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Essays on the Future of the World Trade Organization

Volume I

Policies and Legal Issues

Edited by

Julien Chaisse
 Tiziano Balmelli

Essays on the Future of the WTO - I
 Chaisse / Balmelli

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Volume I
Policies and Legal Issues

Edited by
JULIEN CHAISSE
TIZIANO BALMELLI

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Editors' and Authors' Profiles

Editors' Profiles

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Abstracts

Volume I **Policies and Legal Issues**

Can IBSAC emerge as a Major Bargaining Coalition at WTO Negotiations?

Debashis Chakraborty / Pritam Banerjee / Dipankar Sengupta

India, Brazil, South Africa, China (IBSAC) possess the potential to become the drivers of global economic growth in the coming period and can play a significant role at the multilateral negotiations for protecting developing country interests. IBSAC has earlier come closer to each other at the multilateral trade forum under the negotiating umbrella of developing country forum G-20 and have negotiated jointly on several occasions. Analyzing the current profile of the IBSAC countries, the paper argues that the future negotiating agenda of the four countries would be a function of their economic structure. Over the last decade, China has rapidly enhanced its global market share apart from substantially reforming its tariff schedule, while other IBSAC countries lag behind on that front. Moreover, competing trade interest may hurt IBSAC solidarity. The analysis indicates that IBSA is more likely to continue as a bargaining coalition at WTO, with South Africa remaining at periphery and China joining hands only when its interests coincide with others. In addition, given the trade structure of the countries, IBSAC's agenda at WTO is more likely to remain modest in coming future.

Les négociations agricoles à l'OMC: quel cadre multilatéral pour les agricultures mondiales?

Maxime Baudouin

Le défi des négociations agricoles est de concilier le processus de libéralisation progressive et les politiques agricoles des Membres, et de mettre en place des disciplines qui permettent un accroissement des échanges mondiaux de produits agricoles sans remettre en cause la capacité des Membres à développer une agriculture qui réponde aux besoins et attentes de leurs

populations. Mais, les positions des Membres dans le cadre des négociations agricoles dépendent également des négociations sur les produits non agricoles. Par conséquent, la conclusion d'un accord dans le domaine agricole suppose un accord dans le domaine des produits industriels, et vice-versa. Dans ces conditions, les négociations agricoles et le Cycle de Doha ont-ils une chance d'aboutir? Sans prétendre apporter une réponse à cette question, ce chapitre a pour objet de présenter l'état des négociations dans chaque pilier de l'AsA et d'analyser les principales propositions au regard des objectifs de l'AsA, à savoir établir un système de commerce équitable des produits agricoles, par l'établissement de disciplines concernant l'accès au marché et les soutiens en tenant compte de considérations non commerciales et de la situation des PED.

A Look at Services Trade: Implications of the Doha Talks Suspension and Resumption

Rafael Leal-Arcas

This chapter addresses the current World Trade Organization (WTO) negotiations on trade in services in the framework of the Doha Development Agenda. An analysis of the Sixth WTO Ministerial Conference in Hong Kong is provided. Following the suspension of the WTO multilateral trade negotiations in July 2006 – and its subsequent resumption in February 2007 – by WTO Director-General Pascal Lamy, the world trading system must now find ways and means to integrate developing countries. Failing that could be perceived as a danger to the world order. This chapter analyzes the legal and policy implications of the current Doha Round for the two main developed WTO Members, i.e., the United States and the European Community, and the most relevant developing countries of the WTO. Thoughts on alternative ways to move forward in the multilateral trading system are presented in the conclusions.

Foreign Investment Issues and WTO Law – Dealing with Fragmentation while waiting for a Multilateral Framework

Philippe Gugler / Julien Chaisse

This chapter explores the provisions affecting investment in the existing WTO obligations. Worldwide economic integration is not being achieved via expansion of international trade and foreign direct investment acting as separate channels, but rather as two interrelated phenomena that act together and reinforce one another. The previous failures to establish a multilateral framework for investment combined with the increasing volume of invest-

ment and the corollary need for regulation lead back to the existing regulation of investment within WTO. The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). The Agreement on Trade-Related Aspects of Property Rights (TRIPS) provides protection for intangible assets that form the basis of the activities of multinational corporations. WTO investment provisions are however limited in scope and lack coherence. Based on the findings, the policy lessons for future prospects are drawn notably on the GATS form a multilateral agreement on investment could adopt.

Droit de l'OMC et droit de l'investissement: regards croisés

Ioana Tudor

Le droit de l'OMC et le droit des investissements sont deux droits relativement récents, qui évoluent rapidement et sont caractérisés par une haute spécialisation et technicité. Leur structure est proche car ils reposent tous les deux sur deux piliers principaux, à savoir une base conventionnelle très dense et en progrès permanent et une jurisprudence très riche. Ils forment tous deux une partie intégrante du droit international général. De plus, les domaines du commerce et des investissements étant souvent complémentaires au niveau économique, cette contribution analyse les similitudes substantielles à ces deux droits. Sur de nombreux points, notamment sur les principes utilisés et leurs méthodes d'interprétation, les deux droits convergent et pourraient davantage s'inspirer l'un de l'autre. Une coopération plus étroite entre les deux serait non seulement enrichissante mais serait aussi utile pour éviter les possibles conflits de compétence qui pourraient surgir à l'avenir.

How to reform WTO decision-making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy

Andreas R. Ziegler / Yves Bonzon

In a context of stalled negotiations and strong public protest against the World Trade Organization (WTO), numerous reform proposals have been put forward in recent years to improve the procedures of the WTO. By analyzing the functioning of WTO decision-making, this chapter lays out a framework against which it assesses some of these reform proposals.

After explaining that these proposals are meant to enhance either the efficiency or the legitimacy of decision-making, we consider separately what

we identify as the three components of decision-making: the object, the organ and the procedural mode. We first enumerate WTO powers and define the legitimacy requirements that result from the nature of these powers, pursuant to the idea of a varying legitimacy requirement. Then we take a close look at the WTO procedural modes and the composition of its organs, and assess to what extent the features of these two components fulfill the legitimacy requirements discussed earlier. We then examine some reform proposals and their potential impact on the efficiency and the legitimacy of WTO decision-making, arguing that a balance must be struck between the two imperatives since they can sometimes collide. We conclude that the scope for reforming the WTO organs and procedural modes is limited and that combining the three components of decision-making in a manner that would fulfill legitimacy requirements may imply making some corrections on the object of decision-making; which would mean limiting WTO powers.

Protection du brevet et promotion de la santé publique: Surenchères autour des standards minimums de l'AADPIC au Sud

Samira Guennif

Au moment où l'entrée en vigueur de l'Accord sur les Droits de Propriété Intellectuelle touchant au Commerce dans les pays en développement pose débat en matière d'accès aux médicaments essentiels, depuis quelques années on assiste à la multiplication des accords de libre échange entre PED et Etats-Unis. Si l'AADPIC institue en pratique des standards minimums concernant la protection des brevets dans le monde, les ALE passés entre les PED et les Etats-Unis visent sans surprise la mise en place de standards plus élevés, d'où l'appellation d'« AADPIC plus ». Ce chapitre se propose de montrer comment, surenchérissant sur les dispositions de l'AADPIC, les ALE favorisent une protection effective et forte de la propriété intellectuelle et négligent la promotion de la santé publique au Sud. Précisément, les dispositions des ALE entendent assurer une promotion considérable des positions dominantes des multinationales en obstruant la concurrence exercée par les génériqueurs, l'effet ultime étant de menacer l'accès des populations à des médicaments plus abordables.

Les télécommunications dans le cadre de l'OMC: bilan et perspectives

Mathieu Guennec

Dans les années 1980 et 1990, Etats-Unis et Union européenne en tête, les grandes puissances commerciales ont libéralisé leur secteur des télécommunications. Lors du Cycle d'Uruguay, les pays de l'OCDE ont fait la promotion de ce modèle d'organisation des marchés. A l'issue de ces négociations

en 1995, de nombreux Membres de la nouvelle OMC ont adopté des engagements sur la libéralisation des services de télécommunications à valeur ajoutée. Immédiatement après le Cycle d'Uruguay, ont débuté des négociations sur la libéralisation des services de télécommunications de base, achevées en 1997. Depuis l'échec de Seattle en 1999, les accessions successives de nouveaux Membres ont étendu la portée de ces accords, en particulier celle de la Chine. Surtout, la décision de l'ORD en 2004, dans le cadre du différend entre les Etats-Unis et le Mexique, a consolidé le corpus normatif des télécommunications au sein de l'OMC. Dans le cadre du Cycle de Doha, il est fort peu probable que les négociations débouchent sur une refonte des règles applicables aux télécommunications. Malgré les tentatives de l'Union européenne d'exporter son nouveau modèle règlementaire adopté en 2002 afin d'adapter les règles du secteur aux mutations technologiques, il semble que les Membres de l'OMC ayant les plus grands intérêts offensifs dans le secteur des télécommunications souhaitent conclure un accord *a minima*, sur la base des règles adoptées en 1997.

**Anti-Dumping Measures in the Context of Global Competition:
Amending a Core Agreement of the WTO**

Debashis Chakraborty / KD Raju / Julien Chaisse

The purpose of the WTO Agreement on Anti-Dumping (ADA) is to ensure that the provision is used only as a contingency measure based upon merit, and not as a veiled protectionist mechanism. However, since the establishment of the WTO in 1995, the number of anti-dumping investigations initiated has increased substantially. Given the growing misuse of anti-dumping investigations, there is an urgent need to look into the modification of the procedure, and the current analysis attempts to identify the broad areas of violation of the ADA in world trade and subsequently discusses the potential provisions for future reform.

The Status of the Precautionary Principle in Public International Law

Els Reynaers Kini

The precautionary principle is an important environmental policy tool according to which scientific uncertainty does not justify regulatory inaction. It is well entrenched in international environmental law, and increasingly finds domestic applications. However, its status as a rule of customary international law (CIL) is still disputed. This is relevant since rules of CIL are binding on States independently of whether they are party to a treaty. No international adjudicating body has so far held that it has acquired a CIL

status. To be recognized as a rule of CIL, two elements must be present, a uniform State practice, and the belief that such a practice is undertaken to conform to a legal obligation. It is argued in this paper that despite there being increasing instances of States adopting the principle domestically, there is no indication yet that States in their international relations comply with the precautionary principle out of sense of legal obligation.

UNESCO, the WTO, and Trade in Cultural Products

Christopher M. Bruner

On 20 October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a treaty legitimating legal measures to protect domestic producers of “cultural” products. The Convention represents a major victory for Canada and France – its principal proponents – and a major blow to Hollywood and the United States, audiovisual products being among America’s most lucrative exports. This chapter examines the UNESCO Convention’s legal and diplomatic significance. Following a brief look at the treatment of cultural products under the WTO system, the chapter discusses UNESCO’s history, the Convention’s negotiation, and its legal and diplomatic status, concluding that it will have little (if any) legal effect on existing WTO obligations, but a significant diplomatic impact on future negotiations toward greater audiovisual liberalization – a key trade policy goal of the United States.

Volume II**The WTO Judicial System: Contributions and Challenges**

Good Faith, Fairness and Due Process in WTO Dispute Settlement Practice: Overcoming the Positivism of International Trade Law

Marion Panizzon

The WTO Appellate Body has drawn from public international principles to intensify the normative impact of good faith duties vaguely described in Articles 3.10 and 4.3 of the Dispute Settlement Understanding. The fact is noteworthy in comparison to the repeated rejection of the good faith principle in WTO substantive law of GATT, GATS and TRIPS. This chapter identifies the concretizations in WTO case law of such “procedural” good faith duties and finds that the importation of this general principle of law has both filled in the gaps of dispute settlement rules, while maintaining the

flexibility required of a Member-driven dispute settlement procedure. It will trace their evolving functions from a balancing tool to a new institutional use of triangular checks and balances controlling the exercise of authority by the Appellate Body with the Panel, as well as the use of policy space by the parties in dispute. In a second time, this chapter will decode the function of good faith compliance, a first-time judicial assertion of good faith's enforceability in WTO practice. By measuring good faith compliance according to the judicially designed standard of fairness, promptness and effectiveness, the WTO judiciary has introduced nothing less than a constitutional component of procedural fairness by which to review conduct in dispute settlement procedures, specifically the use of litigation strategies. In relating procedural good faith jurisprudence to the level of fairness, the WTO judiciary relegates to the past power-oriented, diplomacy-based structures of WTO dispute settlement.

The Universe of State Responsibility in the WTO Dispute Settlement System

Yenkong Ngangjoh Hodu

The questions “to what extent can the rules of international law be multilaterally enforced? And, what are the relevant ingredients that might lead to the conclusion that a particular act committed by individuals or entities in the territory of a WTO Member amounts to that of the Member in question?” do not have anything approaching an agreed theoretical answer. Yet a large cadre of scholars and practitioners in this area share the identification of a set of practices and empirical arguments that constitute the nucleus of the debate on the relevance of the law of State responsibility in the WTO Treaty system. The UN International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, which has been used in some respects by the WTO judicial organs, although not clinching the issue, provides some insights into this debate. Taking inspiration from the law of State responsibility and examining it in the context of some WTO case law. Part I of this paper explores when and how activities of private individuals/entities can be attributed to those of the WTO Member for the purpose of State responsibility. In the same vein, using the 2001 ILC's Articles, Part II revisits the question of *actio popularis* in the compliance regime of the WTO dispute settlement system.

