

Confounding Conventional Wisdom: Political not Principled Differences in the Transatlantic Regulatory Relationship¹

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In 2008 two long-standing regulatory disputes between the United States and the European Union again hit the news. In January 2008 the deadline for the EU's compliance with the World Trade Organisation's (WTO) ruling on its procedures for approving genetically modified organisms (GMOs) expired with only partial compliance. In October 2008 the WTO ruled that the US and Canada had not violated WTO rules by continuing to apply sanctions against the EU despite it having modified its ban on hormone-treated beef. These WTO complaints seem to confirm two separate, but related conventional wisdoms about the transatlantic economic relationship: that it is highly conflictual and that many of the conflicts are rooted in profoundly different approaches to regulation.

This article argues that neither conventional wisdom is accurate. Rather, it contends that they are products of two, compounding analytical shortcomings: one methodological, one empirical. The methodological shortcoming takes the form of an implicit selection bias. WTO complaints overwhelmingly attract media, political and academic attention. They are, however, rare and extreme examples. Generalising from them to the regulatory relationship in general, therefore, is unsound. If one considers the full range of regulatory measures that impede transatlantic trade but that have not become WTO complaints, the relationship appears to be characterised by tolerance rather than conflict.

... CW1: The 'precautionary principle' versus 'sound science'

There is wide-spread acceptance that regulatory differences between the EU and US reflect fundamental differences in how the two polities approach risk. *The Economist* (1 March 2008: 69) noted, 'Anybody who dabbles in transatlantic affairs has come across one giant stereotype: Americans admire risk takers, whereas Europeans (at least in the rich, stable parts of the continent) are instinctively risk-averse, expecting the state to shield them from all sorts of dangers....' **The Atlantic Council (2002: 2) identified the 'myth' that 'Europe is inherently more prone to precaution in adopting new technologies, while the United States is less likely to respond to innovation with restrictions.'** David Levy and Peter Newell (2000: 10) and Jonathan Wiener and Michael Rogers (2002: 318) have also identified the 'conventional wisdom' that transatlantic regulatory differences are due to fundamental cultural differences concerning risk and regulation.

This fundamental difference in risk aversion has been cited to explain transatlantic regulatory differences in newspapers (see, for example, *The Economist*, 22 September 2007; *Financial Times*, 22 July 2003: 16; *The Wall Street Journal*, 23 April 2002) **and opinion-shaping magazines, such as** *Foreign Policy* (Tama 2004) and ***The National Interest* (Kogan 2004).** It has also been invoked by **US business interests keen to challenge EU regulations** (see, for example, NAM 2004; **NFTC 2003**) and environmental groups seeking to

defend them (see, for example, Amicus Coalition 2004; Greenpeace 2003, 2006). **This conventional wisdom is also echoed by European Commission officials. In 1999 then Trade Commissioner Pascal Lamy was quoted as saying, ‘In the US they believe that if no risks have been proven about a product, it should be allowed. In the EU we believe something should not be authorized if there is a chance of risk’ (cited in Charnowitz 2000: 185, fn 180).** Other Commission officials have echoed similar views in academic texts (see, for example, Abbott Confounding Conventional Wisdom 6 2003: 564-5; Christoforou 2004). **In interviews a few US government officials also pointed to such fundamental differences contributing to transatlantic regulatory disputes.⁶ The view that transatlantic regulatory disputes are rooted in fundamentally different approaches to risk is also found in some academic work (see, for example, Devereaux et al 2006: 81; Laïdi 2008: 3; Newell 2003: 61-2; Tehrani 2008: 137).**

Central to this conventional wisdom is the tension between the ‘precautionary principle,’ which is enshrined in EU law⁷ and actively promoted by the EU (European Council 2000) and ‘sound science,’ arguably defended by the US. While ‘sound science’ is supposed to be more objective and based closely on scientific risk assessment, the ‘precautionary principle’ suggests action even ‘where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection’ (Commission 2000: 7). The precautionary principle, thus, suggests an easing of the burden of proof on those seeking to restrict new products or technologies (Woolcock 2002: 9). **As caricatured in the conventional wisdom above, this difference boils down to the EU rejecting all risks and the US being unconcerned about them. The implication of this conventional wisdom is that regulatory differences between the US and EU are fundamental, and thus enduring and universal...**

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...Mutually reinforcing conventional wisdoms

These two conventional wisdoms are mutually reinforcing in two ways. First, regulatory WTO complaints – those concerning the EU’s ban on hormone-treated meat and the EU’s procedures for approving GMOs -- figure prominently in accounts depicting the EU as risk averse and the US as hostile to regulation (Atlantic Council 2002; and see, for example, Ahearn 2007; Carlarne 2007; **NFTC 2003; NAM 2004; Thompson 2003).**

(pp. 7-8)

Kogan, L. A. (2004), ‘Exporting Europe’s Protectionism,’ *The National Interest*, 77, Fall, 91-9.

NFTC (2003), ‘Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science,’ (Washington, DC: National Foreign Trade Council), May.

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