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Free Trade and the Precautionary Principle

This article aims to compare the different approaches to the precautionary principle in the European Union and in the United States. Data for comparison have been taken mainly from the *Hormones case*, which was brought about by the European Communities prohibition of imports of hormone-treated meat and meat products. Both the Appellate and the Dispute Settlement Body of the World Trade Organization (“WTO”) were involved in the settlement of the dispute. The case was interesting for several questions which were raised during the dispute — answers to these questions are of cardinal importance in understanding precautionary principle. The following paragraphs seek to throw some light on the possible causes of the difference between the US and the EU viewpoints on the precautionary principle. Reliability of a common belief, according to which the EU is more cautious and caring than the US in matters related to environment and human health, is looked upon too.

1. Trade related environmental measures and precautionary principle

Environmental protection and free trade interrelations have been one of the most disputed subjects during the last decade. Different interest groups have expressed diametrically opposite viewpoints on the matter. Supporters of free trade maintain the opinion that abolishing trade restrictions and the global free trade regime strengthen the world economy and add or liberate resources, which can be used for environmental protection purposes.^{*1} It has even been argued that usually trade restrictions, established by environmental protection considerations, serve indeed only as a pretext to enforce unjustified protectionist measures. This standpoint is also supported by several developing countries, which believe that industrial countries make use of environmental regulations^{*2} in order to keep the cheap goods of developing countries off the markets.

Environmental activists claim that free trade stimulates unsustainable use of natural resources and use of technologies harmful to the environment. In addition, globally extending trade relations are instrumental in

¹ Adam Smith wrote: “the natural liberty of individuals interacting in the economic realm, each seeking their own betterment by providing goods and services to others, would lead to an affective allocation of the resources from the standpoint of society; the wants and desires of individuals would be met, if it was profitable to do so, and the annual revenue of society [...] would be raised to its highest level.” Cited from D. A. Irwin. *Against the Tide (An intellectual history of free trade)*. Princeton University Press, 1996, p. 78.

² As well as labour protection regulations (incl. work conditions for children and women).

favour of expanding economic activities of big transnational corporations into the developing countries³, where environmental standards, as a rule, are lower, or do not exist at all, and where the “polluter pays” principle is not applied.⁴ Under these circumstances environmental activists call for establishment of certain corrective instruments in the framework of the WTO — these instruments should not aim at arbitrary obstruction of trade, but at introducing environmental considerations into the trade regime.⁵

Trade related environmental measures might occur in different shapes. Countries with high environmental protection levels may attempt to apply restrictions on the imports of goods, which do not correspond to the environmental standards in force in these countries. Countries with high environmental awareness might also subsidise their exports to increase the competitive ability of their industry, overburdened by environmental protection regulations. Governments may endeavour to apply different customs tariffs to products, depending on whether the products have been manufactured taking into account environmental protection considerations, or produced polluting the environment and using natural resources in unsustainable ways.

The precautionary principle has often been used in defence of trade restrictions induced by environmental protection considerations. Different countries, international organisations, and the international community have made efforts to find adequate means to protect human health and the environment, even in conditions of scientific uncertainty, for decades already. The traditional approach has always been guided by the principle according to which risk management measures have to be applied only in such cases if danger of potential damage has been satisfactorily proven. The burden of proof has usually been laid not on the developer, but on the community, expecting that the community shall present data on the degree of hazard posed by certain activities or substances. Sufficient evidence however often becomes available only after damage has taken place. The precautionary principle introduces substantial changes into the traditional principles of risk assessment.⁶ The principle has been recognised in international law⁷ and in national legal orders⁸ as well, since the 1980s. The precautionary principle prescribes that measures to protect the environment and human health must be taken before conclusive scientific evidence on hazardous effect of certain activities or substances becomes available. The precautionary principle imposes upon developers an obligation to prove that activities carried out by them, or planned to be carried out, do not bring along substantial or irreversible harm to the environment. Hence the principle counterpoises the so-called “wait and see” principle⁹, according to which precautionary measures can be applied only in cases where scientifically grounded evidence is provided.

The intense “offensive” of the precautionary principle has to be discussed in a wider context also. Social scientist U. Beck, in his book “Risk Society”¹⁰, expressed an idea according to which a transition from industrial society — the main concern of which has been the distribution of welfare — to so-called risk society — where attention focuses on the risks (economic, in the first place) of progress — is taking place. Consequently, according to U. Beck’s conception, a transformation from distributing welfare to distributing risks — in many cases of indistinct nature — is in progress. This tendency has influenced, and shall influence in the future, political and legal systems very essentially — the centre of gravity moves from production relations of society to risks relations of society. Several political and moral values have to be taken into account in making socially sensitive decisions, under the conditions of scientific uncertainty — this has not been the case in the course of ordinary scientific and economic research and analysis.¹¹

To the above-said has to be added, indeed, that the precautionary approach does not contain in principle anything completely new.¹² Our common sense tells us, that “it is better to be afraid than to regret (better

³ So-called race to the bottom.

⁴ See G. van Calster. *International and EU Trade Law. The environmental challenge.* Cameron May, 2000, p. 10.

