict, the other Annex 1A agreements prevail over the GATT, has probably contributed to this approach, it

20 This situation is currently before a panel in the *US-Poultry* case.

21 See, for example, Appellate Body Report, *Brazil – Retreaded Tyres*, above n. 12, a dispute in which neither party invoked the SPS Agreement, but in which Brazil's successful defence under Article XX included an attenuated public health concern.

22 Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, above n. 6, paras. 8.36 to 8.38. See Marceau, Gabrielle and Trachtman, Joel, "A Map of the WTO Law of Domestic Regulation of Goods", in Bermann, George and Mavroidis, Petros (eds), *Trade and Human Heath and Safety* (Cambridge University Press 2006) at p. 20.

23 Such as calling the supreme court "Appellate Body"; mandatory judgment "reverse consensus"; and the court's rules of procedure an "understanding".

24 See, for example, Scott, Joanne, *The WTO Agreement on Sanitary and Phytosanitary Measures – A Commentary* (Oxford: Oxford University Press 2007), particularly but not only Chapter 2.

25 Interestingly, in a recent case the GATT Article II claim has also been advanced as an additional matter. See Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009.

being somewhat lost from sight that there must first be a conflict, and that the principle of harmonious interpretation almost always permits provisions to be construed so as to avoid such conflict.

In my view, neither of these two extreme approaches (stand-alone and unique elaboration of Article XX(b) including the *chapeau*) is particularly convincing. To me, it seems self-evident that the SPS Agreement and the TBT Agreement are satellites of the Article XX planet, and must be subject to the gravitational pull of both Article XX and the rest of the GATT. To borrow the words of the Appellate Body from another context, at least in the case of a measure falling within the material scope of the SPS Agreement, I tend to think that the provisions of the SPS Agreement and the provisions of Article XX(b), including the *chapeau*, as well as the other relevant provisions of the GATT, should be constantly read together. Since we may be certain, based on the text of the preamble, that all provisions of the SPS Agreement elaborate rules for the application of the provisions of the GATT, it follows that, if we cannot identify another provision of the GATT that is implemented by the specific SPS obligation under consideration,[26] it can only be an elaboration of Article XX. This would have the enormously significant consequence that before prosecuting any case under that provision of the SPS Agreement a complaining Member would have to demonstrate a breach of the GATT. For example, in my view, Article 5.1 of the SPS Agreement can only reasonably be construed as elaborating rules for the application of Article XX(b), including the *chapeau*, of the GATT. I cannot see any other provision of the GATT that is implemented by Article 5.1, recalling particularly that the final clause of Article III:1 of the GATT has been found not to contain an independent obligation, but merely inform the remainder of Article III.[27] Although the TBT Agreement is less clear, its second recital does state that it intends to further the objectives of the GATT, and I do not see why a similar approach would not be appropriate.

The conclusion would be that, at least in any case involving a measure falling within the material scope of the SPS Agreement, and taking into account that the SPS Agreement is to be constantly read together with Article XX(b), including the *chapeau*, the concept of precaution is alive and well and to be found also in Article XX(b) and the *chapeau*. I would go further and take the same view even with respect to measures not falling within the scope of the SPS Agreement, taking that agreement and the TBT Agreement as relevant context, and having regard to the fact that precaution is one part of a general principle of making rational decisions on the basis of available information, that simply cannot be written out of Article XX. I would take the same approach with respect to TBT measures. Thus, precaution is going to be potentially relevant in the context of Article XX(b), including the *chapeau*, when considering whether or not a measure is "necessary", whether or not it is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and whether or not it is "a disguised restriction on international trade".[28]