**SPS Measures Adopted in Case of Insufficiency of Scientific Evidence:
Where Do We Stand after EC – Biotech Products Case?**

Lukasz Gruszczynski

This chapter analyzes the disciplines established by Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures. The analysis is based both on the text of the SPS Agreement as well as on the existing case law with special consideration given to the panel's ruling in EC – Biotech Products. The chapter criticizes the approach of the case law to the issue of applicability of Article 5.7 as it confuses the applicability with the consistency. The chapter argues that it is more appropriate to view the SPS Agreement as providing for three mutually exclusive paths of compliance (i.e. Articles 3.1, 3.3 and 5.7). On the substantive level, the chapter points out the deficiencies of panel's approach to insufficiency of scientific evidence (insufficiency as the absolute term). This chapter claims, consistently with the case law under Article 2.2, that the task of a panel under Article 5.7 should be limited to the assessment of plausibility of scientific opinions on sufficiency of scientific evidence rather than deciding which scientific view is better. The chapter also recognizes several issues that still need to be resolved under Article 5.7 (the extent of the exclusion under Article 2.2, meaning of pertinent information, applicable standard of Article 5.7, second sentence). In this context, possible interpretations are discussed.

**La convergence des critères d'examen dans le cadre du GATT et de
l'AGCS: Les notions de restrictions et de limitations quantitatives, et
l'utilisation des moyens de défense affirmatifs**

Panagiotis Delimatsis / Pauline Lièvre

En véritable équilibriste, le juge de l'OMC veille à garantir l'efficacité du droit de l'OMC, tout en respectant la souveraineté et les sensibilités nationales. Bien que décrits dans des termes plutôt vagues, les pouvoirs qui lui sont conférés lui fournissent les moyens d'accomplir cette délicate mission. Le but de ce chapitre est d'évaluer l'utilisation de ces moyens par le juge de l'OMC. Il devient ainsi possible de mesurer son degré d'interférence dans le droit des Membres, tout spécialement dans le champ réglementaire couvert par les accords GATT et AGCS. Dans la mesure où le degré d'interférence dans la sphère nationale est en tout premier lieu déterminé par la portée donnée aux obligations imposées aux Membres, ce chapitre examine de façon comparative l'interprétation de la notion de restriction quantitative dans ces deux accords (Article XI GATT et XVI AGCS). Après avoir mis en évidence un certain degré de symétrie en ce qui concerne l'interprétation de ces obligations de fond par les organes juridictionnels de l'OMC, ce chapitre examine le critère d'examen dans le cas où un moyen de défense affirmatif a

été invoqué pour justifier une dérogation d'une obligation de fond du GATT et de l'AGCS. En parallèle, il examine la manière dont le jeu procédural arrive à influencer le degré d'interférence du droit de l'OMC dans le pouvoir national de réglementer. C'est notamment sur cette problématique que la recherche d'équilibre entre la libéralisation du commerce mondial et d'autres intérêts reconnus comme légitimes apparaît avec la plus grande acuité dans le cadre de l'application des articles XX GATT et XIV AGCS.

Reforming the DSU: An Indian View

Ravindra Pratap

In the light of India's experience at the WTO dispute settlement system, the chapter discusses India's proposals to improve and clarify WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). While India's proposals correctly focus on the special and differential treatment, its proposals on systemic issues have so far not been able to optimize the opportunity. India must be true to its experience with the DSU and mindful of the dynamics of WTO decision making, generally, while negotiating improvements and clarifications of the DSU.

Repeal of the WTO Appeal Process?

Marc Lynedjian

Contrary to most other international procedural treaties, the World Trade Organization's Dispute Settlement Understanding (DSU) institutes a two-tier system. Trade disputes between WTO Members are adjudicated by panels, the decisions of which may be reviewed by the WTO appellate body. This chapter considers whether the WTO's two-tier dispute settlement system is really desirable and whether the move to a single-tier mechanism would not be preferable.

Private Parties and WTO Dispute Settlement System

Alberto Alemanno

This chapter examines the (non) role that private business operators play in the implementation of WTO Dispute Settlement Reports. More precisely, by analysing the legal status of these decisions in national and regional law, it looks at what individuals are entitled to obtain when a WTO Member ignores the results of a Dispute Settlement Body's ruling. As private business operators bear most of the economic costs of non-compliance, there is an

increasing pressure for a more direct involvement of these parties in the Dispute Settlement System mechanisms. The challenge is therefore to find a way to accommodate their interests within the current settlement system, without reducing the discretion WTO Members enjoy in the implementation of the reports. By building upon the EC case law, it is argued that allowing individuals to seek compensation of damages deriving from non-compliance by the losing Member might be a valuable solution to strike a more fair balance between the interests of the WTO actors: its Members and their private business operators.

Une injustice des sanctions de l'OMC

Henri Culot

Ce chapitre examine un problème particulier que pose, sur le plan de la justice, l'application des sanctions dans le droit de l'OMC.

Lorsque les Etats violent les règles de l'OMC, c'est généralement en imposant des mesures protectionnistes qui empêchent les biens étrangers d'être vendus sur leur territoire. Une fois la violation reconnue par l'ORD, l'Etat préjudicié peut prendre des contre-mesures sous la forme d'une augmentation des droits de douane sur les biens originaires de l'autre Etat. Les marchandises concernées par la mesure protectionniste ne sont pas les mêmes que celles visées par la sanction.

Combinées avec l'absence d'effet direct, ces règles induisent des résultats injustes. Les mesures protectionnistes sont seulement imputées aux Etats, mais elles favorisent certains producteurs (généralement appuyés par un lobby efficace) au détriment des producteurs étrangers de biens similaires. De même, les sanctions sont uniquement dirigées contre les États, mais en fait elles portent préjudice aux producteurs de certains (autres) biens choisis par l'Etat qui sanctionne. D'autres catégories d'agents économiques sont également affectées. Sans effet direct, aucun d'entre eux ne peut obtenir un dédommagement. L'absence de coordination entre la violation du droit et la sanction rend ce système injuste.

Ce problème de justice est une conséquence de l'utilisation du concept juridique de la personnalité morale, et se pose dans d'autres hypothèses où le droit considère qu'un groupe d'individus ne forme qu'une seule personne.

WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries

Adebukola A. Eleso

When the WTO came into existence formally as an institution in 1995, it was a culmination of the process to institutionalize the General Agreement on Trade and Tariffs (GATT) which had been in operation since 1947. As an institution with Membership of 151 countries to date, it was imperative on the WTO to provide a forum for Members to settle disputes arising among themselves.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO is probably one of the biggest achievements of the Uruguay Round of negotiations. It aims to provide security and predictability to the multilateral trading system. However, it is a fact that the smaller developing countries have not availed themselves of the procedure.

This chapter argues that the inadequacy and unsuitability of the existing remedies for these countries is responsible, and suggests monetary compensation as an alternative dispute settlement remedy.

The Status of the Precautionary Principle in Public International Law

Who Will Bell the Cat?

Els Reynaers Kini

- I. Introduction**
- II. The evolution of the precautionary principle**
- III. The precautionary principle in the EU and the US**
- IV. Not just customary international law yet**
- V. A contextual analysis of Customary International Law**
- VI. Concluding remarks**

*The mice looked at one another
and nobody spoke.¹*

I. Introduction

At the 1972 UN Conference on the Human Environment the ‘assimilative capacity’ of the environment was a pillar concept according to which the release of harmful substances beyond the assimilative capacity of the environment should be halted to ensure that serious or irreversible damage is not inflicted upon ecosystems.² As Singh observes the assimilative capacity principle is “based on the belief that scientific

¹ Æsop. (Sixth century B.C.) Fables. The Belling of the Cat. “I venture, therefore, to propose that a small bell be procured, and attached by a ribbon round the neck of the Cat. By this means we should always know when she was about, and could easily retire while she was in the neighbourhood. This proposal met with general applause, until an old mouse got up and said: “That is all very well, but who is to bell the Cat?” The mice looked at one another and nobody spoke.”

² Principle 6, Declaration of the United Nations Conference on the Human Environment, available at: www.unep.org.

theories are certain and adequate to provide the remedies for ecological restoration whenever pollution occurs".³ As the limits of science in the face of complex environmental challenges became apparent, the precautionary principle arose and sought to ensure that environmental regulatory policy should seek to avoid or minimize harm before it occurs, even in the face of *scientific uncertainty*.

As Jordan points out, the precautionary principle is no longer merely an *environmental* policy tool, but has been swept up by the sustainable development concept, and has entered the food production, animal welfare, human health and international trade arena as well.⁴ Alluding to the sustainable development reference contained in the preambular language of the WTO Agreement,⁵ the Director-General of the WTO, Pascal Lamy, recently proclaimed that the concept was placed "right at the heart" of the WTO's founding charter.⁶

There is a renewed interest in assessing the precise status of the precautionary principle in public international law, as trade disputes touching upon environmental and health issues increase. The question which will be addressed in this paper is whether the precautionary principle has attained the status of a rule of customary international law (CIL). The premise underlying the importance of this topic in the WTO context is linked to the fact that the WTO Agreements form part of the larger sphere of public international law,⁷ and can, hence, not be read in "clini-

³ Singh G., *Environmental Law in India*, MacMillan India Ltd., 2005, pp. 421, at p. 28.

⁴ Jordan A., *The Precautionary Principle in the European Union*, in *Reinterpreting the Precautionary Principle*, O'Riordan T., Cameron J. and Jordan A. (eds), London: Cameron May, 2001, pp. 143-162, at p. 143.

⁵ Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'), Preamble 1 ("The *Parties* to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising the standards of living, ensuring full employment (...), while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, (...)").

⁶ The Speech of the Director-General addressing the UNEP Global Ministerial Environment Forum on 5 February 2007 is available at www.wto.org.

⁷ For a comprehensive, insightful and sublime analysis, see Pauwelyn J., *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, 2003, pp. 522, at p. 25 ("With one possible exception, no academic author, WTO decision or document disputes that WTO rules are part of the wider corpus of public international law").

cal isolation”⁸ from the larger body of law. Other sources of international law can be relied upon not only for the purpose of interpreting WTO Agreements⁹ but can also serve as applicable law in the event of a dispute between Member States.¹⁰ Another important premise upon which this chapter is built is the recognition that custom is of the same hierarchical status as treaties, and, can, hence, in certain situations “overrule” treaties.¹¹

Moreover, the ongoing trade-and-environment negotiations on the relationship between specific trade obligations contained in Multilateral Environmental Agreements (MEAs) and WTO Agreements,¹² discussed by the author in another place,¹³ would not remain unaffected by an au-

⁸ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996, at p. 17.

⁹ Such as in the US-Shrimp case, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58, 6 November 1998., paras. 128-132 (where the Appellate Body interpreted the WTO term ‘exhaustible natural resources’ of GATT Art. XX(g) with reference to various MEAs, such as the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species (CITES)).

¹⁰ Pauwelyn J., *supra* note 7, at e.g. pp 29, 117 (the argument, of course, runs through the entire thesis of Prof. Pauwelyn), and at p. 465 (pointing out that unlike the ICJ Statute or UNCLOS, the DSU does not include an explicit provision on ‘applicable law’) (also reiterating its main position that public international law continues to apply to the WTO treaty *unless* the WTO treaty has contracted out of it), and at p. 466 (for extensive references on the issue of ‘applicable law’ before the WTO), and at p. 207-12 and 470-471 (discussing the WTO cases in which the panels and the Appellate Body have applied other rules of international law, *independently* of giving meaning to specific words).

¹¹ See Pauwelyn J., *supra* note 7, in particular at pp. 131-143. This chapter integrates these two key premises, without developing supportive arguments, due to space constraint.

¹² Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, para. 31(i) DMD directs as follows: “With a view to enhancing mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among the parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question; (...)”.

¹³ Reynaers E., *Multilateral Environmental Agreements and the WTO*, pp. 275-312, in *Beyond the Transition Phase of the WTO, An Indian Perspective on Emerging Issues*, Ed. D. Sengupta, D. Chakraborty and P. Banerjee, Academic Foundation, New Delhi, 2006, 683 pp.

thoritative ruling on whether the precautionary principle has become a rule of CIL, as it would send a signal that certain environmental principles can override other concerns, and bind States which are not a party to an MEA.¹⁴

Studying whether the precautionary principle has attained the status of a rule of CIL is interesting as it creates binding obligations on all States – independently of whether they have ratified a particular treaty – unless a State has persistently objected to a practice and its legal consequences.¹⁵ Hence, the new rule of CIL could overrule provisions of WTO Agreements, such as the SPS Agreement.¹⁶ Therefore, impliedly, in many a debate and scholarly paper, is the desire to “bind” those few countries which so obstinately refuse to recognize its international relevance.

¹⁴ This is true, although the scope of the negotiations is limited to the relationship between parties to both MEAs and the WTO. It is interesting to recall that the EC in its proposed approach to trade and environment in the new Doha Round suggested clarifying “the relationship between multilateral trade rules and core environmental principles, notably the precautionary principle”, which was, however, not taken up in the Doha Mandate. See: Communication from the European Communities, Preparations for the 1999 Ministerial Conference, EC Approach to Trade and Environment in the New WTO Round, WT/GC/W/194, 1 June 1999.