⁵ See E. B. Weiss. *Environment and Trade as Partners in Sustainable Development: A Commentary.* – *American Journal of International Law*, October 1992, vol. 86, Issue 4, pp. 730–732.

⁶ See S. Safrin. *Treaties in Collision. The Biosafety Protocol and the World Trade Organization Agreements.* – *American Journal of International Law*. July 2002, vol. 96, Issue 3, pp. 610–612.

⁷ One of the most widely known definitions of the precautionary principle derives from Principle 15 of the Rio Declaration — “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The Convention on Climate Changes and the Convention on Biodiversity are amongst the most widely known international conventions referring to the obligation to apply the precautionary principle. The conference of the parties of the Convention on Biodiversity, which took place on 28 January 2000, stressed the determinative role of the precautionary principle in achieving the goals (aims) of the Convention.

⁸ See N. de Sadeleer. *Environmental Principles. From Political Slogans to Legal Rules.* Oxford University Press, 2002, pp. 124–149.

⁹ D. Wirth. *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines.* – *Cornell International Law Journal*, 1994, No. 27, p. 834.

¹⁰ U. Beck. *Risk Society: Towards a new Modernity.* London Sage, 1992.

¹¹ See T. O’Riordan, J. Cameron (ed.). *Reinterpreting the Precautionary Principle.* Cameron May, 2001, p. 11.

¹² See A. Deville, R. Harding. *Applying the Precautionary Principle.* The Federation Press, 1997, pp. 18–21.

safe than sorry)” and instructs us “seven times to measure and one time to cut”. The precautionary principle has been observed in environmental law too, for a long time already, but in an *ad hoc* approach, outside any certain legislative and institutional framework.

The question of when and how the precautionary principle should be applied has given rise to extensive political and scientific discussions during which a great variety of different standpoints has emerged. The precautionary principle is presently a subject of discussions in the European Union. The European Commission has issued a Communication on the precautionary principle.¹³ The Communication points out that decision-makers at different levels are constantly faced with the dilemma of balancing the freedom and rights of individuals, industry and organisations with the need to protect the environment. The problem is complicated by the fact that often decisions have to be taken in conditions of scientific uncertainty — certain human activities, or substances used to perform the activity, may be dangerous to the environment, but there is no final proof of the essence and probability of the danger.

The experience of both the European Union and the WTO proves that the precautionary principle and principles of its application have occupied a central stance in the dispute on the interrelations of free trade and environmental protection.¹⁴ Opinions of WTO Member States on the content and legal status of the precautionary principle differ quite remarkably. EU and US trade conflicts provide clear evidence of this indeed. US and EU interests have conflicted repeatedly in several health and environmental risk management matters¹⁵ over the last few years. The fact that the United States has not officially accepted the precautionary principle and has not recognised it as a universal risk management tool has been one of the reasons for the disputes. The Supreme Court of the US has indicated clearly — in the so-called *benzene case* (*Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 1980¹⁶) — that decisions cannot be made merely on an assumptive basis and a state institution has an obligation to prove the presence of an essential hazard.¹⁷ In Europe, on the other hand, matters of scientific uncertainty are treated more and more in an “unscientific” and discretionary way, involving the public.¹⁸

2. Hormones case

2.1. Facts

The *Hormones case*¹⁹ — if looking from the angle of the precautionary principle — is undoubtedly one of the most interesting WTO cases. The case dealt with the EC regulation of imports of beef treated with growth promotion hormones. The WTO’s Dispute Settlement Body examined the complaints of the United States²⁰ and Canada²¹ against the EC prohibition of imports of meat and meat products derived from cattle to which either certain natural hormones or synthetic hormones had been administered for growth promotion purposes. The complaints were particularly related to the Council Directive 96/22/EC of 29 April 1996²² by which the above-mentioned prohibition was enacted and in which the six prohibited hormones were listed.²³ The Council Directive was based on the assumption that hormone-treated meat may be a source of essential danger to human health, and on the fact that the parties of the WTO are entitled to apply trade restriction measures to eliminate this kind of danger.²⁴ The case was of essential economic importance

¹³ Communication from the Commission on the precautionary principle, COM (2000) 1 final of 2. February 2000. Available at: http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf. (16.06.2003).

¹⁴ See E. U. Petersmann. *The GATT/WTO Dispute Settlement System. – International Law, International Organisations and Dispute Settlement*. London, 1997, p. 94.

¹⁵ Genetically Modified Organisms (“GMO”), climatic changes, concentration of hormones in food, etc.

¹⁶ Available at: <http://www.elr.info/litigation/vol10/10.20489.htm> (2.11.2002).

¹⁷ In this case the Supreme Court of the US cancelled (annulled) the regulation issued by the Occupational Safety and Health Administration reducing the permissible airborne concentration of benzene from 10 parts per million (ppm) to one ppm. The Court ruled that making standards in force more strict is justified only in case the need for such an action is supported by a body of reputable scientific thought, and if grave danger posed by the present standard is proved on the basis of best available evidence.

