Considerations Regarding the *Hormones Case*, the Precautionary Principle and International Dispute Settlement Procedures

Ellen Hey[*]

Keywords: dispute settlement; Appellate Body WTO; precautionary principle; treaty interpretation.

Abstract: This essay focuses on the (non)application of the precautionary principle in the *Hormones Case*. It concludes that the finding of the Appellate Body that the precautionary principle, as such, cannot overrule the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement is debatable, if a similar principle or concept were to exist in health law – a line of thought that is not pursued by the Appellate Body in its consideration of the precautionary principle. In addition, the article includes considerations about the problems that arises if substantive unity is sought in a procedurally non-unified system for international dispute settlement.

1. INTRODUCTION

The Panel in the *Case Concerning Meat and Meat Products*[1] (*Hormones case*) concluded that the precautionary principle could not override Articles 5.1 and 5.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures[2] (SPS Agreement), without considering the status of the precautionary principle in international law. On appeal, the Appellate Body concurred with that conclusion, however, it did devote some considerations to the legal status of the precautionary principle and its relationship to the SPS Agreement.[3] Most noteworthy, the Appellate Body found that the precautionary principle could be relevant to the interpretation of the SPS Agreement, beyond its reflection in Article 5.7 of that Agreement. The Appellate Body also found that it was less than clear

* Professor of International Natural Resources Law and Deputy-Director of the GLODIS Institute, Faculty of Law, Erasmus University Rotterdam.

1. Panel Report United States – EC Measures Concerning Meat and Meat Products (Hormones), adopted 18 August 1997, WT/DS26R/USA and Panel Report Canada – EC Measures Concerning Meat and Meat Products (Hormones), adopted 18 August 1997, WT/DS48/R/CAN. The membership of the panels was identical and their reports were similar, although not identical. Hereinafter the term panel will refer to the two panels.
2. www.wto.org/goods/spsagr.htm.
3. Appellate Report EC Measures Concerning Meat and Meat Products (Hormones), adopted 16 January 1998, WT/DS26/AB/R and WT/DS48/AB/R. The Appellate Body considered the two cases jointly and produced one report, which will hereinafter be referred to as AB Report.

13 Leiden Journal of International Law 239-248 (2000)

whether the precautionary principle was, at the time of its decision, January 1998, a principle of "general or customary international law."[4]

This essay discusses the (non)application of the precautionary principle[5] in the *Hormones case* and addresses some of the wider implications of that case. It concludes that the position taken by the Appellate Body that the precautionary principle, as such, cannot overrule the explicit wording of Articles 5.1. and 5.2 of the SPS Agreement is debatable, if a similar principle or concept were to exist in health law. The latter is suggested, but not analysed, by the Appellate Body in its consideration of the precautionary principle. The essay concludes that the ruling raises important issues related to the relationship between international dispute settlement forums. For other aspects and more detailed discussions of the ruling the reader is referred to relevant literature.[6] A brief summary of the issues at stake in the case, as relevant to the topic of this essay, follows.

2. THE *HORMONES* CASE

The United States and Canada submitted a claim against the European Communities (EC) alleging that the EC prohibition[7] of imports of meat and meat products derived from cattle that had been treated with natural or synthetic hormones (growth hormones) was contrary to the provisions of the GATT, the SPS Agreement and the Agreement on Technical Barriers to Trade (TBT Agreement).[8] The US and Canada claimed that the measures were contrary to WTO rules because, among other things, they were not based on risk assessment and scientific evidence. The EC claimed that under the SPS Agreement it was allowed to impose the measures in question because growth hormones are carcinogenic and their use to promote growth in cattle increases the risk that con-