¹⁵ Cameron J. and Abouchar J., *The Status of the Precautionary Principle in International Law*, in *The Precautionary Principle and International Law*, Freestone D. and Hey E. (eds.), Kluwer Law International, 1996, pp. 29-52, at p. 34; From this perspective analyzing whether the precautionary principle is a “general principle of law” in the sense of Article 38(1)(c) of the ICJ Statute, being a secondary source of law, would not have this “binding” effect, and, hence, become less relevant to argue. See also: Slama J.L., *Opinio Juris in Customary International Law*, Volume 15, *Oklahoma City University Law Review*, 1990, pp. 603-656, at p. 649; Trouwborst A., *Evolution and Status of the Precautionary Principle in International Law*, Kluwer Law International, 2002, pp. 378, at p. 44; Pauwelyn J., *supra* note 7, at pp. 131-132 (explaining that this is also the reason the EC in the EC-Hormones case argued that the precautionary principle was part of customary law or “at least” a general principle of law). The case will be further discussed in Part IV.D.1.

¹⁶ See e.g. Pauwelyn J., *supra* note 7, at p. 142 (if a WTO Member, party to a dispute where the interpretation of Article 5.7 of the SPS Agreement and the precautionary principle, would – hypothetically – have established that the principle is a rule of CIL, it would then be up to the other party to establish that the SPS would not be overruled since it is *lex specialis* between the parties, failure of which would have the precautionary principle prevail. But claims would still have to be based on WTO Agreements, not the new rule of CIL, since the substantive jurisdiction of the WTO’s adjudicative bodies does not stretch beyond claims based on WTO Agreements).

Most authors, nevertheless, tend to either conclude or refute the status of the precautionary principle as a rule of CIL, without dedicating much analysis to the parameters set out by the International Court of Justice (ICJ), or studying the underlying CIL theory. This is, nevertheless, crucial as the latter necessarily influences the former. Therefore, this Chapter seeks to address this lacuna by including a detailed CIL analysis.

This Chapter is structured as follows. Part II will provide an overview of the notion and various characteristics of the precautionary principle, as can be derived from MEAs, environmental declarations (soft law), as well as the SPS Agreement. Part III then turns to reviewing the interpretation and application of the precautionary principle in the EU and the US, two key players in the trade and environment sphere, as well as frequent disputing parties in WTO cases which touch upon the precautionary principle.

In part IV, an overview is offered of the case law and dicta by the various international adjudicating bodies, including of the WTO regime, which were faced with certain aspects of the precautionary principle. Given that no such international body has ever explicitly ruled or thoroughly scrutinized whether the precautionary principle has attained the status of a rule of CIL, Part V will provide a more detailed analysis of the ICJ's case law on the characteristics of CIL rules, much in the style of a lawyer who would use the various dicta to plead a case. This part will also touch upon the moldering CIL theories, flaring academic disagreements, and its implications for the precautionary principle. Part V seeks to capture some of the main findings of this Chapter by way of concluding remarks.

Following Jarred Diamond, it may be prudent to state from the outset where one falls in the spectrum of the pro-environment camp or 'other' camp, as environmental (legal) debates tend to be controversial.¹⁷ Sharing a deep conviction that environmental concerns must be taken seriously, and that we must steer the planet to the best of our ability, while firmly believing that the corporate sector must be brought on board, becoming an environmental lawyer only seemed natural. Yet, this does not alter the conclusion of this Chapter.

¹⁷ Diamond J., *Collapse – How Societies Choose to Fail or Survive*, Penguin Books, 2005, pp. 575, at pp. 15-16.

II. The evolution of the precautionary principle

We will first turn to the origins of the precautionary principle in a more descriptive manner, before turning to its core principles more analytically. Subsequently we will touch upon its interpretation in the EU, as well as domestically in the US, which will further elucidate the different applications of the precautionary principle.

A. *The rise of the precautionary principle and its core characteristics*

The origins of the precautionary principle can be traced back to domestic environmental law adopted in the late 1960s and early 1970s in Germany (Vorsorgeprinzip)¹⁸ and Sweden,¹⁹ which required that damages to the environment must be avoided and that regulatory action must be taken, even in the absence of a full scientific understanding.²⁰ Hence, the precautionary principle distinguishes itself from other environmental “preventive” measures by the fact that it prompts regulatory action even when faced with scientific *uncertainty*.²¹ The first MEAs which explicitly referred (in their preambles) to the need for the adoption of precautionary measures are the 1985 Convention for the Protection of the Ozone Layer (Vienna Convention)²² and its 1987 Protocol on Sub-

¹⁸ Sands P., *Principles of International Environmental Law, Volume I – Frameworks, Standards and Implementation*, Manchester University Press, 1995, pp. 773, at p. 208; Percival R. V., *Who’s Afraid of the Precautionary Principle?*, Volume 23, *Pace Environmental Law Reporter*, Winter 2005-06, pp. 21-81 at p. 24; Wiener J.B., *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, Volume 27, *Ecology Law Quarterly*, 2001, pp. 1295-1371, at p. 1305; and Cameron J. and Abouchar J., *supra* note 15, at p. 31.

¹⁹ Percival R. V., *supra* note 18, at p. 24 (referring to the 1969 Swedish Environmental Protection Act).

²⁰ *Ibidem*.

²¹ See for a more extensive analysis of precautionary and preventive measures: Cameron J., *The Precautionary Principle in International Law*, in *Reinterpreting the Precautionary Principle*, O’Riordan, T., Cameron J. and Jordan A. (eds), London: Cameron May, 2001, pp. 113-142, at pp. 116-117; de Sadeleer N., *L’Emergence du Principe de Précaution*, *Journal des Tribunaux*, 2001, pp. 393-401, at p. 393; Sands P., *supra* note 18, at p. 209; Trouwborst A., *supra* note 15, at pp. 43-44.

²² The Vienna Convention for the Protection of the Ozone Layer, Preamble, para. 5 (“Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels”).

stances that Deplete the Ozone Layer.²³ Since then, the precautionary principle has been integrated in the substantive provisions of MEAs as well, such as in the recently adopted Convention on Persistent Organic Pollutants (2001),²⁴ the Cartagena Protocol (2000) to the Convention on Biological Diversity,²⁵ and the UN Framework Convention on Climate Change (1992).²⁶ That said, the explicit insertions of the precautionary principle in the substantive body of the MEAs has been the subject of intense negotiations, often resulting in ‘compromise’ language, the discussion of which go beyond the scope of this paper.²⁷ As per

²³ The Montreal Protocol on Substances that Deplete the Ozone Layer, Preamble, para. 6 (“Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it...”), and para. 8 (“Noting the precautionary measures for controlling emissions of certain chlorofluorocarbons that have already been taken at national and regional levels”).

²⁴ The Stockholm Convention on Persistent Organic Pollutants, Art. 1 (“Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants”), see further Arts. 8(7) and 8(9).

²⁵ The Cartagena Protocol on Biosafety, 2000, Art. 1 (“In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development (...”), Art. 10.6 (“Lack of scientific certainty due to insufficient relevant scientific information and knowledge (...) shall not prevent that Party from taken a decision, as appropriate, with regard to the import of the living modified organism (...”), and Art. 11.8 (“Lack of scientific certainty due to insufficient relevant scientific information and knowledge (...) shall not prevent that Party from taking a decision , as appropriate, with regard to the import of that living modified organism (...”).

²⁶ UN Framework Convention on Climate Change, Art. 3.3 (“The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.”).

²⁷ See e.g.: Gupta A., *Advance Informed Agreement: A Shared Basis for Governing Trade in Genetically Modified Organisms?*, Volume 9, *Ind.J. Global Legal Stud.* 2001, pp. 265-66; Blomquist R.F., *Ratification Resisted: Understanding America’s Response to the Convention on Biological Diversity, 1998-2002*, Volume 32 *Golden Gate University Law Review*, 2002, pp. 493-585; Adler J.H., *More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, Volume 35, *Texas International Law Journal*, 2000, pp. 173-205; Brunnée J., *The United States and International Environmental Law: Living With an Elephant*, Volume 15 No. 4, *European Journal of International Law*, 2004, pp. 617-649; Maguire S. and Ellis J., *Uncertainty, Precaution and Global*

Trouwborst's research the precautionary principle is referred to in about 50 legally binding international instruments, and about 45 non-legally binding international instruments and decisions.²⁸

There are numerous definitional variations²⁹ of the precautionary principle,³⁰ but one version that often serves as a benchmark,³¹ or is even seen as the turning point of when the precautionary principle crystallized into a rule of CIL,³² is the definition contained in Principle 15 of the 1992 Declaration of the UN Conference on Environment and Development ("Rio Declaration"), which was signed by representatives of 178 nations (including the US) and which provides:

Interdependence: Implications of the Precautionary Principle for State and Non-state Actors, in Proceedings of the 2001 Berlin Conference on the Human Dimensions of Global Environmental Change "Global Environmental Change and the Nation State", Frank Biermann, Rainer Brohm, Klaus Dingwerth, eds., Potsdam: Potsdam Institute for Climate Impact Research, 2002, pp. 256-265 (analyzing the Stockholm Convention on POPs).

²⁸ See Trouwborst A., supra note 15, Annex A and Annex B, pp. 303-347; See also for a detailed analysis (with focus on maritime law) Van Dyke J.M., *The Evolution and International Acceptance of the Precautionary Principle*, Chapter 15 in *Bringing New Law to Ocean Waters*, D.D.Caron and H.N. Schreibe (eds.), Koninklijke Brill N.V., the Netherlands, 2004, pp. 357-79.

²⁹ Wood S. G., Wood S. Q, and Wood R. A., *Whither the Precautionary Principle? An American Assessment From an Administrative Law Perspective*, Volume 54, *American Journal of Comparative Law*, 2006, pp. 581-613, at p. 589, ("Professor Sunstein, for example, indicates that there are "twenty or more" such formulations.") (hereinafter 'Wood').

³⁰ We may add that the distinction between precautionary approach and principle is a value-laden one, mainly put forward by the US, to stress its broader meaning and insinuate a non-binding character, which would otherwise be attached to a "principle". Most scholars, or for that matter States when negotiating MEAs, do not attach the same significance to the distinct terms precautionary approach and principle. For the sake of clarity the term precautionary principle will be used throughout this Chapter.

³¹ In most literature, Principle 15 of the Rio Declaration is referred to as a "weaker" version of the precautionary principle. See e.g. Wood, supra note 29, at p. 593.

³² See Cameron J., supra note 21, at p. 115, and Trouwborst A., supra note 15, at p. 268 and 276 (citing Cameron J. – "UNCED was the crystallizing moment in the development of the principle from one that was emerging as to one that is legally binding"). Contra: Priess H-J and Pitschas C., *Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva's Walls?*, Volume 24, *Fordham International Law Journal*, 2000, pp. 519-553, at p. 527 (The authors submit that the precautionary approach was a rather new concept at the time of the Rio Conference, and, therefore, must be seen "if at all, as a *starting point* for the evolution of international customary law"). (emphasis added).

“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”.³³

Stone summarized the principle succinctly by observing that the precautionary principle consists of three negatives: uncertainty does not justify inaction.³⁴ Typically, definitions of the precautionary principle do not specify *how* the precautionary regulatory policy should be,³⁵ and, hence, do not impose a positive obligation on States.³⁶ Only the domestic environmental laws reflect how the precautionary regulatory policy should be.³⁷

Several authors, including Wood,³⁸ Applegate,³⁹ and Sandin⁴⁰ have categorized the various definitions and identified core aspects of the

³³ 1992 Rio Declaration on Environment and Development, Percival R. V., *supra* note 18, at p. 25 (Percival notes how the English translation of Principle 15 refers to the “precautionary approach”, whereas the official translation on several other official languages refers to the “precautionary principle”).

³⁴ Cited in Ellis J., *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, Volume 17, *European Journal of International Law*, 2006, pp. 445-462, at p. 446; See also Applegate J. S., *The Taming of the Precautionary Principle*, Volume 27, *William and Mary Environmental Law and Policy Review*, 2002, pp. 13-78, at p. 29.

³⁵ Percival R. V., *supra* note 18, at p. 28.

³⁶ Ellis J., *supra* note 34, at p. 446.

³⁷ Percival R. V., *supra* note 18, at p. 34.

³⁸ Wood, *supra* note 29, at p. 590 (Wood actually uses a fifth criteria – whether the precautionary principle should take into account the relative capabilities of nationals to address environmental problems. This is considered less relevant in the context of this paper and, therefore, omitted).

³⁹ Applegate J. S., *supra* note 34, at pp. 17-21 (Applegate offers a detailed analysis of the various elements of the precautionary principle, which he coins as (1) the trigger element – the degree of future harm; (2) the timing element – the relationship between the hazard (trigger) and the taking of the regulatory action; (3) the regulatory response; and (4) iteration – the revisiting of scientific information and the corresponding regulatory decision and the reversal of burden of proof).