¹⁸ T. O’Riordan. *Europe and the US on Precaution. – Environment, May 2000, vol. 42, No. 4.*

¹⁹ WTO Appellate Body Report: EC Measures Concerning Meat and Meat Products. Document WT/DS26/R/USA (18 August 1997); WTO Appellate Body Report: EC Measures Concerning Meat and Meat Products. Document WT/DS26/AB/R; WT/DS48/AB/R (16 January 1998). Available at: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (12.10.2002).

²⁰ Complaint by the US, WT/DS26/R/USA. Available at: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (12.10.2002).

²¹ Complaint by Canada, WT/DS48/R/CAN. Available at: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (12.10.2002).

²² Available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0022&model=guichett (16.06.2003).

²³ Exceptions were provided when using hormones for therapeutic or zootechnical purposes.

²⁴ G. van Calster (Note 4), p. 241.

to the US because growth-promoting hormones are very widely used in US cattle breeding — this way the EC ban concerned almost all of the beef produced in the US.

The European Communities gave the following reasons for the applied measures. The main problems were related to three synthetic hormones — zeranol, trenbolone acetate, and melengestrol acetate. Evidence was found that these hormones, when used in large quantities, may have a carcinogenic effect and may transfer also to humans through meat. An important problem was related to accumulation of small dosages, especially in regard of those hormones occurring naturally in humans. In the United States, however, all these hormones were allowed in cattle breeding.

Use of hormones for growth promotion purposes became an issue of concern in the EC as early as in 1970. This was caused by the high concentration of the hormone diethylstilbestrol (“DES”) in veal — DES was thought to be the reason of hormonal disturbances discovered at this time on many humans.^{*25} The findings had a negative impact on the veal market throughout the EC. The Commission of the European Communities arrived at a conclusion, that there is a need to introduce control measures and these measures must be effective enough to restore completely consumers’ confidence in veal.^{*25} Thus the regulation was a requisite to guarantee effective functioning of the common market.^{*27} A comprehensive research on the effects of five growth hormones was carried out in Europe in the middle of the 1980s and it was found that three hormones of the five are harmful to human health. As regards two other hormones — zeranol and trenbolone — no essential risks to health were found.^{*28} Notwithstanding this, marketing of meat treated with all these five growth hormones (including “harmless” zeranol and trenbolone) was prohibited. The acting EC agricultural commissioner F. Andriessen explained that “scientific opinion on the case was essential, but not determinative”.^{*29}

The *Hormones case* was directly related to articles 3.1^{*30}, 3.3^{*31}, 5.1^{*32}, and 5.7^{*33} of the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”), adopted in the framework of the WTO.

It became apparent during settlement of the case that the United States, Canada, and the WTO Appellate and Dispute Settlement Bodies agreed in the following.

- The EC has acted inconsistently with article 5.1 of the SPS Agreement by maintaining sanitary measures, which are not based on risk assessment conducted in accordance with this article.
- The EC has acted inconsistently with the requirements of article 3.1 of the SPS Agreement, without justification under article 3.3 of that Agreement, by applying sanitary measures, which are not based on existing international standards, guidelines, and recommendations.
- The United States, Canada, and the Appellate Body of the WTO also expressed similar opinions regarding the EC interpretation of the precautionary principle — none of them agreed with it.

The precautionary principle was discussed in the framework of this case from two different angles. Appropriate standards of risk assessment, in connection with applying article 5 of the SPS Agreement, were amongst the main subjects of the discussions. The second level was more general and dealt with two main questions — has the precautionary principle become a norm of customary international law and how is it reflected in the SPS Agreement.^{*34}

²⁵ D. Vogel. *Trading up: Consumer and Environmental Regulation in a Global Economy*. Harvard University Press, 1995, p. 154.

²⁶ Later DES was banned in the US also.

²⁷ D. Vogel (Note 25), pp. 154–155.

²⁸ D. Vogel. *Barriers or Benefits: Regulation in Transatlantic Trade*. Washington DC: Brookings Institute Press, 1997, p. 15.

²⁹ *Ibid.*, p. 16.

³⁰ Article 3.1 states: “To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.”

³¹ Article 3.3 states: “Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.”

³² Article 5.1 states: “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

³³ Article 5.7 states: “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

³⁴ Actually there was a third angle also — proportionality of precautionary measures — but this is not a subject of the present article.

2.2. Adequate risk assessment

The United States grounded its complaint against the EC trade measures, concerning beef imports, as follows. A similar approach to like products is one of the WTO/GATT basic provisions.^{*35} The European Communities, however, treated beef of US and Canadian origin, in comparison with European similar products, differently. A different approach, however, was not justified because the research on the carcinogenic effect of hormones carried out in Europe was not based on scientific methods. The EC's basis for differentiating US beef was therefore arbitrary, violating the WTO/GATT Agreement and the SPS Agreement.^{*36}

To prove the inconsistency of risk assessment carried out in Europe, the following considerations were pointed out.