4. AB Report, para. 123.
5. For broader considerations of the precautionary principle *see*: D. Freestone & E. Hey (Eds.), The Precautionary Principle and International Law, The Challenge of Implementation (1996); T. O'Riordan & J. Cameron (Eds.), Interpreting The Precautionary Principle (1994).
6. D. Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 Journal of International Economic Law 277-405, at 385-396 (1998); R. G. Tarasofsky & F. Weiss, *World Trade Organization*, 8 Yearbook of International Environmental Law 582-603, at 599-602 (1997); V. Walker, *Keeping the WTO from Becoming the 'World Trans-Science Organization': Scientific Uncertainty, Science Policy and Factfinding in the Growth Hormones Dispute*, 31 Cornell International Law Journal 251-320 (1998).
7. The EC measures at stake were Council Directive 81/602/EEC, 31-7-81, *Official Journal*, No. L 222, 7-8-81, at 32; Council Directive 88/146/EEC, 7-3-88, *Official Journal*, No. L 70,16-3-88, at 16; and Council Directive 88/299/EEC, 17-3-88, *Official Journal*, No. L 128, 21-5-88, at 36 all of which were repealed and replaced by Council Directive 96/22/EC, 29-4-96, *Official Journal*, No. L 125, 23-5-96, at 3, effective as of 1-7-97.
8. The Panel found that the EC measures at stake were sanitary measures related to the trade in goods, which are subject to the GATT, and specifically the SPS Agreement. It found that the TBT Agreement was not at stake since its Article 1.5 excludes sanitary and phytosanitary measures as defined in the SPS Agreement.

sumers face from background levels of hormones. The EC contended that the measures were based on risk assessment and scientific evidence, as required by Articles 5.1 and 5.2 of the SPS Agreement and thus justifiable under the SPS Agreement in order to protect human life and health within its territory.[9]

The Panel found that the EC measures were not based on risk assessment and thus inconsistent with Article 5.1 of the SPS Agreement; that the measures consisted of arbitrary or unjustifiable distinctions in different situations, which resulted in discrimination or a disguised restriction on international trade and were inconsistent with Article 5.5 of the SPS Agreement; and that because the measures were not based on existing international standards and without justification under Article 3.3 of the SPS Agreement they were contrary to Article 3.1 of that Agreement.[10] The Appellate Body reached different conclusions on a number of points of law and modified and reversed the Panel's interpretation and findings of a number of provisions of the SPS Agreement. It, however, also concluded that the EC measures were contrary to the SPS Agreement.[11]

3. THE PRECAUTIONARY PRINCIPLE IN THE *HORMONES CASE*

The precautionary principle arose in the *Hormones case* because the EC submitted that it had become a general rule of customary international law or at least a general principle of law, which applies to the management and assessment of risk. It argued that the principle justified the measures adopted, also under Articles 5.1 and 5.2 of the SPS Agreement.[12] The United States and Canada took the view that the precautionary principle had not become part of public international law. The United States suggested that it is better characterized as an 'approach' than a 'principle.'[13] Canada "considers the 'precautionary approach' or concept as an *emerging* principle of international law, which may in the future crystallize into one of the 'general principles of law recognized by civilized nations,' within the meaning of article 38(1) of the *Statute of the International Court of Justice*."[14]

As mentioned above, the Panel had little to say about the precautionary principle, except that the principle would not override the explicit wording of Articles 5.1 and 5.2, regardless of its status in international law.[15] The Appellate

9. AB Report, para. 16.
10. Panel Reports, para. 9.1.
11. AB Report, para. 253.
12. AB Report, para16. For further information *see* Walker, *supra* note 6.
13. AB Report, para. 43.
14. AB Report, para. 60, italics in original.
15. Panel Reports, para. 8.157 (US) and para. 8.160 (Canada).

Body while reaching the same conclusion did base its findings on a somewhat broader consideration of the precautionary principle.[16]

3.1. The considerations of the Appellate Body

The Appellate Body first considered the legal status of the precautionary principle in international law.[17] It found that this status continues to be debated among academics, practitioners, regulators and judges and that some consider the principle "as having crystallized into a general principle of customary international *environmental* law" but that "whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less clear."[18] It, subsequently, mentioned that it considers it "unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question."[19] This position is justified by a statement that the precautionary principle, "at least outside the field of international environmental law, still awaits authoritative formulation"[20] and a reference, in a footnote,[21] to the case *Concerning the Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (*Gabčíkovo-Nagymaros case*), decided by the International Court of Justice (ICJ) on 25 September 1997.[22] The Appellate Body in the same footnote states that the ICJ did not identify the precautionary principle as one of the recently developed norms, which the Court determined should be taken into consideration in the field of environmental protection and that the Court did not conclude that the principle could override the obligations of the treaty at stake in that case. These considerations will be returned to below.[23]

In spite of the above, the Appellate Body found it important to note some aspects of the relationship of the precautionary principle to the SPS Agreement.[24] In this context it found the following.

