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Blame it on the WTO?: A Human Rights Critique

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Oxford University Press

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...D. The SPS and TBT Agreements

...The SPS

(p. 120)

...The dispute resolution bodies have used scientific risk assessment as the touchstone for deciding whether an SPS measure is rational, implying that scientific assessments are objective and relative unimpeachable. The *Beef Hormone* decision was heavily influenced by the relevant Codex standard, which was lower than that of the EC. However, the relevant standard had been adopted by the organization by a margin of 33-29 with seven abstentions, 175 a vote which is hardly indicative of an uncontroversial standard. The marginal nature of this vote was not taken into account by the Panel (or the Appellate Body). While that approach showed more fidelity to the words of the SPS Agreement,¹⁷⁶ it probably unduly undermined the ability of States to depart from Codex standards in the interest of promoting the right to health. In fact, this level of reliance on science raises greater problems 'in terms of cultural autonomy and democratic legitimacy'.¹⁷⁷ Scientific assessments are not value-free or culturally uniform.¹⁷⁸ Science is also often 'incomplete and uncertain'.¹⁷⁹ Nor is it stable, as scientific opinion on a matter constantly evolves.

Dr. Caroline Foster has argued that the assessment of risk must involve objective and subjective elements. While risk involves consideration of the likelihood and magnitude of an eventuality, the Panels and Appellate Body have tended to focus on likelihood, which is much easier to measure in objective technical terms (so long as there is sufficient available scientific evidence).¹⁸⁰ Yet an assessment of magnitude clearly entails subjective elements, as questions of magnitude 'will always hinge partly on value judgments by society that is to be subjected to the risk'.¹⁸¹ Therefore, in her view, the Panels should take public opinion into account in making decisions under the SPS. Such consideration would result in more transparent decision-making. Presently, Panels and Appellate Body are likely influenced by their own views of the risk at issue but they do not tend to acknowledge those views.¹⁸² **A problem with Foster's**

proposal is that consumer choice might be manipulated for protectionist ends. For example, regarding the GMO issue, it has been argued that European consumers are being brainwashed by a barrage of GMO-propaganda produced by protectionist farmers in an unholy alliance with influential NGOs.¹⁸³ However, Foster argues that evidence of the provision to the public of appropriate information could be sought, including evidence of a process of public consultation and deliberation (including processes which take account of the views of affected offshore exporters)...

179 Caroline E. Foster, 'Public Opinion and the interpretation of the World Trade Organisation Agreement on Sanitary and Phytosanitary Measures' in Joseph, Kinley, and Waincymer (eds) 309 (2009).

180 Ibid, 297-8.

181 Ibid., 298.

182 At 299, *ibid*, Foster notes that the Panel in *Biotech* seemed to believe that the risk entailed in biotech products was not great, 'a view seemingly not shared by Austria, France, German, Italy, Greece and Luxembourg.

183 Lawrence A Kogan, 'Trade protectionism: Ducking the truth about Europe's GMO policy', *International Herald Tribune* (New York), 27 November 2004.

(pp. 123-124)