VII. Moving into deeper regulatory space: precaution in Article III:4 of the GATT

The task of demonstrating a breach of the GATT may not always be an easy one. The main relevant provisions are Article XI (import restrictions) and Article III:4 (equal treatment for imports and domestic products). However, a "note and supplementary" provision to Article III makes it clear that *erga omnes* regulations enforced at the border in the case of imports are to be assessed under Article III. This in turn leads one into the lost land that time seems to have temporarily forgotten: the "regulatory space" of Article III:4. Here, the proposition is that if a regulation does not discriminate between imports and domestic like products, there is no breach of Article III:4 and therefore no need to invoke the "affirmative defence" of Article XX(b) and eventually the SPS Agreement. Here again I see a place for precaution, in the sense I have described it in this article. After all, if precaution might have a role to play in the adoption of a technical regulation that is just different, without there being any particular or compelling reason for that difference, then why cannot that

26 There are some obvious possible candidates: Articles I and III of the GATT and Article 2.3 of the SPS Agreement (MFN and national treatment); Article X of the GATT and Annex B of the SPS Agreement (transparency); Article XXIII of the GATT and Article 11 of the SPS Agreement (dispute settlement).

27 Appellate Body Report, *Japan – Alcoholic Beverages II*, above n. 6, at pp. 17 to 18.

28 See Appellate Body Report, *EC-Asbestos*, above n. 19.

same regulation comfortably inhabit the land of Article III:4? I have the impression that regulatory exporters, such as the United States, tend to avoid this issue, when on the offensive by focussing on the import aspects of the measure and articulating arguments under Article XI, and when on the defensive by simply conceding a breach of Article XI.[29]

One further implication of this, for example, is that panels could not possibly judicially economise a claim under Article III:4 of the GATT (as they have a tendency to do) whilst at the same time making findings under Article 5.6 of the SPS Agreement, for example. That is because a necessary part of considering whether or not an SPS measure is a proportionate response to a particular risk is considering whether or not the measure breaches the GATT.

This discussion has also played out in the context of the question of what constitutes a like product within the meaning of Article III:4. The best example of this is the *EC-Asbestos* case,[30] in which the majority thought the notion of like product was essentially a competitive one; whilst one Member of the Appellate Body thought that a product constituting a health threat could not be like a product not constituting a health threat. It has to be said that whilst this notion of likeness might potentially provide a legal arena for a policy debate, it really does not advance one towards understanding which differences can lawfully be taken into account in the context of Article III:4, and which can only be considered in the context of Article XX(b) and eventually the SPS Agreement.

A further controversial issue is whether any relevant difference must relate to the physical characteristics of the product, or may also include the processes and production methods used, potentially resulting in extraterritorial effects for domestic regulations. In my view,[31] there is nothing in Article III:4 to support the view that it does not "apply" to so-called PPMs.[32]

These propositions might no doubt illicit the objection in the mind of the reader that arbitrary and unjustified measures with significant trade distorting effects might shelter in Article III:4 and never by subject to the disciplines of Article XX and/or the SPS Agreement or the TBT Agreement. The difficult question of how to distinguish the "good" and "bad" measures leads one to the classic problem of so-called "in fact" breaches of Article III:4. This is a situation in which the law on its face is not discriminatory, but all the indications are that in fact it has the same effect, and that was precisely what was intended. The classic situation would be one in which extensive trade has gone on for years; the importing Member's industry hits a rough patch; the importing Member adopts a regulation that happens to fit the way its industry is doing business, but requires substantial and costly changes to the other Member's industry if they are to comply; and there is little or no rational explanation for the new regulation. Given that all regulations may affect trade, but it is not the task or objective of the WTO to achieve global harmonisation, the difficulty is in distinguishing between those regulations that are acceptable and those that are not. The traditional doctrine used to approach this problem is the so-called "aim and effects" test, which has waxed and waned over time, and that some believe may be about to make something of a comeback.[33]

29 For example, the United States did not refute the Article XI claim in GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted, at para. 5.7; nor in Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821, at para. 7.13 (there also being no appeal on that point – see Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, at para. 34).

30 Appellate Body Report, *EC-Asbestos*, above n. 19.

31 Thus disagreeing with paras. 5.11 to 5.16 of GATT Panel Report, *US-Tuna (Mexico)*, unadopted, above n. 29; and paras 5.8 to 5.9 of GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted.