1) [T]he principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of the Members set out in particular provisions of that Agreement;
2) [T]he precautionary principle indeed finds reflection in article 5.7 of the *SPS Agreement* [however, this does not imply] that there is a need to assume that Arti-

16. AB Report, paras. 120-125.
17. AB Report, para. 123.
18. AB Report, para. 123, italics in original.
19. AB Report, para. 123.
20. AB Report, para. 123.
21. AB Report, note 93, at para. 123.
22. 37 ILM 1998, at 162. For further information on the case *see Symposium: The Case Concerning Gabčíkovo-Nagymaros Project* with contributions by Ch.B. Bourne, A.E. Boyle, P. Canelas de Castro, J. Klabbers, S. Stec and G.E. Eckstein, 8 Yearbook of International Environmental Law 3-50 (1997).
23. *See infra* p. 243.
24. AB Report, para. 124.

cle 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the Preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e. more cautious) than that implied in existing international standards, guidelines and recommendations.

3) [A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life terminating, damage to human health are concerned.
4) [H]owever, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement.[25]

4. THE *HORMONES CASE* IN THE LIGHT OF THE *GABČÍKOVO-NAGYMAROS CASE* AND SUBSEQUENT DECISIONS

The ruling in the *Hormones case* raises issues regarding the legal status of the precautionary principle but that have wider implications in international law. These interrelated issues concern: 1) the Appellate Body's consideration of the decision of the ICJ in the *Gabčíkovo-Nagymaros case*; and 2) the role of authoritative formulations in international law and the relationship between different international dispute settlement forums.

4.1. The *Gabčíkovo-Nagymaros* case, a Dynamic Method of Treaty Interpretation

The Appellate Body in its ruling makes two assertions about the decision of the ICJ in *Gabčíkovo-Nagymaros case*.[26] First, it asserts that the ICJ did not identify the precautionary principle as one of the recently developed norms in the field of environmental protection that have to be taken into consideration. Secondly, it found that the ICJ did not declare that the precautionary principle overrides the treaty at stake in that case. Strictly speaking, the Appellate Body is correct on both assertions, however, some further clarifications are warranted.

The ICJ indeed in the *Gabčíkovo-Nagymaros case* did not explicitly identify the precautionary principle as a recently developed norm of international law. Nor did it, except for continuos environmental impact assessment, identify other specific norms or rules that the parties to that case have to take into account in their further negotiations. The ICJ, however, did provide insight into the nature of the norms at stake and in doing so endorsed, if not the precautionary princi-

25. AB Report, para. 124, italics in original.
26. AB Report, note 93, para. 123.

ple, the precautionary approach or concept,[27] as part of the discourse of international environmental law. [28] Relevant references are those to the need "to evaluate the environmental risks,"[29] the "awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuos basis,"[30] the need to exercise "vigilance and prevention," "on account of the irreversible character of the damage to the environment and of the limitations in the very mechanism of reparation of this type of damage"[31] and that "owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – [...] new norms and standards have been developed [...], such new norms have to be taken into consideration, and such new standards given proper weight [...]."[32]

The issue that was at stake in the *Hormones case* seems to be whether similar considerations play a role in health law as relevant to the adoption of sanitary and phytosanitary measures. It is difficult to understand that such consideration would not play a role in the body of law governing the protection of human health. The third finding[33] of the Appellate Body in relation to the precautionary principle seems to suggest that such considerations indeed do play a role in that body of law.