- Hormone-treated beef has been consumed for years already and no data exists of damage to human health caused by the use of this product.
- Research carried out until now has not provided persuasive proof of the risks originating from the growth hormones.
- Scientific research has not been scientific enough; many unscientific assumptions were added.
- Many other everyday foodstuffs (*e.g.* eggs) contain similar hormones and often in much larger quantities.^{*37}

The European Communities did not back down from the standpoint that the results of the scientific research carried out provide solid proof that hazards deriving from growth hormones to human health are adequately evident. Representatives of the EC found also that the “available scientific evidence”, referred to in article 5.2, includes both majority scientific views^{*38} as well as trusted minority scientific opinion, often first expressed by individual scientists.^{*39} The EC also did not agree with the way that the US, Canada and WTO Dispute Settlement Body handled risk. Representatives of the EC argued that risk has not always to be handled as harm or adverse effect. Under the SPS Agreement risk means also hazard or probability of hazardous effect — a risk evaluated to be one in a million is sufficient justification. The EC found that the concept of risk in the SPS Agreement is a qualitative, not a quantitative concept.^{*40}

2.3. The status of precautionary principle and its connection with the SPS Agreement

The second question under discussion was the status of the precautionary principle in international law and its connection with the SPS Agreement.

The European Communities took the following standpoint.^{*41} The precautionary principle has already become a general rule of customary international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof. Therefore the EC claimed that the WTO Dispute Settlement Body erred in stating that the application of the precautionary principle “would not override the explicit wording in articles 5.1 and 5.2 of the SPS Agreement, and might be in conflict with those articles”. The EC asserted that articles 5.1 and 5.2 and Annex A.4 of the SPS Agreement did not prescribe a particular type of risk assessment, but rather simply identified factors that need to be taken into account. Representatives of the EC expressed that these provisions do not prevent Member States from setting additional precautionary measures in the face of conflicting scientific information and uncertainty. As every country may define separately a necessary level of environmental protection and the precautionary principle has not been given any particular meaning in the SPS Agreement, the SPS Agreement has to be interpreted based on a common and universal precautionary principle recognized in international law.

³⁵ The question on whether those products with identical consuming characteristics but different environmental parameters are similar or different has been a source for arguments in the framework of GATT/WTO already for years.

³⁶ Office of the US Trade Representative, Press Release: Statement of Mickey Kantor. 11 January 1996. Available at: <http://www.ustr.gov/releases/1996/01/96-03.html> (27.9.2000).

³⁷ Office of the US Trade Representative, Fact Sheet, US Response to EU Beef Import Ban. July 1999. Available at: <http://www.ustr.gov/releases/1999/07/fact> (27.9.2000).

³⁸ As regards carcinogenic effects of growth hormones a majority of scientists were not sure enough.

³⁹ Report of the WTO Appellate Body: EC Measures concerning meat and meat products, para. 27. Document WT/DS26/AB/R; WT/DS48/AB/R (16 January 1998). Available at: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (12.10.2002).

⁴⁰ *Ibid.*, para. 29.

⁴¹ *Ibid.*, para. 16.

The United States expressed a viewpoint differing remarkably from that of the EC and denied the belonging of the precautionary principle to the customary international law as well as to the general principles of law.^{*42} Moreover, representatives of the US even attempted to prove that precaution cannot be handled as a legal principle at all, and it should be treated as a certain precautionary approach, which could be applied in solving environmental and health problems. At the same time the precautionary approach was said to have many forms, which may be very different in different circumstances. The United States also expressed an opinion according to which a precautionary approach has been given a special meaning under article 5.7 of the SPS Agreement — it is handled strictly as a temporary and extraordinary means. Additional basing on the precautionary principle in applying the SPS Agreement, as the European Communities insists, is therefore not justified. The articles of the SPS Agreement prescribe that trade measures have to be grounded on risk assessment carried out based on scientific methods and measures must not be applied without being based on scientific evidence, and the measures must be proportional — the United States expressed an opinion according to which the European Communities are not able to prove in which way exactly does the precautionary principle affect enforcement of these articles. The precautionary principle, which the European Communities refers to, cannot replace risk assessment and appropriate scientific proof. Thus the United States speaks in favour of principled necessity of applying precautionary measures and recognition of this in the SPS Agreement, but denies the universal character of the precautionary principle.

Representatives of Canada expressed a viewpoint according to which the precautionary principle was reflected in article 5.7 of the SPS Agreement, but this could not override articles 5.1 and 5.2 of the SPS Agreement which prescribe that trade measures must be grounded on appropriate risk assessment. Canada joined the viewpoint according to which the principle should be handled as a precautionary approach and not as a legal principle. At the same time the precautionary approach or concept was admitted to be a rapidly emerging principle of international law, which may crystallise in the future into one of the “general principles of law recognized by civilized nations”.^{*43}

The WTO Appellate Body had a good opportunity to express its point of view as regards the status of the precautionary principle in international law. Unfortunately, the opportunity was not used. The Appellate Body declined to give a direct answer and pointed at the existing uncertainty as regards the content and status of the precautionary principle:

“The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that [...] the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.”^{*44}

The Appellate Body evidenced at the same time that the “precautionary principle indeed finds reflection in article 5.7 of the *SPS Agreement*”^{*45} and that “there is no need to assume that article 5.7 exhausts the relevance of a precautionary principle”.^{*46} It appears that the main conclusion of the Appellate Body can be summarised as follows.