32 For a general discussion of these issues, see Hudec, Robert, "The Product-Process Doctrine in GATT/WTO Jurisprudence", in Bronckers, Marco and Quick, Reinhard (eds), *New Directions in International Economic Law* (Kluwer Law International 2000) at p. 217; Howse, Robert and Regan, Donald, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy", *EJIL* (2000), Vol. 11 No. 2, 249–289; Hudec, Robert, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, available on the Internet at worldtradelaw.net (last accessed 1 January 2010); Howse, Robert and Tuerk, Elisabeth, "The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute", in Bermann, George and Mavroidis, Petros (eds), *Trade in Human Health and Safety* (Cambridge: Cambridge University Press 2006), at p. 77; Ortino, Federico and Ripinsky, Sergey (eds), WTO Law and Process, The Proceedings of the 2005 and 2006 Annual WTO Conferences, *Exceptions to the Rules: Evolving Jurisprudence*, at pp. 209-229.

33 See the literature cited at footnote 32.

My own view is that there are other areas of WTO law where the same "in fact" versus "in law" problem has arisen, and which might provide guidance. The SCM Agreement appears to be a particularly rich source of examples. One thinks, for example, of export subsidies,[34] domestic input subsidies,[35] in fact specificity,[36] and demonstrating the existence of entrustment or direction.[37] But an "in fact" case can be advanced with respect to any WTO obligation. Particularly in the context of export subsidies, although panels have not always made a good job of the analysis, the Appellate Body has correctly explained that the legal standard is the same for an "in law" claim and an "in fact" claim, what differs being the evidence. In an "in fact" claim the text of the offending measure is not disclosed or is unwritten, so it is a question of adducing other evidence demonstrating the existence and precise content of the measure. This is, for example, essentially the approach adopted in the zeroing methodology cases.[38] This goes rather beyond the notion of "aim and effects"; and is more than a question of "head-counting".[39] It is rather a question of looking at all the evidence, considering what facts are reasonably established by such evidence, and then carefully explaining how the evidenced facts work together (or not) so as to reasonably support the conclusion that a measure inconsistent with Article III:4 exists (or does not). Throughout this process a panel is entitled to put questions to the defending Member, and draw reasonable inferences from any failure to respond, in whole or in part.

Thus, there is no doubt that Article III:4 has posed a conundrum that to-date has not yet been satisfactorily solved;[40] and that in any event an "in fact" claim under Article III:4 is a difficult task both for the complainant and the panel. Perhaps that is one of the reasons why treating the SPS Agreement as "stand alone" has looked like such an attractive proposition.

This difficult discussion has had spill-over effects on the question of burden of proof, itself likely conditioned by an unnecessarily rigid distinction between provisions containing obligations and provisions containing rights (thus categorised as an "affirmative defence"). Complainants have unreasonably been told they must make a *prima facie* case under all provisions of the SPS Agreement, notwithstanding the fact that it is the importing Member that has adopted the measure, whether under Article 5.1 or 5.7, and should reasonably be able to explain, at least in the first place, why they have done so. Thus, in effect, throughout this process the panel should have one eye on the provisions of Article XX, including the implementing agreements, constantly reading them together, and adopting an intelligent and flexible approach to the problem of burden of proof.[41]

One of the particular characteristics, and I would say virtues, of the regulatory space of Article III:4 (subject to the possibility of an "in fact" determination) is that it provides a degree of flexibility that one does not find in Article XX. It counterbalances the relative rigidity of that provision, and in effect completes the range of issues with respect to which the WTO can balance the trade interest. For example, the Appellate Body is sometimes criticised for its reasoning in the *US-Shrimp* case that relied on the proposition that turtles are an exhaustible natural resource. Whilst I do not share those criticisms

34 See, for example, Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377.

35 See, for example, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985.

36 See, for example, Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671.

37 See, for example, Panel Report, *EC – Countervailing Measures on DRAM*, above n. 36.

38 See, for example, Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417.

39 Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367.