⁴⁰ Sandin P., *Dimensions of the Precautionary Principle*, 5 *Hum. & Ecological Risk Assessment* 889 (1999), quoted extensively in Percival R. V., *supra* note 18, at pp. 32-34 (Sandin identifies the following four major elements of the precautionary principle: (1) the threat dimension; (2) the uncertainty dimension; (3) the uncertainty dimension; and (4) the command dimension, i.e. whether the measures are mandatory or merely permitted).

precautionary principle: (1) the *degree of harm* required before action must be taken (e.g. serious or irreversible damage vs. reasonable grounds for concern); (2) the *evidence of harm* required to justify reliance on the precautionary principle (e.g. near certainty vs. likely or possible certainty); (3) the *type of precautionary action* that can be undertaken (e.g. cost-effective measures vs. no such requirement); and (4) whether one must revisit the regulatory measures and the evidence of harm,⁴¹ as well as whether the precautionary principle reverses the traditional burden of proof (placed on the party desirous of undertaking the harmful activity vs. on the party opposing the activity). Whereas all references to the precautionary principle would consist of differing components of the criteria mentioned above, it is still disputed whether the reversal of the burden of proof is a necessary characteristic of the precautionary principle.⁴²

The precautionary principle has been criticized for not being well-defined,⁴³ given the numerous versions of it in MEAs, international declarations, and domestic laws, and, therefore, *a fortiori* not being able to qualify as a rule of CIL. This is ill-founded, as we have just seen that some core aspects can be discerned.

B. *The precautionary principle under the SPS Agreement*

Having provided an overview of the core characteristics of the precautionary principle, it is worth turning to the version contained in the SPS Agreement. Article 2.2 provides a window for the precautionary principle by stating that: “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is *not maintained without sufficient scientific evidence, except as pro-*

⁴¹ Ibidem, at p. 20.

⁴² See e.g. Cameron J., supra note 21, at p. 120 (Cameron asserts that “[...] [c]ommon to all precautionary measures is a shifting of the burden of proof.”); Sands P., supra note 18, at p. 212 (holding that it is an “increasingly widely held view that the precautionary principle does entail the reversal of burden of proof). Contra: See e.g. Ellis J., supra note 34, at p. 459 (“I agree wholeheartedly with Julien Cazala when he states that the reversal of the burden of proof, ‘abusively associated with the principle of precaution, is more sensational than representative of reality’”).

⁴³ See overview provided in Wood, supra note 29, at pp. 589-590; Trouwborst A., supra note 15, at pp. 51-52 (arguing that many other concepts in law may also be vague and require interpretation); Applegate J. S., supra note 34, at p. 16.

vided for in paragraph 7 of Article 5”.⁴⁴ The relevant part of Article 5.7 reads as follows: “In cases where relevant scientific evidence is insufficient, a member may *provisionally* adopt sanitary or phytosanitary measures on the basis of available pertinent information (...). In such circumstances, members shall seek to obtain the *additional information* necessary for a more *objective assessment of risk* and *review* the sanitary of phytosanitary measure accordingly *within a reasonable period of time*”.⁴⁵ In a rather controversial manner the SPS Agreement posits in a binary fashion the reliance on *science* (Art. 2.2) on the one hand, and by way of exception the reliance on the *precautionary principle* (Art. 5.7) on the other. This is a flawed distinction as even the application of the precautionary principle “involves scientific argument, about risk or irreversibility”.⁴⁶ Some harsher critics even question whether the version contained in Article 5.7 is a “bona fide version of the precautionary principle” as it permits regulation only where risks have been proven.⁴⁷ Charnovitz criticizes the dual approach of the WTO Agreements, which requires sanitary measures that impede trade to be supported by science, whereas, for instance, the imposition of anti-dumping duties must not be backed by such scientific findings.⁴⁸

Interestingly, Article 5.7 does not require the regulatory measures to be based on a cost-benefit analysis, unlike the Rio Declaration.⁴⁹ Hence, inserting the version contained in the Rio Declaration into the SPS Agreement would indeed allow a Member State to regulate in the absence of “full scientific certainty”, but would impose a new requirement of the regulatory measures being based on a cost-benefit analysis. Consequentially, “contrary to the assumption of some consumer advocates, adding the precautionary principle to the SPS would not necessarily

⁴⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994) (hereinafter SPS Agreement) (emphasis added).

⁴⁵ Ibidem.

⁴⁶ Cameron J., supra note 21, at p. 142; Applegate J. S., supra note 34, at p. 52-54.

⁴⁷ Applegate J. S., supra note 34, at p. 55 (further referring and quoting Wendy Wagner who has contained the Article 5.7. version “the unprecautionary principle”).

⁴⁸ Charnovitz S., The Supervision of Health and Biosafety Regulation by World Trade Rules, Volume 13, Tulane Environmental Law Journal, 2000, pp. 271-302, at p. 301.

⁴⁹ Ibidem, at p. 294.

make it easier for governments to justify bans on hormones or GM products”.⁵⁰

III. The precautionary principle in the EU and the US

Several authors have undertaken laudable research by reviewing the incorporation of the precautionary principle in various national legislatures, ranging from Australia,⁵¹ Belgium, to Ecuador, Kenya, Romania and South Africa,⁵² as well as the application of the principle by national courts, such as by the Supreme Court of India and Pakistan, and courts in Australia,⁵³ all of which is relevant when touching upon the State practice element of a rule of CIL, which will be discussed below.⁵⁴ Due to space constraint we will focus on the interpretation and application of the precautionary principle in the EU and the US. An added purpose is to offer a new dimension and place their respective positions in the WTO and environmental fora in perspective.

A. *The explicit developments in the EU*

1. *The EC Treaty*

The Maastricht Treaty of 1992 adopted the precautionary principle as one of the main principles of European Community environmental law.⁵⁵ Article 174(2) of the EC Treaty provides that Community policy on the environment “(...) shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. (...)”.⁵⁶ Article 174(3) complements by stating that the Community, in preparing its environmental policy, shall take ac-

⁵⁰ Ibidem.

⁵¹ Barton C., *The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and As a Common Law Doctrine*, Volume 22, *Harvard Environmental Law Review*, 1998, pp. 509-558.

⁵² See e.g. Unger R., *Brandishing the Precautionary Principle Through the Alien Tort Claims Act*, Volume 9, *New York University Environmental Law Journal*, 2001, pp. 638-692, at pp. 660-664.

⁵³ Ibidem, at pp. 664-665; see also Cameron J., *supra* note 21, at p. 131; Cameron J. and Abouchar J, *supra* note 15, at pp. 46-48; and Trouwborst A., *supra* note 15.

⁵⁴ See Part V.

⁵⁵ See for history and analysis Cameron J., *supra* note 21, at pp. 125-126.

⁵⁶ See: Article 174 EC Treaty, European Union – Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, O.J., 29.12.2006, C 321 E/124 (hereinafter EC Treaty).

count of, *inter alia*, available scientific and technical data, and the potential benefits and costs of action or lack of action. However, the EC Treaty does not explain what the precautionary principle encompasses. It is, therefore, worth turning to the 2000 Communication from the Commission on the Precautionary Principle⁵⁷ ('EC's Communication'), as well as some of the findings of the European Court of Justice (ECJ) and the Court of First Instance (CFI).

2. *The Commission's Communication*

The Communication clarifies that, though, the EC Treaty refers to the precautionary principle only once in the environmental context, its scope is, *in practice*, much broader and encompasses human, animal or plant health.⁵⁸ This is in tune with the environmental integration obligation contained in Article 6 EC Treaty, and Article 95(3) EC Treaty according to which the Commissions must take a high level of protection in its proposals concerning health, safety and environmental and consumer protection,⁵⁹ and the case law of the ECJ in this regard.⁶⁰ The Communication prescribes that measures based on the precautionary principle should be, *inter alia*, proportional to the chosen level of protection, non-discriminatory, based on *cost-benefit analysis*, and subject to review in the light of new scientific data.⁶¹ The Communication acknowledges that the burden of proof may sometimes shift, particularly in the case of substances deemed *a priori* hazardous, in which case, typically, a prior approval mechanism would be adopted⁶², whereas in other cases the burden would still rest with the user, consumer, or authority to demonstrate the nature of the danger and the level of risk.⁶³ The fact that the precautionary principle is embedded in a risk assessment methodology, cost-benefit analysis, the need to reevaluate in the light of new information, and that the burden of proof is only partly

⁵⁷ Communication From the Commission on the Precautionary Principle, 2nd of February 2000, COM(2000)1.

⁵⁸ *Ibidem*, at p. 3.

⁵⁹ EC Treaty *supra* note 72, See also Scott J., *European Regulation of GMOs and the WTO*, Volume 9, *Columbia Journal of European Law*, 2003, pp. 213-239, at p. 220.

⁶⁰ See e.g. Case C-6/99, *Greenpeace v Ministère de l'Agriculture et de la Pêche and Others* (Third Parties: Novartis Seeds SA and Monsanto Europe SA), judgment of 21 March 2000; See for analysis: Cameron J., *supra* note 21, at p. 131; and de Sadeleer N., *supra* note 21, at p. 397.

⁶¹ Communication from the Commission, *supra* note 57, at pp. 5, 16-20.

⁶² Such as *vis-à-vis* drugs, pesticides or food additives.

⁶³ *Ibidem*, at pp. 21-22.

shifted, leads Applegate to observe that the Commission has adopted a “compromise version”, falling in the camp of the “tamed” versions of the principle.⁶⁴ After referring to the insertion of the precautionary principle in various MEAs and the Rio Declaration, the Communication concludes that “this principle has been progressively consolidated in international *environmental* law, and so it has become a full-fledged and *general principle of international law*”⁶⁵ – but it does not go as far as equating it with a rule of CIL.⁶⁶

3. *ECJ and CFI case law*

One of the earliest indirect applications⁶⁷ of the precautionary principle can be found in the *Danish Bees*⁶⁸ case, in which the ECJ upheld a Danish regulation even in the *absence of conclusive scientific evidence*.⁶⁹ In the 1999 *Greenpeace* case, the ECJ confirmed that the 1990 Directive on the release into the environment of GMOs respected the precautionary principle, and was, hence, not incompatible with Community law.⁷⁰ The position according to which the Community legislation on authorization, tracing and labeling of GMOs is sufficiently precautionary was

⁶⁴ Applegate J. S., *supra* note 34, at pp. 59-62 (the author argues that increasingly weaker versions of the precautionary principle are being used in MEAs, whereby the principle is being “tamed” from a tiger to a housecat).

⁶⁵ Communication from the Commission, *supra* note 57, at p. 11 (emphasis added). Article 38(1)(c) of the ICJ Statute recognizes general principles of law as a source of international law. This has been interpreted as to include, *inter alia*, the *pacta sunt servanda* principle, consistent provisions of various municipal legal systems which can be transposed in international law, often relating to the conduct of judicial proceedings, such as principles on jurisdiction, burden of proof, or the doctrine of *res judicata*. See Pauwelyn J., *supra* note 7, at pp. 125-131.

⁶⁶ Priess and Pitschas, *supra* note 32, at p. 529, see this as an acknowledgment by the Commission that the precautionary principle has *not* attained a status of CIL.

⁶⁷ Cameron J., *supra* note 21, at p. 130.

⁶⁸ Case C-67/97, Criminal Proceedings Against Ditlev Bluhme (Danish Bees), 3 December 1998, [1996] ECR II-3051; See for more detailed analysis of the Danish Bees case: Temmink H., From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection – A Case Law Analysis, in: H. Somsen (Ed.), *Yearbook of European Environmental Law*, Vol. 1, Oxford, 2000, pp. 61-102.

⁶⁹ Danish Bees case, *supra* note 68, at paras. 33-34; Cameron J., *supra* note 21, at p. 130; and Temmink, *supra* note 68, at pp. 88-89. (the Danish regulation that was challenged, based on a lack of scientific evidence, pertained to the the risk of extinction of a bee species on a particular Danish island).

⁷⁰ Case C-6/99, *supra* note 60.

restated by the ECJ in the 2005 *Codacons*⁷¹ case. Interestingly, in the *Danish Nitrites*⁷² case the ECJ has also shown its willingness to uphold a Member State's *pre-existing* national legislation which is stricter than the Community standards, based on the precautionary principle, provided it is *supported by scientific advice* of a reputed body.⁷³

In the *BSE*⁷⁴ case, the ECJ held that "[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent",⁷⁵ a passage which was repeated in subsequent cases.⁷⁶

⁷¹ Case C-132/03, *Ministero della Salute v Coordinamento delle Associazioni per la Difesa dell'Ambiente e dei Diritti degli Utenti e dei Consumatori (CODACONS)*, [2005] ECR I-4167, at 55-64. (In this case an Italian consumer organization had challenged the fact that no exemption was provided in the GMO legislation for consumables destined to infants and young children).

⁷² Case C-3/00, *Denmark v Commission of the European Communities*, [2003] ECR I-2643 (in which Denmark challenged the Community standards restricting the use of sulphites, nitrites and nitrates as food additives).

⁷³ *Ibidem* (the ECJ gave considerable consideration to the opinion of the Scientific Committee for Foodstuffs which criticized Community standards for nitrates and nitrites for not being stringent enough. No such scientific opinion was expressed for sulphites, and, hence, the ECJ did not uphold the Danish standard for sulphites).

⁷⁴ Case C-157/96, *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & excise, ex parte National Farmer's Union*, [1998] ECR I-12211. (In this case the English National Farmer's Union challenged the Commission's decision to temporarily ban the export of all bovine animals and beef from the UK to other EC Member States or third countries, based on, *inter alia*, the ground that it breaches the *proportionality principle*). See for an analysis of the proportionality principle: Ignacio Signes de Mesa, co-author in this publication; See also Priess J-H. and Pischas C., *supra* note 32, at p. 522-523.

⁷⁵ Case C-157/96, *supra* note 74, at para. 63. This passage is also quoted in the Commission's Communication, see *supra* note 57. The ECJ then moves on to refer to Article 174(2) of the EC Treaty which provides that the EC's policy is to aim at a high level of protection and is to be based in particular on the principles that *preventive action* should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies (see ground 100).