- The precautionary principle exists and is reflected (at least partly) in the SPS Agreement. Hence the Appellate Body does not join the opinion of the United States, according to which the precautionary principle is not a legal principle at all and has to be handled as a much more flexible and general “approach”.
- The absence of distinctness and lucidity, as regards the content of the precautionary principle, implies the need for this deficiency to be removed by the development of international law in the future.
- The status of the precautionary principle as a norm of customary international law remains unclear. The Appellate Body admits at the same time that this is a question of essential importance that should be clarified.

Thus the Appellate Body does not deny the existence of the precautionary principle and the importance of it, but delays answers to several questions of essential importance. There is nothing exceptional in the way the Appellate Body has acted — several leading international courts and tribunals have reached approximately the same results recently and have taken a cautious approach as regards the principle in question.^{*47}

⁴² *Ibid.*, para. 43.

⁴³ *Ibid.*, para. 60.

⁴⁴ *Ibid.*, para. 123.

⁴⁵ *Ibid.*, para 124.

⁴⁶ *Ibidem.*

⁴⁷ See K. Kulovesi. Cautious About Precaution: Recent Judicial Practice Concerning the Status of Precautionary Principle in International Law. – *Ympäristöjuridiikka*, 2002, No. 2, pp. 8–27.

3. Dispute between the US and the EU, possible causes

The difference of the positions of the US and the European Union in the following key questions, as regards the precautionary principle and risk assessment, can be summarised as follows.

- The United States handles precaution not as a legal principle, but rather as a principle of environmental policy, which has many different forms and implementation mechanisms. The EC finds that the precautionary principle has formed into a rule of international customary law and has clearly defined content.
- The US finds that precaution has been given a special meaning under article 5.7 of the SPS Agreement and it has to be treated as an extraordinary and temporary means. The EC finds that the precautionary principle has a general and universal essence, which cannot differ from agreement to agreement, and precautionary measures must not necessarily be extraordinary or temporary.
- The US maintains the viewpoint that trade related measures must be justified, necessary, and disturb trade as little as possible. Assessment of indispensability must be grounded on appropriate scientific risk assessment. The EC standpoint is that in the examination of the indispensability of trade related measures the precautionary principle must be taken into account. The precautionary principle is not only a risk management principle, but a risk assessment principle too.
- The EC handles risk not only as actual damage, but also as the possibility of it.
- The EC stressed that in risk assessment all available information has to be taken into account, including insufficient, incomplete, and controversial research, and minority opinions pointing out essential risks. The United States has always trusted research grounded on sound science.
- The EC has stressed the opinion, that consumers' concerns (perhaps irrational), as regards the quality of food and their health, have to be taken into account also, in addition to scientific and economic matters, when making decisions whether to apply trade related measures or not.

Hence the US deems it possible to err only towards less caution, and the EC, on the contrary, only towards greater caution. The EC stays with the approach of better safe than sorry.

The approach of the US and the WTO to the precautionary principle in the *Hormones case* has been strongly criticised by several leading environmental organisations.^{*48} Many analysts have also seen in this a confrontation of civilised and cautious Europe with risky and incautious America.^{*49} The precautionary principle thus appears to be a kind of counterweight to industrialization, globalization and Americanization.^{*50} Contrary opinions have been expressed also. Static, technophobic, and protectionist Europe attempts to confront scientific and entrepreneurial America. Hence the precautionary principle stands in the way of development of science and trade, and consequently, progress as well.^{*51} As regards application of the precautionary principle, braking of progress is considered to be the most substantial danger in scientific writings as well.^{*52}

The above-referred considerations do probably contain a great deal of truth. Nevertheless, arguments like more or less protectionist, caring, careless, scientific, *etc.* seem not to be quite appropriate wordings for a scientific approach. The statements of politicians are often not quite adequate too. Margot Wallström, European Commissioner for the Environment, has educed five possible reasons, why Europe agrees to accept the precautionary principle, but US does not.^{*53}

- The EC is committed to more international obligations, which prescribe implementation of the precautionary principle, than the US.

⁴⁸ Royal Society for the Protection of Birds. The precautionary principle, trade and the WTO. Discussion paper for the European Commission Consultation on Trade and Sustainable Development, 7 November 2000. Available at: <http://www.rspb.org.uk/search>.

⁴⁹ S. G. Richter. The US Consumer's Friend. – New York Times, 21 September 2000.

⁵⁰ J. B. Wiener, M. D. Rogers. Comparing Precaution in the US and Europe. Available at: http://www.env.duke.edu/solutions/documents/pp-eu_us_jrr_2002_03_25.pdf, p. 2. p. 2 (12.03.2003).

⁵¹ *Ibidem*.

⁵² As comment it has to be said that the wording sustainable development has been used during recent years more frequently than progress. Article 2 of the EC Treaty, in which the main objectives of the Community are defined, balanced and sustainable development has been given a priority over the concept of pure quantitative expansion.

⁵³ Speech of Margot Wallström "EU and US Approaches to Environment Policy" to the European Institute. Washington DC, 25 April 2002. Available at: <http://www.europaworld.org/week80/euandus3502.htm> (16.06.2003).