The precautionary principle, or concept, as I have argued elsewhere,[34] albeit for environmental law, addresses the manner in which policy makers apply science, technology and economics. The principle assumes that science does not always provide the insights needed to protect the environment, or in this case protect human health, and that undesirable effects may result if measures are taken only when science does provide such insights. Furthermore, it assumes that scarce financial resources may be allocated inefficiently if action is taken only after scientific certainty as to detrimental effects has been ascertained, particularly when alternative technologies and/or products are available. The precautionary principle thus is related directly to the manner in which risk assessment and management are to be conducted and more specifically to the role to be attributed to scientific findings in that assessment and management. If the precautionary principle, or a principle, approach or concept of similar content,

27. *See* E. Hey, *The Precautionary Principle in Environmental Law and Policy: Institutionalizing Caution*, 4 Georgetown International Environmental Law Review 303-318 (1992) on the manner in which the terms precautionary concept, principle, approach and measures may be used.
28. *See further* E. Hey, *The Watercourses Convention in the Context of the Gabčíkovo-Nagymaros case*, *in* Terry D. Gill & Wybo P. Heere (Eds.), Reflections on Principles and Practice of International Law, Essays in Honour of Leo J. Bouchez 83-95 (2000).
29. The Gabčíkovo-Nagymaros Project (Hungary *v.* Slovakia), Judgment of 25 September 1997, 1997 ICJ Rep. 7, para. 112.
30. *Id.*
31. Gabčíkovo-Nagymaros case, *id.*, para. 140.
32. *Id.*
33. *Supra* note 4.
34. Hey, *supra* note 27.

were to be found to be relevant in health law, that principle, approach or concept would be part and parcel of Articles 5.1 and 5.2 of the SPS Agreement. Such a dynamic interpretation was employed by the ICJ in the *Gabčíkovo-Nagymaros case* and subsequently by the Appellate Body in the *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp – Turtle case*).[35]

The ICJ in the *Gabčíkovo-Nagymaros case* had no reason to find that the precautionary principle or the considerations referred to above[36] override the treaty in question, as it found these considerations to be embodied in the treaty by way of the 'evolving provisions'[37] contained in that same treaty. The Court held that as a result of these provisions "the Treaty is not static, and is open to adapt to emerging norms of international law."[38] Given that the precautionary principle addresses the role of science in risk assessment and management, the topic of Articles 5.1 and 5.2 of the SPS Agreement, it would seem, that if such a principle, approach or concept plays a role in health law, it would have been proper to read it into those provisions. A position that the Appellate Body did not, but in my view should have, considered.

It is noteworthy that in the *Shrimp – Turtle case* the Appellate Body did adopt the same dynamic interpretation method as used by the ICJ in the *Gabčíkovo-Nagymaros case*.[39] In that ruling the Appellate Body held that the term 'exhaustible natural resources' in Article XX(g) "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment"[40] and that "from the perspective embodied in the preamble of the *WTO Agreement* [...] the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'."[41] Why this should be otherwise for the provisions of the SPS Agreement, if the precautionary principle, approach or concept were to part of health law, is difficult to understand.

Finally, on matter of substance, instead of interpretation method, the Order of the International Tribunal for the Law of the Sea (Tribunal) in the *Southern Bluefin Tuna Cases, request for provisional measures* (*Southern Bluefin Tuna cases, PM*) (New Zealand *v.* Japan, Australia *v.* Japan), of 27 August 1999,[42] is

35. Appellate Report United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R. For further information *see Symposium: The United States – Import Prohibition of Certain Shrimp and Shrimp Products Case* with contributions by J. Attik, D. Brack, J.L. Dunoff, H. Mann, Th.J. Schoenbaum and D. Wirth, 9 Yearbook of International Environmental Law 6-47 (1998).
36. *See* text following note 25.
37. The relevant provisions were general provisions in the treaty that required the protection of nature and water quality.
38. Gabčíkovo-Nagymaros case, *supra* note 29, para 112.
39. *See also* J.Brunnée & E. Hey, *Introduction* to the Symposium, referred to in *supra* note 35.
40. *Shrimp – Turtle Case*, *supra* note 35, para. 129.
41. *Id.*, para. 130. It must be noted that in this case the Appellate Body also found the measures to be contrary to WTO rules, as it found them to be in conflict with the chapeau of Art. XX GATT.
42. www.un.org/Depts/los/Order-tuna34.htm.

also worth mentioning. In this case the Tribunal also addressed the relationship between scientific uncertainty and appropriate regulatory measures, albeit in a case related to the use of natural resources. The Tribunal in that case considered that the parties should act with prudence and caution and motivated the provisional measures that it prescribed with reference to, among other things, scientific uncertainty regarding the measures to be taken to ensure conservation of the stock.