⁷⁶ See e.g. Court of First Instance, Case T-199/96 *Labs. Pharmaceutiques Bergaderm SA & JJ Goupil v Commission of the European Communities*, 16 July, 1998, grounds 66 and 67; Court of First Instance, Case T-392/02, *Solvay Pharmaceuticals BV v Council*, 21 October 2003, see paras. 120-122; Court of First Instance, Case T-177/02, *Malagutti-Vezinhet SA v Commission of the European Communities*, 10 March, 2004, at para. 54.

The Court of First Instance (CFI) seized the first opportunity to elaborate explicitly on the precautionary principle and risk regulation in two cases pertaining to the withdrawal of certain antibiotics from the list of permitted additives in animal feed.⁷⁷ In the *Alpharma*⁷⁸ case, the CFI held that “requirements linked to the protection of public health should undoubtedly be given greater weight than economic considerations”, which was reiterated in the *Pfizer*⁷⁹ case.

Along the lines of the *BSE* case, the CFI ruled in *Pfizer* that “[w]here there is *scientific uncertainty* as to the existence or extent of risks to human health, the Community institutions may, by reason of the *precautionary principle*, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent (...)”.⁸⁰ On the other hand, in the *Pfizer* case the CFI also held that “a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified (...)”.⁸¹ The ECJ echoed this reasoning in the 2003 *Monsanto* case.⁸² Heyvaert poignantly discerns a pattern in the case law of “confirmation” of discretionary power of the Community institutions, immediately followed by a “qualification” requiring sufficient scientific indications or reasonably reliable information.⁸³ The confirmation-qualification directions are in a way competing prescriptions, which makes it “impossible to predict” whether the Court will make the scales tilt in favour of the discretionary margin of the Community institutions or the requirement that Community decisions be underpinned with sufficient reliable information, making it in turn difficult to assess the impact

⁷⁷ It was feared that the antibiotic resistance would transfer to humans, making it ineffective as medicines, though, this was not yet scientifically established. See for an excellent and thorough analysis: Scott J., *supra* note 59, at pp. 220-224.

⁷⁸ Case T-70/99, *Alpharma Inc. v Council of the European Union*, 30 June 1999, [1999] ECR II-2027, para. 3. The Commission’s Communication also refers to this segment, see *supra* note 57.

⁷⁹ Case T-13/99R, *Pfizer Animal Health SA/NV v Council of the European Union*, [1999] ECR II-1961, para. 171.

⁸⁰ *Ibidem*, at p. 139.

⁸¹ *Ibidem*, at p. 143.

⁸² Case C-236/01, *Monsanto Agricoltora Italia SpA v Presidenza del Consiglio dei Ministri*, [2003], ECR I-8105, see in particular at 106.

⁸³ Heyvaert V., *Facing the Consequences of the Precautionary Principle in European Community Law*, Volume 32(2), *European Law Review*, 2006, pp. 185-206, at p. 197 (the author offers an excellent overview of the cases where EC instruments have been challenged for being “insufficient precautionary” as well as “excessively precautionary”).

of the precautionary principle on Community law.⁸⁴ This qualified approach is also reminiscent of rulings by the WTO's Appellate Body,⁸⁵ such as in the *Hormones* case, which will be discussed below.⁸⁶

Importantly, in the *Artogodan*⁸⁷ judgment, the CFI went as far as equating the precautionary principle with a "general principle of Community law". Moreover, the CFI referred to the precautionary principle as "requiring the competent authorities to *take appropriate measures* to prevent potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests".⁸⁸ Nevertheless, Heyvaert rightly draws attention to the fact that so far the "precautionary principle as a legal tool to *compel* Community institutions to take protective action has been marginal".⁸⁹

B. The implied applications in the US

To most authors familiar with US environmental law and the precautionary principle debate, such as Percival,⁹⁰ Cameron,⁹¹ Wiener,⁹² Bodansky,⁹³ and Wood,⁹⁴ there is a clear and somewhat ironical distinction

⁸⁴ Ibidem, at pp. 201-202.

⁸⁵ See also: Scott J., supra note 59, at p. 223 ("In this respect the cases are stamped very clearly with the mark of the WTO") (the author provides a very insightful analysis of the relevant conclusions by the CFI in both the Alpharma and Pfizer cases, such as the fact that the CFI considers a cost-benefit analysis a particular expression of the proportionality principle in cases concerning risk management).

⁸⁶ See at Part IV.D.1.

⁸⁷ Case T-74/00, *Artogodan GmbH v Commission of the European Communities*, [2002] ECR II-4945, para. 184.

⁸⁸ Ibidem, at 183. (emphasis added) (Though the CFI strongly endorsed the precautionary principle, it must be added that it ultimately annulled the Commission's decision to recall the anorectics pills from the market).

⁸⁹ Heyvaert, supra note 83, at p. 195.

⁹⁰ Percival R.V., supra note 18.

⁹¹ Cameron J., supra note 21.

⁹² Wiener J.B., *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, Volume 13, *Duke Journal of Comparative and International Law*, 2003, pp. 207-262 (hereinafter: *Whose Precaution After All?*); Wiener J.B. and Rogers M. D., *Comparing Precaution in the United States and Europe*, Volume 5(4) *Journal of Risk Research*, 2002, pp. 317-349.

⁹³ Bodansky D., *The Precautionary Principle in US Environmental Law*, in O'Riordan T. and Cameron J. (eds.), *Interpreting the Precautionary Principle*, pp. 203-228, London, 1994, cited in Cameron, supra note 21, at p. 127.

⁹⁴ Wood, supra note 29.

between the opposition by the US government to the precautionary principle in international environmental fora and its domestic applications given that “it is generally consistent with the thrust of most U.S. environmental laws”.⁹⁵ Wood astutely points out that “the regulatory policies embodied in the precautionary principle, but *not the terminology* itself, have played, play and will continue to play a significant role in American law”.⁹⁶

I. Case law

There certainly has not been the same court activity as witnessed in the EU, and only few cases in the mid-1970s and early 1980s have directly addressed the precautionary principle. For instance, in *Ethyl Corp. v EPA*,⁹⁷ the Court of Appeals for the District of Columbia, in 1976 endorsed the precautionary principle while assessing whether or not lead additives in gasoline should be regulated by the EPA.⁹⁸ In this landmark case, the Court, *inter alia*, held that “[w]here a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served”.⁹⁹ Similarly, in the *Reserve Mining Company* case, the US Court of Appeals for the Eight Circuit held in 1974 that it was reasonable to require abatement of the discharges “*even in the face of uncertainty* concerning their actual impact on human health”.¹⁰⁰ This trend was dampened by the US Supreme Court in the so-called *Benzene*¹⁰¹ case of 1980, in which it imposed that the Occupa-

⁹⁵ Percival R.V., supra note 18, at p. 26.

⁹⁶ Wood, supra note 29, at p. 585 (emphasis added).

⁹⁷ *Ethyl Corp. v EPA*, 541 F.2d, 10 (D.C. Cir. 1976), cited extensively in Percival R.V., supra note 18.

⁹⁸ Percival R.V., supra note 18, at pp. 57-63 (the author offers a detailed and insightful analysis of the Ethyl case).

⁹⁹ Quoted in Percival R.V., supra note 18, at p. 61.

¹⁰⁰ Percival R.V., supra note 18, at p. 56, see also pp. 52-56 (the author offers a detailed account and valuable references to this key environmental case. In this case, the discharges in a water body and its possible health effects on citizens was at stake).

¹⁰¹ *Indus. Union Dep't v Am. Petroleum Institute*, 448 U.S. 607 (1980). See also: Dresden C., *Biotechnology in the Balance of International Trade: Scientific Uncertainty and Legal Response*, Volume 12, *Currents: International Trade Law*

tion Safety and Health Administration (OSHA), while issuing standards, first undertake a risk assessment, establishing that the risk is “significant” and that the standard would “appreciable reduce” it.¹⁰² Hence, precautionary regulation was not entirely brushed aside, but conditioned upon certain “threshold findings” by the regulatory authority.¹⁰³ There have been no significant cases before the US Supreme Court since the *Benzene* case that would shed more light on the judicial interpretation of the precautionary principle, which is in sharp contrast with the developments taking place before the ECJ and CFI.

2. Policy

As per the comprehensive comparative analysis of Wiener, despite some of the few highly visible examples, such as the *Hormones* case and the *GMO* case, the US has made significant precautionary policy choices domestically.¹⁰⁴ For instance, the US has been more precautionary than the EU when addressing the mad cow disease, diesel engine exhausts, particulate air pollution and tobacco consumption.¹⁰⁵ Nevertheless, there are tenacious counter-examples, such as the regulation of chemicals, which in the US is still rarely regulated until after they have been released into the environment,¹⁰⁶ whereas the testing of new chemicals *before* they are marketed is required in the EU since the 1979 EC Directive,¹⁰⁷ and is most recently elaborated under the REACH Regulation.¹⁰⁸ In short, both the EU and the US find themselves on the high spectrum of precautionary approaches, but may differ on the risks they choose to be precautionary about.¹⁰⁹ Tickner and Raffensperger finely observe that in the US the “explicit acceptance and endorsement of the precautionary

Journal, 2003, pp. 44-53, at pp. 50-51; Wiener J.B., *Whose Precaution After All?*, supra note 92, at p. 212-213, 216.

¹⁰² See: *Percival R.V.*, supra note 18, at pp. 64-65. (Note that the OSHA is by law required to issue standards which most adequately assure, to the extent feasible, and on the basis of the best available evidence, that no employee shall suffer material impairment of health).

¹⁰³ *Ibidem*.

¹⁰⁴ Wiener J.B., *Whose Precaution After All?*, supra note 92.

¹⁰⁵ *Ibidem*, at pp. 226-229; *Percival*, supra note 18, at p. 36.

¹⁰⁶ *Percival R.V.*, supra note 18.

¹⁰⁷ Directive 79/831, cited in Cameron J., supra note 21, at p. 125.

¹⁰⁸ Regulation (EC) No. 1907/2006 on the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), which entered into force on June 1, 2007.

¹⁰⁹ Wiener J.B., *Whose Precaution After All?*, supra note 92, at pp. 229, 252-253, 257-258, 262.

principle is not likely to occur at the federal level in the foreseeable future” and that real implementation will probably take place at the state and local levels”.¹¹⁰

That said, much of the “taming” of the precautionary principle in MEAs can be traced back to an active and persistent effort by the United States.¹¹¹ This is partly explained by a certain fear of US legislators that the explicit recognition of the precautionary principle might increase tort claims by US citizens,¹¹² as well as by foreign citizens under the Alien Tort Claims act on the basis of violations of international law, including CIL, even if it occurred outside the US jurisdiction.¹¹³

IV. Not just customary international law yet

Before turning to the analysis of whether the precautionary principle could qualify as a rule¹¹⁴ of CIL, we highlight in this part the ‘close encounters’ the precautionary principle made in international courts, tribunals and panels, while expanding more on the cases handled by the WTO dispute settlement mechanism.

A. *The opportunities before the ICJ*

1. *Second Nuclear Test case (1995)*

New Zealand approached the ICJ to halt French underground testing of nuclear weapons on atolls of French Polynesia in the South Pacific, and based its submission, *inter alia*, on the ground that CIL obliged France to execute an Environmental Impact Assessment prior to the testing and that this would be in tune with the precautionary principle which is

¹¹⁰ Cited in Ellis J., *supra* note 34, at p. 449. Wood, for instance, notes how in 2005 San Francisco became the first American city to adopt an Ordinance which requires all departments of the City to implement the precautionary principle in conducting the city’s affairs. See: Wood, *supra* note 29, at p. 612.

¹¹¹ Applegate J. S., *supra* note 34, at p. 34; Shaw S. and Schwartz R., UNU-IAS Report, *Trading Precaution: The Precautionary Principle and the WTO*, 2005, pp. 18, at p. 5, available at www.ias.unu.edu; see also Brunnée J., *supra* note 27.

¹¹² See e.g. Wiener J.B., *Whose Precaution After All?*, *supra* note 92, at p. 247; Shaw S. and Schwartz S., *supra* note 111, at p. 5.

¹¹³ See comprehensive analysis: Unger R., *supra* note 52.

¹¹⁴ See Report by the International Law Association – Committee on Formation of Customary International Law (hereinafter ILA Report), 2000, pp. 66, available at www.ila-hq.org, at p. 11 (on the use of terminology – principles operate at a higher level of generality – therefore, rules encompass principles).