- In the European context environmental policy, in comparison with other branches of policy, has a considerably higher standing than in the US. Public polls place the environment consistently in the top five issues for European voters.
- EC consumers do not accept new products and technologies with such high enthusiasm as American consumers do.
- Americans have greater faith in the potential of technological advances and believe that this can solve most of the global problems that mankind is confronting.
- In the United States environmental matters are handled as local matters. In the European Union, on the contrary, environmental policy is one of the most important fields of common action.

Analysing the arguments presented, it becomes apparent that each of them contains a modicum of truth, but none of them is completely acceptable. The first argument, according to which Europe has committed to relevant international obligations, is not entirely correct, because the majority of international conventions enacting the precautionary principle are not enforced yet and most of these conventions define the principle itself in quite an uncertain way. The truth of the second argument is contained in the assertion that environmental matters have indeed been withdrawn from the most important priorities in the United States. Nevertheless, it is not correct to assume that if public opinion considers environmental protection important, it automatically accepts the precautionary principle, which is only one of the methods of environmental regulation. Environmental protection cannot be identified with the precautionary principle. One who stands for a high level of environmental protection does not necessarily approve the precautionary principle. The second and third arguments seem to be correct, but the present writer has insufficient data to present a final assessment on them. The fifth argument, however, is obviously false. Support for the precautionary principle should indeed be stronger in the case of environmental problems being handled as local and personal matters — precautionary principle prescribes obligatory risk management even in cases where risks are uncertain. When hazard and risk management tools concern individuals personally, they agree, as a rule, with more radical methods, than is the case with global and far off problems.

Amongst the reasons for US reluctance, regarding matters related with the precautionary principle, the present writer deems worthy of most serious consideration, the following.

I would like to place US economic interests first in priority. The US economy is more innovative than that of Europe and has given rise to several technological innovations, including innovations which are not quite safe to the environment and human health. The most intensive counteraction of the United States to the precautionary principle has been witnessed in the sectors of the economy where US economic interests are most vulnerable. Widespread use of growth hormones and genetically modified organisms in US agriculture and probable setbacks in the US energy sector (related to reduction of greenhouse gas emissions) are appropriate examples to illustrate this. From here one can derive the reason why the United States handles precaution as an approach, not as a principle. “Approach”, according to the United States, is, so to say, a softer option, because it is as if it carries within itself the idea according to which cost benefit analysis⁵⁴ and reasonable opportunities should be taken into account whilst applying precautionary measures.⁵⁵

The cultural-psychological dimension should be mentioned in second place. Authors who recall the colonisation of America and the fact that America has always been attractive to the most risk-loving Europeans⁵⁶ should be agreed with. This should be supplemented by Americans greater belief in technological advance. American culture, at the same time, has a reputation of a culture where enterprise is favoured more and indeed private freedom is estimated higher. Approaches to the precautionary principle are influenced by all these circumstances to quite a definite extent.

Differences arising from the distinctions between the political systems may play an important role also. It has been written that electoral systems in the member states of the EC are of such a character to give minor parties an opportunity to reach parliament too.⁵⁷ Amongst these minor parties are, furthermore, European Green Parties which have succeeded to join the government in several countries (Germany, Netherlands, Finland, Sweden, Denmark, *etc.*). EC experience proves that this argument is worthy of serious consideration. The mentioned countries, where the Green Parties have strong positions, have always belonged to the initiative group when establishing of new EC environmental directives is concerned.

The reasons for a more favourable attitude towards the precautionary principle can be derived from an analysis of the historical development of environmental policy of the EC. The Treaty of Rome of 1957, establishing the European Economic Community, did not contain articles regulating environmental protec-

⁵⁴ Cost benefit analysis is one of the most favorable approaches of US environmental law.

⁵⁵ D. VanderZwaag. The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces. – Journal of Environmental Law and Practice, October 1999, vol. 8, No. 3, p. 355.

⁵⁶ J. B. Wiener, M. D. Rogers (Note 50), p. 21.

⁵⁷ *Ibid.*, p. 19.

tion and did not delegate the European Communities direct environmental powers. The latter were enacted in the Treaty only in 1987. Nevertheless, many environmental directives were established in the framework of the European Communities before 1987. The competency of the European Communities in environmental matters was derived from article 2 of the Treaty of Rome which foresaw as the objective of the European Communities, in addition to economic expansion, a rapid raising of the standard of living in Member States. It is obvious that a high quality of life environment is one of the inseparable parts of the standard of living. The European Communities is not solely an economic union and the objective of the Communities is also to achieve social progress and continuous improvement of the conditions of life and work of its inhabitants. Hence economic expansion was treated not only as a quantitative, but also as a qualitative indicator.^{*58} Attention to so-called “soft values” in the EC has arisen continuously. Support of the EC for the precautionary principle appears therefore to be a logical result of previous development.

