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Research Handbook on International Environmental Law

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10 The precautionary principle

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Introduction

... This chapter gives an overview of the historical development of the precautionary principle from the preventative principle. An analysis of the various components of the principle is carried out, including the

relationships between science, economics, ethics and politics. Emphasis is given to the lack of a clear definition, or guidelines for the interpretation of the principle's components, which present a challenge to scientists and policy-makers in its application. Later in the chapter, examples are given of ways in which the precautionary principle has been and can be implemented.

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...2.3. WORLD TRADE ORGANIZATION (WTO) DISPUTE SETTLEMENT BODIES

The WTO has also been the scene of international disputes on the precautionary principle, of which two cases will be summarized here.¹³

In 1988, the EC banned the use of six hormones for growth promotion and thus also imports of meat and meat products unless the exporter could prove that these had not been treated with the banned hormones. The United States and Canada both requested the establishment of a panel under the WTO, arguing that the EC's ban on imports violated trade agreements (WTO Hormones Dispute).¹⁴

In January 1998 the WTO Appellate Body held that the EC was not entitled under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) to maintain its ban on the importation of meat from cattle treated with growth hormones.

... Although the WTO Appellate Body recognized that the precautionary principle had been incorporated into the Preamble,¹⁷ Article 3.3¹⁸ and Article 5.7¹⁹ of the SPS Agreement, it decided that the precautionary principle did not apply to the case because it could not override the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement, which provide that SPS measures must be based on risk assessment and scientific evidence (WTO Appellate Body Report, EC Measures Affecting Meat and Meat Products (Hormones), Complaint by the United States and Canada, 13 February 1998).

... The precautionary principle was once again the subject of a trade dispute when in May 2003, the United States, Canada and Argentina launched a WTO case against the EC concerning the EU authorization regime for genetically modified organisms (GMOs). The complainants asserted that the de facto moratorium applied by the EC since October 1998 on the approval of biotech products, has restricted imports of agricultural and food products and thus violated international trade agreements. The *EC – Approval and Marketing of Biotech Products Case* was addressed by the WTO dispute settlement body and, as in the *Hormones Case*, was founded on differing perceptions about what constitutes legitimate precaution versus its invocation as trade protectionism in disguise. The panel spent several years evaluating the complex topic and gathered the views of independent and highly reputable scientists from different parts of the world.

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... **Concluding remarks**

Despite much criticism around the practical application of the precautionary principle, it is clear that the debates surrounding the issue have also highlighted its value. Whereas criticism has focused on the vagueness of the principle and on the lack of clear guidance on how to implement it in the face of uncertainties and limited scientific understanding, it has also been recognized that rather than requiring a set of rules for its implementation, the application needs to be carried out on a case-by-case basis where value judgements based on moral, cultural, economic and political interests need to be weighed up.

... The GMO debate, discussed above, clearly reflects how different preferences and attitudes dictate the use of precaution. In this sense, the precautionary principle can be seen as a barometer for a society's risk aversion (a tolerance threshold of a group or society to risk) to a particular product, process or practice (Ellis and

Fitzgerald, 2004). **In the United States there has not been public worry about genetically modified food, while in Europe the same issue has stirred public fear and outcry. These societal norms, or cultural preferences, which have been reflected at national and regional levels through the establishment of institutional legal frameworks and commercial adoption of less formal technical product and safety standards, have increasingly come into conflict at the level of international trade (Kogan, 2004: 78).** From this perspective, the use of the precautionary principle as a unifying decision rule for environmental policy-making areas is problematic.

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... Notes

...13. For a detailed discussion of the precautionary principle in WTO law, see Kogan (2004: 77–123).

14. *EC Measures Concerning Meat and Meat Products (Hormones), Dispute WT/DS26 and Dispute WT/DS48*, 1996. For more information about the Hormone Dispute, see: http://www.wto.org/English/tratop_e/sps_e/sps_agreement_cbt_e/c5s3p1_e.htm (last visited on 15 March 2008).

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