“widely accepted in contemporary international law”.¹¹⁵ The ICJ never ruled on the merits of the case, but three judges who *dissented* with the decision to dismiss the case,¹¹⁶ shed a favourable light on the precautionary principle. In particular Judge (Ad Hoc) Palmer was very explicit in its views while stating that “customary international law may have developed a norm of requiring environmental impact assessment where activities may have a significant effect on the environment; the norm involved in the precautionary principle has developed rapidly and may now be a *principle of customary international law relating to the environment*”.¹¹⁷

2. *Advisory Opinion (1996)*

Both the World Health Organization and the UN General Assembly submitted a request for an advisory opinion from the ICJ on the legality of the threat or use of nuclear weapons.¹¹⁸ While touching upon a set of general principles of international environmental law, Judge Weeramantry in his Dissenting Opinion also briefly refers to the precautionary principle and the ‘reversal’ of the burden of proof principle.¹¹⁹

3. *Gabcikovo-Nagymaros case (1997)*

Hungary and present Slovakia had agreed by way of treaty to jointly undertake a damming project, the Gabcikovo-Nagymaros hydrological power project.¹²⁰ Subsequently, based on a report according to which there was insufficient knowledge on the environmental impact and risks of the hydrological project, Hungary felt compelled to terminate the construction works and the treaty.¹²¹ Hungary approached the ICJ seeking a judgment against Slovakia for its unilateral continuation of the project, and based its position, *inter alia*, on the precautionary principle.¹²² The ICJ held that in the field of environmental protection “new

¹¹⁵ Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22), para. 5; see for a relevant analysis Trouwborst, *supra* note 15, at pp. 158-161.

¹¹⁶ Trouwborst, *supra* note 15, at p. 159.

¹¹⁷ Nuclear Tests (N.Z. v. Fr.) case, *supra* note 115, Dissenting Opinion Judge *Ad Hoc* Palmer, p. 412. See also for analysis Unger R., *supra* note 52, at p. 654.

¹¹⁸ Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons, ICJ Rep., 1996, p. 22. See for further analysis Cameron J., *supra* note 21, at p. 129; and Trouwborst, *supra* note 15, at pp. 161-162.

¹¹⁹ Trouwborst, *supra* note 15, at pp. 161-162.

¹²⁰ See for analysis: Trouwborst, *supra* note 15, at pp. 162-165.

¹²¹ *Ibidem*, at p. 162.

¹²² *Ibidem*.

norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past”.¹²³ Nevertheless, the ICJ failed to identify the precautionary principle as such a recently developed norm.¹²⁴ It also declined to declare that such principle could override the obligations of the treaty between the two countries, thereby implicitly holding that the precautionary principle has not yet attained the status of CIL.

Vice President Judge Weeramantry in a Separate Opinion did state that the concept of sustainable development rests on a basis of worldwide acceptance and should be regarded as “more than a mere concept, but a principle with normative value crucial to the determination of this case”, and that the precautionary principle is part of the wider legal principle of sustainable development.¹²⁵

B. *The European Court of Human Rights*

In a case before the European Court of Human Rights, local residents challenged the extension of a nuclear power plant’s operating lease.¹²⁶ Twelve of the twenty judges rejected their claim based on the ground that they had not suffered sufficient actual injury to give them standing.¹²⁷ On the other hand, eight dissenting judges criticized the majority opinion for ignoring “the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in the development of the precautionary principle”, and should have instead contributed by “reinforcing the precautionary principle”.¹²⁸

¹²³ Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25), at 78.

¹²⁴ See also Unger R., supra note 52, at p. 655; Trouwborst, supra note 15, at p. 163.

¹²⁵ Separate Opinion, Vice-President Judge Weeramantry.

¹²⁶ Balmer-Schafroth v. Switzerland, 25 Eur. H.R. Rep. 598 (Eur. Ct. H.R. 1997), cited in Unger R., supra note 52, at p. 658; and Van Dyke J.M., supra note 28, at p. 374.

¹²⁷ Van Dyke J.M., supra note 28, at p. 374; see also Sands P., Treaty, Custom and the Cross-Fertilization of International Law, Volume 1 Yale Human Rights and Development Law Journal, 1998, pp. 85-105, at p. 93.

¹²⁸ Quoted in Unger R., supra note 52, at p. 659.

C. *The aborted Southern Bluefin Tuna case before the International Tribunal for the Law of the Sea*

The *Southern Bluefin Tuna*¹²⁹ case handled by the International Tribunal for the Law of the Sea (ITLOS) has attracted considerable attention given that the *majority* of the judges endorsed the relevance of precautionary measures in protecting the Southern Bluefin Tuna from being fished beyond the quota allocated to Japan.¹³⁰ The case, however, did not move beyond the phase of the issuance of provisional measures, as it was found that ITLOS lacked jurisdiction.¹³¹

The Provisional Order held, *inter alia*, that “[although there is] *scientific uncertainty* regarding measures to be taken to conserve the stock of southern bluefin tuna and (...) although the Tribunal *cannot conclusively assess the scientific evidence* presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration”.¹³² The Order is replete with precautionary concepts, but fails to name the precautionary principle. Judge Treves in his Separate Opinion added that “the precautionary approach seems to me inherent in the very notions of provisional measures”.¹³³

Cameron also points out that this case is relevant since the concept of precaution was applied by ITLOS while interpreting the UN Convention on the Law of the Sea, which itself does not contain any reference to the precautionary principle, thereby, indicating, in his view, that it is implicitly being treated as a rule of CIL.¹³⁴

D. *WTO Jurisprudence – Trepidation by the Appellate Body and Panels*

So far, only five cases pertaining to the interpretation of the SPS Agreement were placed before the Dispute Settlement Body of the

¹²⁹ International Tribunal for the Law of the Sea (ITLOS), *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (Requests for Provisional Measures), August 27, 1999 (hereinafter Provisional Order), para. 9, Separate Opinion of Judge Treves, and para. 16 (Separate Opinion of Judge Laing); Award on Jurisdiction and Admissibility, Aug. 4, 2000, all available at www.itlos.org.

¹³⁰ See for detailed analysis Van Dyke J.M., *supra* note 28, at pp. 371-372 and Trouwborst, *supra* note 15, at pp. 169-174.

¹³¹ Van Dyke J.M., *supra* note 28, at p. 371.

¹³² ITLOS Provisional Order, *supra* note 146, at paras. 79-80.

¹³³ See for a detailed analysis Trouwborst, *supra* note 15, at pp. 169-174.

¹³⁴ Cameron J., *supra* note 21, at p. 130.

WTO. The Appellate Body issued recommendations in four cases, whereas the fifth case was only dealt with at Panel-level. It may be noted from the outset that in all five cases the plaintiff Member State “won” the case. The gist and relevant rulings will be touched upon below, while limiting the discussion to the extent it contributes to the overall assessment of whether the precautionary principle has acquired a status of CIL.¹³⁵

1. *Hormones case (1997)*

In the *EC – Measures Concerning Meat and Meat Products (Hormones)*¹³⁶ case, the US and Canada challenged the ban imposed by the EC on the import of hormone-treated beef.¹³⁷ As mentioned above, Article 5.7 does contain a version of the precautionary principle.¹³⁸ Nevertheless, the EC opted not to rely on the exception provided for in Article 5.7, given that it only allows a Member State to *provisionally* adopt an SPS measure in the absence of sufficient scientific evidence.¹³⁹ Instead, it “sought a more permanent rule”¹⁴⁰ and argued that the precautionary principle had become a “general customary rule of international law” or at least “a general principle of law”, and should be applied even beyond the corners of Article 5.7, that is, not merely on a provisional basis.¹⁴¹ The Appellate Body held that:

¹³⁵ It may be noted that the World Wildlife Fund for Nature (WWF) argued for the application of the precautionary principle in its *amicus curiae* submitted in the Shrimp-Turtle case, supra note 9; however, the Member States did not argue this aspect. See more at: Cameron J., supra note 21, at p. 136.

¹³⁶ Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS/26/AB/R, and WT/DS48/AB/R, 16 January 1998, (hereinafter *Hormones case*).

¹³⁷ *Ibidem*, at paras. 2-5.

¹³⁸ See Part II.B.

¹³⁹ See Bohanes J., *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, Volume 40, *Columbia Journal of Transnational Law*, 2002, pp. 325-389, at p. 336 (“Arguably, the European Communities chose this strategy because the ban on hormone-treated beef had been in force for too long to qualify as a provisional measure...”).

¹⁴⁰ Cameron J., supra note 21, at p. 137. The question does arise why the EC did not rely on Article 5.7 by way of an alternative plea.

¹⁴¹ *Hormones case*, supra note 136, para. 121 (capturing the EC’s basic submission). See also Bohanes J., supra note 139 (the author convincingly shows how interpreting the precautionary principle beyond Article 5.7 would require applying a different standard of review, and amending the Dispute Settlement Understanding, which seems unfeasible. Therefore, to accommodate the precautionary principle, the SPS agreement would have to be amended or creatively interpreted).

“The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. 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 Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international *environmental law*, still awaits authoritative formulation”.¹⁴²

The Appellate Body further held that although the precautionary principle is embodied in Article 5.7, it cannot be invoked outside the scope of Article 5.7 and override other provisions of the SPS Agreement, in particular the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement, requiring a risk assessment in support of a national SPS measure.¹⁴³ It concluded that the EC had violated the SPS Agreement given that it had not undertaken the necessary risk assessment in support of its ban.¹⁴⁴ It did, however, agree with the EC, that “there is no need to assume that Article 5.7 exhausts the relevance of the precautionary principle”,¹⁴⁵ thereby inserting a certain flexibility in its interpretation that can be expanded upon in future cases. It added that a Panel charged with determining whether a Member States’ SPS measure is supported by sufficient scientific evidence, 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 is concerned”.¹⁴⁶

Faced with a direct plea on the status of the precautionary principle in the *EC-Hormones* case, the Appellate Body could have, and as some authors feel, should have, interpreted whether the precautionary principle

See also Neumayer E., *Greening Trade and Investment – Environmental Protection Without Protectionism*, Earthscan Publication Ltd., 2001, pp. 228, at p. 153 (for proposal of an amendment to Article 5.7).

¹⁴² *Hormones case*, supra note 136, at para. 123 (emphasis added).

¹⁴³ *Ibidem*, at para. 125.

¹⁴⁴ *Ibidem*, at paras. 124-125.

¹⁴⁵ *Ibidem*, at para. 124.

¹⁴⁶ *Hormones case*, supra note 136, at para. 124.

is a rule of CIL.¹⁴⁷ It instead chose to note that the ICJ had failed to identify the principle as a rule of CIL in the *Gabcikovo-Nagymaros* case.¹⁴⁸

2. *Salmon case (1998)*

In the *Australia – Measures Affecting Importation of Salmon*¹⁴⁹ case, Canada challenged the ban imposed by Australia on salmon which was not pre-heated, arguably to avoid the introduction of exotic pathogens.¹⁵⁰ As in the *Hormones* case, the Appellate Body held that Australia violated the SPS Agreement since it had not supported its measure on a risk assessment.¹⁵¹ Apart from identifying the various constitutive elements of a risk assessment,¹⁵² the Appellate Body further clarified some of the dicta of the *Hormones* case by holding that “[t]his does not mean, however, that a Member cannot determine its own appropriate level of protection to be “zero risk””.¹⁵³ Cameron notes that this section of the decision “suggests that members have scope in taking precautionary measures, but how much scope remains to be seen in practice”.¹⁵⁴

Based on the *Salmon* case, Charnovitz illustrates his critique on some aspects of the SPS dispute settlement mechanism, given that it will be countries such as Australia which will have to foot the bill in case the WTO dispute settlement bodies err about the danger of alien pathogens.¹⁵⁵ From a larger perspective (but the discussion of which would go beyond the scope of this paper) many authors have questioned the capacity of the WTO dispute settlement bodies to adequately address such

¹⁴⁷ Pauwelyn J., supra note 7, at p. 482 (“In my view, the Appellate Body was obliged to make a ruling on whether this principle is, indeed, part of customary law binding on the disputing parties. (...) “Or at least *assume* that it was customary law and on that basis to examine further, whether it could possibly overrule SPS rules”. The author, then concludes that the Appellate Body was correct in concluding that the precautionary principle does not override the provisions of the SPS Agreement).

¹⁴⁸ *Hormones* case, supra note 136, at para. 123 and footnote references.

¹⁴⁹ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, AB-1998-5, WT/DS18/AB/R, 20 October 1998, (hereinafter *Salmon* case).

¹⁵⁰ *Ibidem*, at paras. 1-2.

¹⁵¹ *Ibidem*, at pt. VII (pp. 81-83).

¹⁵² *Ibidem*, at para 121, and subsequent analysis in paras. 122 – 136.

¹⁵³ *Ibidem*, at para. 125, see also para. 65.

¹⁵⁴ Cameron J., supra note 21, at p. 139.

¹⁵⁵ Charnovitz S., supra note 48, at p. 290.

science-based disputes;¹⁵⁶ the myth of science as a “neutral arbiter”;¹⁵⁷ and, indeed, the real risk that such disputes would tend to overlook domestic democratic choices in Member States.¹⁵⁸

3. *Agricultural products case (1999)*

Neither in the *Hormones* case, nor the *Salmon* case did the parties rely on Article 5.7 of the SPS Agreement, the provision containing the precautionary language. It was for the first time directly relied upon by a Member State and addressed in the *Japan – Measures Affecting Agricultural Products* case¹⁵⁹

The US challenged Japan’s phytosanitary (quarantine) measure, i.e. varietal testing requirements, pertaining to several fruit varieties and walnuts. While Japan explicitly relied on the precautionary principle, the Appellate Body reiterated its position expressed in the *Hormones* case that the principle “has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement”.¹⁶⁰ It further clarified that Article 5.7 sets out four *cumulative* requirements which must be met in order to adopt a *provisional* SPS

¹⁵⁶ See e.g. Christoforou T., Settlement of Science-based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty, Volume 8, New York Environmental Law Journal, 2000, pp. 622-647; Peel J., Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?, Jean Monnet Working paper 02/04, pp. 99; Walker V.R., Keeping the WTO From Becoming the “World-Trans-Science Organization: Scientific Uncertainty, Science Policy, and Fact-finding in the Growth Hormones Dispute, Volume 31, Cornell International Law Journal, 1998, pp. 251-320; Guzman A.T., Food Fears: Health and Safety at the WTO, Volume 45, Virginia Journal of International Law, 2004, pp. 1-39; Bohanes J., supra note 139.