The EC position on the precautionary principle has found its expression in the above-mentioned Communication from the Commission on the precautionary principle. It has to be noted that the purpose of the Communication is not only to contribute to the formation of common understanding of the contents of the precautionary principle and principles of its application, but also “to avoid unwarranted recourse to the precautionary principle, as a disguised form of protectionism”^{*59}. The last mentioned goal was probably caused by two circumstances.

- Many countries and international institutions, as it was persuasively demonstrated in the *Hormones case*, do not share the favourable attitude of the European Communities to the precautionary principle and consider the application of the principle inappropriate. The principle is found to be too uncertain, its application unpredictable and in many cases arbitrary. Elimination of the latter deficiency is one of the goals of the Communication. The Communication obviously aims at depriving opponents of the precautionary principle of the arguments favouring effective attacks against the principle. The EC wants to prove that the principle has a definite content and its application is subject to certain rules. Amongst principles of the application of the precautionary principle it is especially stressed that “precautionary measures should be proportional, non-discriminatory and consistent”.^{*60} Thus, the principle appears not to be an arbitrary, unjustified, and expensive instrument of environmental and health risk management.
- The Communication addresses measures to avoid misuse of the precautionary principle by the Member States. The Treaty establishing the European Community delegates Member States certain opportunities to establish stricter environmental measures than those enacted in the environmental directives — that is to choose higher levels of protection of the environment. Article 95 (5) of the EC Treaty delegates a Member State such a right, if a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment on grounds of a problem specific to that Member State. The Commission has obviously reached a conclusion that Member States can — based on this article and making use of the precautionary principle — destabilise seriously the harmonisation of environmental regulations within the framework of the EC. There is a hope that this kind of danger can be avoided by reaching a unanimous understanding on the content and principles of application of the precautionary principle.

Article 174 of the Treaty establishing the European Community establishes precautionary principle as one of the main principles of EC environmental policy. EC institutions therefore have an explicit obligation to take into account the precautionary principle while taking environmental harmonisation measures. According to article 174 (1) of the EC Treaty the objectives of the Community environmental policy also include protecting human health and promoting external measures at an international level. When establishing measures which have effects outside the Community, the precautionary principle has consequently to be taken into account too. Article 6 of the EC Treaty stresses the important role of the precautionary principle in the EC too — environmental protection requirements must be integrated into the definition and implementation of all Community policies. As the precautionary principle is one of the fundamental principles of environmental law, it undoubtedly forms a part of environmental protection requirements referred to in article 6 and an obligation of integration extends to this principle also.^{*61}

The EC Treaty gives us a good example of possible effects of the precautionary principle. Article 174 of the Treaty establishes the foundations of forming an environmental policy of the Community. Amongst other foundations an obligation to take account of “available scientific and technical data” is pointed out also.

⁵⁸ See J. Jans. *European Environmental Law*. Europa Law Publishing, 2000, pp. 4–5.

⁵⁹ Communication from the Commission on the precautionary principle (Note 13).

⁶⁰ *Ibid.*, p. 4.

⁶¹ See G. Majone. *What Price Safety? The Precautionary Principle and its Policy Implications*. – *Journal of Common Market Studies*, 2002, vol. 40, No. 1, p. 94.

Without the precautionary principle this foundation of policy can be interpreted in a way that in a case if scientific data on the hazardousness of certain activities or substances are insufficient, inconclusive, or uncertain, there is no justification for control measures to be taken. The result is contrary while interpreting the foundation in connection with the precautionary principle — precautionary measures must be applied in case of insufficient, inconclusive, or uncertain evidence, referring, however, at essential danger.^{*62} The fact that such obligation is subjected to the supervision of the Court of the European Communities is important also.

The role of the Court of the European Communities in promoting the precautionary principle has to be stressed especially. The Court of the EC and the Court of First Instance have had to control the lawfulness and justification of application of precautionary principle in many cases. In its decision on the Commission's decision banning the export of beef and beef products from the United Kingdom (cases C-157/96^{*63} and C-180/96^{*64}, 5 May 1998) the Court ruled that:

“When there was such uncertainty regarding the risk to human health, the Community institutions were empowered to take protective measures without having to wait until the reality and seriousness of those risks became fully apparent.”

The Court in its decision referred to paragraph 1 of article 174 of the EC Treaty — according to which one objective of EC policy on the environment shall be to contribute to the pursuit of protecting human health, and to paragraph 2 of article 174 — according to which the policy shall aim at high level of protection, which shall be based on the precautionary principle. The Court of First Instance used similar justifications in case T-199/96 (*Laboratoires pharmaceutiques Bergaderm SA*^{*65}), which dealt also with the protection of human health. In case T-70/99 (*Order on application for interim relief in Alpharma Inc. v. Council of the EU*^{*66}) the President of the Court of First Instance ruled that: US economic interests

“[...] economic interests cannot outweigh the need to protect public health.”