4.2. Authoritative Formulations and the Relationship Between International Dispute Settlement Forums

In refraining from taking a position on the status of the precautionary principle in international law, by asserting that the precautionary principle awaits authoritative formulation and then referring to the ICJ decision in the *Gabčíkovo-Nagymaros case*, is the Appellate Body taking a position in the debate on the relationship between international dispute settlement forums?[43] Is it indicating that it will refrain from interpreting, and thus, taking a position on the legal status of international rules outside the immediate realm of international trade law? If so, that position is laudable from the point of view of the need for a system of international law that is unified in substance. It, however, also raises various delicate issues so long as the relationship, or a hierarchy, among international dispute settlement forums has not been formulated and in the absence of a system of compulsory dispute settlement in general international law. In short, so long as there is no procedurally unified international system for the settlement of disputes, the desire to attain a system that is unified in substance is problematic.

In the absence of an explicit hierarchy among international dispute settlement forums, the notion of 'authoritative formulation' may acquire an arbitrary usage. In this respect it is noteworthy that in the *Southern Bluefin Tuna case, PM* the International Tribunal for the Law of the Sea did not refer to the ICJ decision in the *Gabčíkovo-Nagymaros case* when considering the importance of caution and scientific uncertainty.

In the absence of a system for compulsory dispute settlement in general international law 'authoritative formulations' by the ICJ may not be forthcoming. As result other dispute settlement forums, such as the WTO Panels and Appellate Body, and the International Tribunal for the Law of the Sea, maybe at a loss when they are called on to decide especially cases that involve the interrelationship between different functional bodies of international law. The press-

43. F. Orrego Vicuña & Ch. Pinto, *The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century*, prepared for the centennial celebration of the Hague Peace Conference, 18-19 May 1999, available from www.bz.minbuz.nl/english; L.B. Sohn, *The Future of Dispute Settlement, in* R.St.J. MacDonald & D.M. Johnston (Eds.), The Structure and Process of International Law 1121-1146, at 1131-1134 (1983).

ing nature of this problem is illustrated by the fact that the cases referred to in this essay all involve such interrelationships. Except for the *Hormones case*, where human health law and international trade law are at stake, the cases referred to involve the relationship between international environmental law and other areas of international law, such as international watercourses law, fisheries law and trade law.

The apparent deferral of the Appellate Body to the ICJ is thus on the one hand to be welcomed because it serves the substantive unity of the international legal system. On the other hand, in a horizontal system of dispute settlement, it also has its drawbacks because it makes the development of international law dependent on agreement between states to submit cases to the ICJ. A procedure that in many, if not most, cases is not compulsory,[44] as opposed to the dispute settlement procedures under the WTO Agreement and the United Nations Convention on the Law of the Sea.

5. CONCLUSIONS

The Panel or Appellate Body in the *Hormones case* should have examined whether the precautionary principle, or a similar principle or concept, plays a role in health law as related to the adoption of sanitary and phytosanitary measures. If so, it would have been appropriate to read that principle or concept into Articles 5.1 and 5.2 of the SPS Agreement. This is because these articles deal precisely with the matters that are central to the precautionary principle, risk assessment, risk management and the role of science in such assessments. The position that the precautionary principle, or a similar principle, approach or concept in health law, could, as such, not override the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement, in my view, is debatable. If such a principle, approach or concept were to exist in health law, it would be appropriate to read it into those articles.

With the growing interaction between different bodies of international law, the dynamic interpretation method used by the ICJ in the *Gabčíkovo-Nagymaros case* and later by the Appellate Body in the *Shrimp – Turtle case* may offer a viable means for international dispute forums to consider cases where such different bodies of law are relevant. Awaiting authoritative formulations from the ICJ, however, may diminish the usefulness of the dynamic interpretation method. This last point illustrates the need for giving further thought to the relationship and hierarchy among international dispute settlement forums and to the devel-

44. Note that the ICJ is also one of the dispute settlement forums to which disputes may be submitted under the United Nations Law of the Sea Convention (LOS Convention), *see* Art. 287 LOS Convention. Under the LOS Convention and other treaties the ICJ may thus function as a compulsory dispute settlement forum.

opment of a system of compulsory procedures for dispute settlement in general international law. Substantive unity of international law, while a desirable goal, will be difficult to attain if procedural unity is not also ensured.