¹⁵⁷ See e.g. Walker V. R., The Myth of Science as a “Neutral Arbiter” for Triggering Precautions, Volume 26, British Columbia International and Comparative Law Review, 2003, pp. 197-228; Scott D. N., Nature/Culture Clash: The Transnational Trade Dispute over GMOs, Global Law Working Paper 06/05, Hauser Global Law School Program, pp. 55, at p. 53.

¹⁵⁸ See e.g. Howse R., Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization, Volume 98, Michigan Law Review, June, 2000, pp. 2329-2357; Winickoff D., Jasanoff S., Busch L., Grove-White R., Wynne B., Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law, Volume 30, Yale Journal of International Law, 2005, pp. 81-123.

¹⁵⁹ Appellate Body Report, Japan – Measures Affecting Agricultural Products, AB-1998-8, WT/DS76/AB/R, 22 February 1999, (hereinafter *Agricultural Products case*).

¹⁶⁰ *Ibidem*, para. 81.

measure: (1) the measure must be imposed in respect of a situation where "relevant scientific information is insufficient"; (2) adopted "on the basis of available pertinent information"; (3) the Member "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and (4) "review[s] the ... measure accordingly within a reasonable period of time".¹⁶¹ The Appellate Body ruled that Japan violated the SPS Agreement by not seeking additional information and failing to review the SPS measure within a reasonable period of time.¹⁶² However, the Appellate Body did not address the larger question of the status of the precautionary principle in public international law, and its consequences for the interpretation of WTO Agreements.

4. *Apples case (2003)*

A similar case arose between the US and Japan based on Japan's quarantine and inspection requirements of apples, allegedly to eliminate the threat of contamination from a particular bacteria.¹⁶³ The Japanese measures included a complete ban on the import of apples from orchards showing any sign of the bacteria.¹⁶⁴

The Appellate Body endorsed the Panel Report in full by finding the Japanese measures to infringe the SPS Agreement. Of relevance to the present analysis is the Appellate Body's finding according to which "[t]he application of Article 5.7 is triggered *not by the existence of scientific uncertainty*, but rather by the *insufficiency of scientific evidence*. The text of Article 5.7 is clear: it refers to "cases where relevant scientific evidence is insufficient", not to "scientific uncertainty". *The two concepts are not interchangeable*. Therefore, we are unable to endorse Japan's approach of interpreting Article 5.7 through the prism of "scientific uncertainty".¹⁶⁵ The Appellate Body, thus, distinguishes the connotation of *scientific uncertainty*, so characteristic of the precautionary

¹⁶¹ Ibidem, para. 89.

¹⁶² Ibidem, paras. 90-92, and pt. VII.

¹⁶³ See Panel Report, Japan--Measures Affecting the Importation of Apples, WT/DS245/R, 15 July 2003, at para. 2.1.

¹⁶⁴ Ibidem.

¹⁶⁵ Appellate Body Report, Japan--Measures Affecting the Importation of Apples, WT/DS245/AB/R, 26 November 2003, (hereinafter Apples case), para. 184. (Furthermore, the Appellate Body gave considerable weight to the fact that there was not only a large quantity but a high quality of scientific evidence produced over the years describing the risk of transmission of the bacteria through apple fruit as negligible, and that "this is evidence in which the experts have expressed strong and increasing confidence"), para. 180.

principle, from the text of Article 5.7. This has, so far, not been further clarified.¹⁶⁶ The *Apples* case and *Varietals* case do seem to signal a trend towards “a more intensive review of the scientific evidence supporting a Member’s measures and underlying risk assessment”.¹⁶⁷

5. *Panel – GMO case (2006)*

Three main exporters of agricultural and food products containing genetically modified organisms (GMOs), i.e., the United States, Canada, and Argentina, filed complaints against the EC’s alleged general *de facto* moratorium on the approval of GMOs between 1998 and 2003, as well as some of the EC Member States’ national bans on GMOs.¹⁶⁸ The Panel circulated its Interim Report in February, 2006 and its final and long-awaited Report in September, 2006,¹⁶⁹ and found the EC to be in violation of the SPS Agreement. More precisely, it agreed with the complainants that the EC imposed moratoria, which resulted in “undue delay” in its GMO approval procedure.¹⁷⁰ Moreover, the Panel found that certain EC Member States failed to conduct risk assessments (violating Article 5.1 of the SPS Agreement), and, hence, struck down the national bans as well.¹⁷¹ Many hoped that the WTO dispute settlement mechanism would seize the opportunity to play a significant role in resolving the tension between a “sound science principle and democratic

¹⁶⁶ See Stannard C., van der Graaff N., Randell A., Lallas P., *Agricultural Biological Diversity For Food Security: Shaping International Initiatives to Help Agriculture and the Environment*, Volume 48, *Howard Law Journal*, 2004, pp. 397-430, at p. 423.

¹⁶⁷ Peel J., *Science and Risk Assessment in International Environmental Law: Learning From the WTO Experience*, Volume 98, *American Society of International Law Proceedings*, 2004, pp. 283-287, at p. 285; see also: Valley P. J., *Tensions Between the Cartagena Protocol and the WTO: The Significance of Recent WTO Developments in the Ongoing Debate*, Volume 5, *Chicago Journal of International Law*, 2004, pp. 369-378, at p. 375; Dresden C., *supra* note 101.

¹⁶⁸ On August 8, 2003, the US, Canada and Argentina requested the establishment of a Panel. See respectively: *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23, WT/DS292/17, and WT/DS293/17.

¹⁶⁹ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293, 29 September 2006 (hereinafter *GMO case*)

¹⁷⁰ *Infringing Article 8 and Annex C of the SPS Agreement*. See for an excellent analysis: Cho S., *ASIL Insight*, *The WTO Panel on the EC-Biotech Dispute Releases Its Final Report*, October 26, 2006, Volume 10, Issue 28, available at www.asil.org.

¹⁷¹ *Ibidem*.

self-determination”,¹⁷² that it would become a landmark case, and perhaps even rule on the status of the precautionary principle. To those, the Panel Report would certainly be an anti-climax. We now turn to the relevant parts for the analysis of the precautionary principle.

The EC argued that the precautionary principle “has by now become a fully-fledged and general principle of international law”.¹⁷³ It further referred to the fact that the principle found reflection in the Rio Declaration, the Climate Change Convention and the Convention on Biological Diversity and that “in the specific field of GMOs, the Biosafety Protocol has confirmed the key function of the precautionary principle in the decision to restrict or prohibit imports of GMOs in the face of scientific uncertainty”.¹⁷⁴

Though *not explicitly argued by the EC*, the US submitted that the precautionary principle had not acquired the status of a rule of CIL, since it did neither constitute a general, consistent, extensive, virtually uniform practice of States, nor was it followed by them from a sense of legal obligation.¹⁷⁵ It is, indeed, interesting to note that the EC opted not to base its arguments on the ‘precautionary principle’ *strictu sensu*, nor that it had acquired the status of CIL, but instead interwove its submissions with terminologies referring to ‘precaution’ and ‘prudence’, and references to the Cartagena Protocol.¹⁷⁶

The Panel held that while interpreting the relevant WTO Agreements it was not required to take into account other rules of international law which are not applicable to one of the Parties to this dispute.¹⁷⁷ In casu,

¹⁷² See e.g. Winickoff D., Jasanoff S., Busch L., Grove-White R., Wynne B., supra note 158, at p. 85 (note how the authors further argue the importance of public contributions to the GMO risk assessment in Europe, which they contrast with the lack of public participation in the US. In particular at pp. 100-104); Contra: Scott J., European Regulation of GMOs: Thinking About ‘Judicial Review’ in the WTO, Jean Monnet Working Paper, 04/04, pp. 29 (Scott argues that the role for public opinion in the GMO Food and Feed authorization process is small. In particular at pp. 3, 21-22).

¹⁷³ Panel Report, GMO case, supra note 169, at paras. 4.523 and 7.78.

¹⁷⁴ Ibidem, at paras. 4.524 and 7.78.

¹⁷⁵ Ibidem, at paras. 4.542 and 7.82.

¹⁷⁶ See Scott D. N., supra note 157, at p. 45 (the author offers an excellent overview of the various submissions made the parties in the GMO case).

¹⁷⁷ Panel Report, GMO case, supra note 169, at para. 7.71.

it noted that the US was neither party to the CBD,¹⁷⁸ nor party to the Cartagena Protocol.¹⁷⁹

It quite correctly noted that the EC had not explained what it meant by the term "general principle of international law", which could be understood as encompassing either rules of customary law or the recognized general principles of law or both.¹⁸⁰ While referring to the crucial part of the *Hormones* case, quoted above,¹⁸¹ it observed that "the legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing, and that there has, to date, been no authoritative decision by an international court or tribunal which recognizes the precautionary principle as a principle of general or customary international law".¹⁸² It also noted that there remain questions regarding the precise definition and content of the precautionary principle, and that doctrine remains divided on the issue.¹⁸³ It concluded that "[s]ince the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, *particularly if it is not necessary to do so*", and would, therefore, "refrain from expressing a view on this issue".¹⁸⁴

It must be added that the EU lifted its moratorium by approving several GMO maize varieties in 2004¹⁸⁵ (which it raised – unsuccessfully – as a ground for mootness of the dispute). The decision by the EU not to appeal the Panel Report is not entirely unexpected, but is unfortunate since the Appellate Body will not address the many unanswered aspects of the legal principles at issue.¹⁸⁶

V. A contextual analysis of Customary International Law

For the purpose of this chapter we will limit our analysis of CIL to those aspects which shed light on the assessment of whether the precautionary principle could constitute a new rule of CIL. We will first proceed by providing an overview of the various ICJ judgments, restricting our-

¹⁷⁸ Ibidem, at para. 7.74.

¹⁷⁹ Ibidem, at para. 7.75.

¹⁸⁰ Ibidem, at para. 7.86.

¹⁸¹ Ibidem, at para. 7.87.

¹⁸² Ibidem, at para. 7.88.

¹⁸³ Ibidem.

¹⁸⁴ Ibidem, at para. 7.89 (emphasis added).

¹⁸⁵ Shaw S. and Schwartz R., supra note 111, at p. 9.

¹⁸⁶ Ibidem.

selves to the relevant *ratio decidendi* much in the way a lawyer would do while preparing a case, and place the precautionary principle against the benchmarks laid out in the ICJ cases. We proceed by a brief analysis of the principle of the persistent objector, and what this entails in the context of the precautionary principle debate, in particular to the approach taken by the US. We then provide an overview of the numerous nebulous aspects underlying the concept of CIL, and highlight the need for a coherent CIL theory, before concluding on how this absence of a strong CIL theory necessarily affects the discussion of the precautionary principle.

A. *ICJ's case law*

1. *The two prerequisite elements of CIL*

As per Article 38(1)(b) of the Statute of the ICJ, the Court, whose function is to decide disputes in accordance with international law, shall apply “international custom, as evidence of a general practice accepted as law”.¹⁸⁷ The classic definition of CIL requires the presence of two elements, that is, State practice (*usus*), as well as a psychological-legal element consisting of the belief that such a practice is undertaken to conform to a legal obligation (*opinio iuris sive necessitatis*).¹⁸⁸

This was explicitly confirmed in the 1969 *Continental Shelf* case in which the ICJ held that:

“an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as

¹⁸⁷ Basic Documents in International Law, Oxford University Press, Edited by Ian Brownlie, First Indian Edition (2003), 341 pp., at p. 319; It is worth pointing out that much of the confusion pertaining to CIL is traced back to the phrasing of Article 38(1)(b) of the Statute of the International Court of Justice (“(...) [it] would have been very helpful were the relevant provision not so laconic and even, in the view of many, badly drafted.”) ILA Report, supra note 114, at p. 5.

¹⁸⁸ See e.g. Cogen M., *Handboek Internationaal Recht*, 1998, Mys & Breesch, pp. 464, at pp 3-8; Kooijmans P.H., *Publiek Internationaal Recht in Vogelvlucht*, Wolters-Noordhoff, 1994, pp. 292, at pp. 20-23; Singh G., *International Law*, MacMillan India Ltd., 2003, pp. 585, at p. 24; Slama J.L. supra note 15, at p. 648 (for an overview of different definitions of the psychological element) and at p. 652 (for a discussion on the underlying requirement of the metaphorical reference to “belief” and “psychological” element of a State).

to show a general recognition that a rule of law or legal obligation is involved. (...) for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are confirming to what amounts to a legal obligation”.¹⁸⁹

From this case and very passage, several aspects can be derived, which we will address below.¹⁹⁰

2. *Time element*

Firstly, CIL can crystallize even in a very short time span, and can according to some even be “instant customary law”¹⁹¹ – though, how short this time span may be is still subject to debate.¹⁹² This is relevant for the precautionary principle, which, as discussed above, saw a rapid rise in international environmental law during the end of the eighties, truly took

¹⁸⁹ North Sea Continental Shelf Case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports, 1969, p. 43 (para. 74) and p. 44 (para. 77), quoted in Cogen M., *supra* note 188, at pp. 3-4.