This way it appears that the Court of the EC has supported the precautionary principle in a quite vigorous way.^{*67}

K. von Moltke finds that different approaches to the precautionary principle reflect the differences of governance structures in the US and Europe. The way that the US responds to uncertain risks is adapted to the disjointed character of the US government, “which requires the constant construction of a formal record at one level or in one branch of government since any decision is liable to be reviewed at another level or in another branch that functions independently. In particular, decisions based on relatively ambiguous scientific findings are liable to be questioned over and over again [...]”^{*68} This statement, at least part of it, seems to have solid foundations. The precautionary principle can be handled, first of all, as a decision-making tool and application of this instrument in differently constructed structures is inevitably different. The United States and the European models of the separation of powers may consequently bring along differences in the decision-making mechanism and arguments used in it.

One more group of arguments consists of those pointing at the particular national specialties of the American legal system. The American legal system has been claimed to be more open. In this case it is meant that environmental organisations and private citizens have wider and more effective access to justice (*e.g. via* citizen suits). These organisations and individuals may therefore attempt to enforce provisions of international environmental agreements internally.^{*69} In Europe access to justice is of a more restricted character.^{*70} Under these circumstances it is understandable that the US is much more careful in binding itself to international obligations than the EC. It is quite possible that representatives of the European Union and the United States may treat a text containing matters related to the precautionary principle in completely different

⁶² See J. Jans (Note 57), pp. 33–34.

⁶³ Available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0157 (16.06.2003).

⁶⁴ Available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0180 (16.06.2003).

⁶⁵ Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=T199%2F96&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (16.06.2003).

⁶⁶ Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=T70%2F99&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (16.06.2003).

⁶⁷ EC Court and Court of First Instance have treated the precautionary principle in a quite favourable way in several other cases too, *e.g.* case T-13/99 *R Pfizer Animal Health SA/NV v. Council of the European Union*; case C-6/99 *Association Greenpeace France and Others v. Ministère de l'Agriculture et de la Pêche and Others*; case C-473/98 *Kemikalieinspektionen v. Toolex Alpha AB*.

⁶⁸ See K. von Moltke. The Dilemma of the Precautionary Principle in International Trade. Available at: <http://www.iisd.org/pdf/precaution.pdf>.

⁶⁹ See R. Kagan. *Adversarial Legalism: The American Way of Law*. Harvard University Press, 2001, pp. 15–24.

⁷⁰ The most widespread standing standard in Europe is violation of rights, sometimes justified interest.

ways — Europeans as a rhetoric, Americans as a legal text that has to be enforced by the court.^{*71} J. Wiener and M. Rodgers stress also that the need for precautionary measures is stronger in the countries where the right for damage compensation is less effective.^{*72} The system of environmental civil liability in the US is undoubtedly the most radical in the world.^{*73} Radical schema of civil liability may give industry an additional stimulus of risk assessment and management, acting this way as a generally preventive tool. The present writer, however, shares the opinion that precautionary principle cannot be replaced by civil liability. The standpoint of commentators, who see the cause of the hesitations of the US in the lack of the proportionality principle, is interesting too. It has been said that in Europe the abuse of the precautionary principle could be avoided by the proportionality principle of precautionary measures.^{*74} As a comment it has to be added hereby that the relation between precautionary and proportionality principles is obviously one of the most important disputed subjects in the above-mentioned Communication on the precautionary principle.^{*75}

4. Conclusions

Though one case does not provide sufficient data to draw far-seeing conclusions, it appears that the European Communities and the United States have distinctly different approaches regarding the precautionary principle — analysis of the possible causes of the differences makes it possible to state that this is not merely coincidental. The reluctance of the US to apply the precautionary principle in international trade relations derives in the first place from the economic interests of the US in the spheres of the economy where new technologies are applied. The economic aspect is obviously not the only reason why the attitude of the environmental policy of the US is dubious, so far as the precautionary principle is concerned. This may have several cultural-psychological and political causes, and causes deriving from the specifics of the legal system. General development of environmental policy in the European Community, inclusion of the precautionary principle into the Treaty, and the favouring attitude of the European Court to the Principle are the factors that help to ground logically the favouring attitude of the representatives of the European Communities to the precautionary principle.

⁷¹ See J. B. Wiener, M. D. Rogers (Note 41), pp. 22–23.

⁷² *Ibid.*, p. 23.

⁷³ See E. T. James. An American Werewolf in London: Applying the Lessons of Superfund to Great Britain. – *The Yale Journal of International Law*, Summer 1994, vol. 19, No. 2, pp. 350–352.

⁷⁴ See D. Geradin. *Trade and Environment. A Comparative Study of EC and US Law*. Cambridge University Press, 1977, pp. 95–99.

⁷⁵ See Communication from the Commission on the precautionary principle. COM (2000) 1 final of 2 February 2000, pp. 18–19. The principle of proportionality in this case shows a need to take into account the following circumstances.

- The measures envisaged must make it possible to achieve the appropriate level of protection.
- Measures based on the precautionary principle must not be at the same time disproportionate to the desired level of protection and must not aim at zero risk.
- Though a total ban may not be the only solution, this opportunity has to be taken into account also.
- If it is possible to achieve the same goal with milder measures, these measures have to be given the advantage.
- If it is possible to replace the substances or products concerned by safer substances or products, it has to be done.
- In evaluating the proportionality of the action (measures to limit or eliminate risk) not only immediate and direct effects should be taken into account, but also long-term effects. This applies in particular to effects on the ecosystem.