40 Personally, I do not believe that the problem can be solved by tinkering with the standard of review, a concept that, based on experience, I find to be largely a matter of rhetoric, and in any event incapable of reliably filtering out the political prerogatives of the importing Member when setting its ALOP. For a contrary view, see Button, Catherine, *The Power to Protect: Trade, Health and Uncertainty in the WTO* (Oxford and Portland: Hart Publishing 2004).

41 For a more general discussion of these issues, see Grando, Michelle, *Proof and Fact Finding in WTO Dispute Settlement* (Oxford: Oxford University Press 2009).

at all, nevertheless if one places the US measure in that case into the regulatory space of Article III:4, and looks at it through the prism of precaution, the reasonableness of the outcome is, in my view, confirmed and even enhanced.

In similar vein, the flexibility inherent in the regulatory space of Article III:4 is potentially particularly apt when none of the somewhat rigid pigeon holes of Article XX precisely fit the bill, the concerns being, perhaps, a little bit of everything, particularly in the light of the concept of precaution. Cloning for the food chain, for example, might variously raise concerns regarding human health, the environment, animal welfare or even moral considerations. I personally find it hard to look at the WTO Agreement and see it as definitively regulating such issues. It just doesn't smell to me like a real trade issue.

VIII. Conclusion

The notion of precaution has tended to be launched and developed in a milieu of domestic and international law dominated by individuals concerned about the environment, and has worked its way into public health policy, albeit initially in very specific circumstances. Perhaps because of the need to redress what might be perceived as past imbalances, it has been a hard sell. Part of that has been cloaking the notion in the grandeur of "principle". Ironically, this has probably been a hindrance rather than a help when it comes to persuading other persons and jurisdictions of the merits of the approach. The WTO itself has tended to be cautions about precaution as a "principle" – being in doubt it has tended to leave it out – except perhaps with respect to Article 5.7 of the SPS Agreement.

However, stripped of its pretentious garb, the concept becomes much more user friendly and easy to accept, because it is basically a matter of common sense. In that more streamlined form, one can trace its relevance not only throughout the SPS Agreement, but also in the TBT Agreement, in Article XX, including the *chapeau*, in the regulatory space of Article III:4 of the GATT, and even eventually in other provisions of the covered agreements, and indeed in the interstices between them. This is not very surprising if one recalls that all these provisions are connected as part of the WTO "single undertaking" and exercise gravitational influence over each other; and that they are basically all about law, that is, being rational and reasonable. Thus, if one travels far enough into regulatory space – that is, the single WTO universe - eventually one arrives at the point of departure. Against this background, one can perceive more readily the reasonable balance struck in the WTO Agreement as a whole between the trade interest and public health or environmental interests. One can also more readily perceive how the SPS cases to-date have tended to overstate the trade interest. In my view, the proper way forward does not lie through distortion of the legal framework during litigation (with the same people pursuing an internal policy agenda and advising panels) but rather through a move away from consensus in the relevant international organisations. If that is not immediately forthcoming, so be it. The citizens of the world have agreed to the specific disciplines set out in the GATT and the implementing agreements, no more, no less. They have not agreed to a covert programme of trade-driven global harmonisation for its own sake, that effectively writes the concept of precaution out of the script. Even if it may be true these days that all economics is international, it has also pithily been observed that all politics is local – and what could be more political and more local that an individual citizen deciding for themselves (and/or through their domestic polity) what to ingest? After all, we are what we eat. Is this not what the rule that the importing Member fixes its own ALOP really stands for; and is this not akin to notions of subsidiarity (that is, that the decision should be taken closest to those most immediately affected by it?). Thus, if it is a principle one is looking for, do not the legal texts point in a slightly different direction – that is, towards the principle of informed consent? If State consent is looking increasingly outdated in the international law arena, at least in the WTO, is citizen consent perhaps emerging as a more real and ultimately more powerful consideration, harnessed, perhaps, through the process of labelling? From this perspective, the comforting conclusion would be that the exercise of (judicial) force, rather than (legislative) persuasion, would ultimately appear to be (politically and commercially) futile, as John Gummer discovered when his daughter 'just said no'.