¹⁹⁰ This case involved a dispute between the Federal Republic of Germany vis-à-vis Denmark as well as vis-à-vis the Netherlands, the latter two States seeking the application of the equidistance rule as an emerging rule of CIL which “crystallized” by the adoption of the Geneva Convention of 1985 on the Continental Shelf, which they had ratified, but not Germany. Put differently, many a commentator looks at exactly this type of hypothetical dispute between a State, such as, let us say the US, which has not ratified any MEA containing precautionary language, and another State which has done so. Hence, from a factual point of view the 1969 Continental Shelf case is relevant too.

¹⁹¹ See e.g. Cheng B., *United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?*, Vol. 5, *Indian Journal of International Law*, 1965, pp. 23-48; Kooijmans P. H., *supra* note 188, at pp. 21-22 and Singh G., *International Law*, *supra* note 188, at p. 264 (referring to the Truman Proclamation of 1945 declaring jurisdiction and control over the exploration and exploitation of the natural resources of the subsoil of the Continental Shelf up to 200 meters water depth, to which no State objected.) It must be noted in this regard that as per the ILA Report, *supra* note 114, at p. 21, “the process took several years to be completed”.

¹⁹² See e.g. Guzman A.T., *Saving Customary International Law*, Volume 27, *Michigan Journal of International Law*, 2005, pp. 115-176, at pp. 157-158 (providing overview of varying opinions) (hereinafter: *Saving CIL*); ILA Report, *supra* note 114, at II.C.12, comment b. (concluding that there is no specific time requirement for the formation of CIL).

center stage at the Rio Conference in 1992, and has been used in most MEAs after that.¹⁹³ Hence, the relative short time span in which the precautionary principle emerged in international fora would in itself not constitute a hindrance to the formation of CIL.

3. *The importance of the psychological element*

Secondly, as per the existing ICJ case law, the psychological element still plays a pivotal role,¹⁹⁴ which was also confirmed in subsequent cases,¹⁹⁵ to the extent that the ICJ's analysis at times focuses solely on the psychological element.¹⁹⁶ Furthermore, in the *Continental Shelf* case, the ICJ referred to the 1926 *Lotus*¹⁹⁷ case tried by the Permanent Court of International Justice (PCIJ) when holding that States may behave in a particular manner in their international relations, *without that they feel themselves legally compelled to do so*, and may have been motivated by numerous other factors.¹⁹⁸ Villiger captures the *opinio juris* element as the "conviction of a state that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to fall on it".¹⁹⁹ There are varying approaches as to what counts as State practice (e.g. are domestic laws and court judgments in?), as will be further discussed below. Even if one were to

¹⁹³ See Part I above.

¹⁹⁴ See also Slama J.L., *supra* note 15, at pp. 641-645.

¹⁹⁵ See: *Continental Shelf (Libya v Malta)*, 1985, ICJ 13, at 29 (June 3) ("[T]he material of customary international law is to be looked for primarily in the actual practice and opinion juris of States..."); *Advisory Opinion on the Legality of Nuclear Weapons*, 1996, *supra* note 118, (in which the ICJ held that it could not find that there was an *opinio juris*, and, hence, had to reject the claim that the prohibition on the use of nuclear weapons was a rule of CIL); see also analysis by Guzman A. T., *Saving CIL*, *supra* note 192, at p. 141; and Singh G., *International Law*, *supra* note 188, at p. 28-29.

¹⁹⁶ See: *Military and Paramilitary Activities (Nicar. v US)*, 1986 ICJ 14 PP-191-92 (June 27); see e.g. Guzman, *Saving CIL*, *supra* note 192, at p. 154 ("the ICJ found a rule of CIL (...), requiring States to refrain from the use of force. It did this without reference to practice. The court focused instead on *opinio juris*, which it found by looking at, among other things, UN resolutions.").

¹⁹⁷ *SS Lotus (France v Turkey)*, PCIJ, 1927, Ser. A. No. 10 (where the claim by France that the granting of exclusive criminal jurisdiction to the flag State was a rule of CIL was rejected, based on the fact that even if States had often, in practice abstained from instituting criminal proceedings, it did not prove that they recognized themselves as being obliged to do so), analyzed in Singh G., *International Law*, *supra* note 188, at p. 25-28.

¹⁹⁸ Singh G., *International Law*, *supra* note 188, at p. 28.

¹⁹⁹ Villiger M. cited in Slama J. L., *supra* note 15, at p. 638.

accept the numerous domestic environmental law developments as well as the considerable number of MEAs containing precautionary language as State practice in the CIL formation process, it would not be a sinecure to prove that States are complying with the precautionary principle *out of a sense of a legal obligation outside any treaty (MEA) regime*. Do States in their *international legal relations*²⁰⁰ rely on the precautionary principle out of sense of legal obligation – even in the absence of a treaty obligation? Do States believe it is mandatory in their international legal relations to take regulatory action in the presence of a “*threat of (non-negligible) environmental harm accompanied by scientific uncertainty*”?²⁰¹ That the psychological element must be placed against the background of States’ *international legal relations* is relevant as there may be “a great uniformity in some parts of domestic law – such as constitutional or corporate law – without the rules in question becoming part of public international law”.²⁰² A strict and traditional view of the requirement of a psychological element in treaty formation would pose a significant hurdle to the precautionary principle acquiring the status of CIL.

4. *State Practice element*

Thirdly, in the *Continental Shelf* case, the Netherlands and Denmark also argued that State practice pertaining to the equidistance rule had emerged *after* the adoption of the 1958 Convention, and, hence, had become CIL (it cited fifteen instances where States had subsequently applied it to determine continental shelf boundaries).²⁰³ The ICJ held that the instances cited were but a small number of those cases *potentially* calling for boundary delimitation in the world, and it would not be necessary to evaluate them separately.²⁰⁴ Such a legal yardstick is a very relative and speculative one. Applying it to the case of the precautionary principle would almost be impossible – one could always argue that as a

²⁰⁰ See Working Definition used in the ILA Report, *supra* note 114, at p. 8.

²⁰¹ Trouwborst A., *supra* note 15, at pg. 52.

²⁰² ILA Report, *supra* note 114, at p. 9; See also Kelly P., *The Twilight of Customary International Law*, Volume 40, *Virginia Journal of International Law*, 2000, pp. 449-543, at p. 468 (“Convergence on norms is occurring with many principles of domestic law that are associated with the spread of the market economy, encouraged by the policies of the World Bank and the International Monetary Fund, but there is little indication that these domestic policy choices are, in any sense, obligatory.”).

²⁰³ See analysis by Singh G., *International Law*, *supra* note 188, at p. 27.

²⁰⁴ *Ibidem*.

practice it is insignificant compared to the number of instances where the precautionary principle could *potentially* be applied in international relations between States. For instance, it has been observed that there is an absence of and a need for a global precautionary forest regime.²⁰⁵ Would indications such as this prevent the precautionary principle of becoming a rule of CIL?

Fourthly, the ICJ concluded that the State practice regarding the equidistance rule had not been “sufficiently uniform” and even if it would have been, the psychological element was absent.²⁰⁶ This leaves with two further observations. Unlike what some commentators put forward,²⁰⁷ the ICJ does not interpret State practice *as proof of* the psychological element in the process of CIL formation, since it requires above and beyond “sufficient” State practice, a separate belief by the States that they undertake a particular practice out of a sense of legal obligation. Next, in the context of the precautionary principle, an additional difficulty would arise while assessing the level of “sufficient” State practice. Would the fact that a significant number of States have signed MEAs with precautionary language suffice? Or would one have to assess on a subsequent level how the precautionary principle is further translated into *actual practice between States* (for instance when solving a particular transboundary environmental conflict), or how it is implemented domestically. Put differently, would one have to scrutinize the *measures* adopted to comply with the precautionary principle,²⁰⁸ while analyzing whether the State practice is sufficiently uniform? Given that the precautionary principle is in essence a flexible environmental policy tool, such analysis on a subsequent level – that is, beyond the formal ratification of an MEA – would pose considerable problems as States may still translate the precautionary principle in many different ways when adopting specific measures.²⁰⁹

²⁰⁵ See e.g. Trouwborst A., *supra* note 15, at p. 34.

²⁰⁶ *Ibidem*.

²⁰⁷ See discussion below at Part V.C.

²⁰⁸ Trouwborst A., *supra* note 15, at p. 286 (the author raises this as one of his concluding open-ended questions).

²⁰⁹ In the North Sea Continental Shelf case, *supra* note 189, the ICJ also made an oblique reference to the requirement that a treaty provision should, at all events potentially, be of “fundamentally norm-creating character” such as could be regarded as forming the basis of a general rule of law. Slama J.L., *supra* note 15, at p. 649-651, has analyzed that three factors would have to be considered: (1) Whether the principle imposes a primary obligation; (2) Whether the principle is subject to exceptions; (3) Whether a State may exclude itself from the obligation

The *Lotus* case referred to above in the context of the importance of the psychological element is worth returning back to, as the PCIJ rejected the claim of France that a rule of CIL had emerged, based on the fact that (1) State laws were not consistent, (2) decisions of State courts conflicted, (3) no uniform trend could be deduced from treaties, and (4) publicists were divided in their views.²¹⁰ This is not only indicative of the type of evidence that can count towards State practice, but in the context of the precautionary principle, it could also be held that (1) State laws at this stage are not yet consistent enough,²¹¹ (2) decisions of State Courts are still too few and some of them are conflicting, (3) yet, it would have to be acknowledged that there is a uniform trend in MEAs to adopt precautionary language, but (4) at this stage “publicists” remain divided over the issue.²¹²

B. Persistent Objector rule and its relevance for the US

As mentioned in the Introduction of this Chapter, the importance of being able to establish that the precautionary principle has indeed crystallized into CIL lies in the fact that a rule of CIL can be imputed on a State which did not participate in the formation of the CIL.²¹³ An important ‘exception’ to this characteristic of CIL lies in the so-called persistent objector rule, according to which a rule of CIL would not be binding upon a State which has ‘persistently’ objected to the *formation* of a CIL rule.

of the principle by an expression of its intent not to be bound by such. Trouwborst, *supra* note 15, at pp. 49-52, argues that the precautionary principle has a “fundamentally norm-creating character”. In this Chapter we only focus on the difficulty of meeting the two basic elements of traditional CIL, without compounding the issue by assessing whether the precautionary principle is of a fundamentally norm-creating character, particularly, since it would not help tilting the balance of the debate in either direction.

²¹⁰ The issue in the *Lotus* case was whether the granting exclusive criminal jurisdiction to the flag state of a vessel was a rule of CIL. See Singh G., *International Law*, *supra* note 188, at p. 25, (offering a succinct analysis of the *Lotus* case).

²¹¹ See e.g. Ellis J., *supra* note 34, (pointing out that OECD countries are only starting to implement the precautionary principle); Trouwborst A, *supra* note 15, (offers an impressive and comprehensive analysis of what he thinks would count as State practice, and argues that such State practice is already sufficient).

²¹² See e.g. Ellis J., *supra* note 34, (reviewing four recent publications on the precautionary principle).

²¹³ See e.g. Kooijmans P. H., *supra* note 188, at p. 23.

The ICJ addressed this aspect of CIL in the 1950 *Asylum*²¹⁴ case, in which Columbia claimed that the granting of diplomatic asylum was a regional custom binding upon Latin-American States, which the ICJ rejected. The World Court, nevertheless, addressed the hypothesis of it having acquired a rule of CIL status, but held that even then “it could not be invoked against Peru, which far from having by its attitude adhered to it, has, on the contrary repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum”.²¹⁵

Additionally, in the 1951 *Anglo-Norwegian Fisheries*²¹⁶ case, the ICJ concluded that the ten-mile rule for the establishment of baselines to delimit territorial waters, would not be applicable to Norway given that “she has always opposed any attempt to apply it to the Norwegian coast”.²¹⁷

Though the rule has received more attention in scholarly writings than in the ICJ case law, it is widely accepted that for the persistent objector rule to be applicable, a State must have (1) persistently objected to a CIL rule, and (2) done so during the *formation* of the CIL rule.²¹⁸ The instances during which a *State can express* its objection with regard to its *international law position* include reservations at the time of signing, ratifying a treaty, statements made during the negotiating process, diplomatic communications, domestic legislation, domestic court rulings, etc.²¹⁹ While analyzing just how persistent the persistent objector must be, Colson states that this would vary on a case by case basis, but that a State would have to be more vocal about its opposition in cases where a rule of CIL is supported by a majority of States, as compared to less clear-cut situations.²²⁰

Guzman, in its proposal for a new and coherent theory of CIL based on rational choice theory, argues that it should be perfectly legitimate for States to be ‘subsequent’ objectors too, that is after the formation of the

²¹⁴ The *Asylum* case (Columbia v Peru), ICJ Reports, 1950, pp. 266, at p. 277-8.

²¹⁵ Ibidem, see also Singh G., *International Law*, supra note 188, at p. 30.

²¹⁶ *Anglo-Norwegian Fisheries* case (UK v Norway) 1951, ICJ Reports, pp. 116, at p. 131.

²¹⁷ Ibidem; See also Trouwborst A., supra note 15, at p. 279.

²¹⁸ See ILA Report, supra note 114, comment 15 at p. 27.

²¹⁹ See Colson D, *How Persistent Must the Persistent Objector Be?*, Volume 61, *Washington Law Review* (July, 1986) pp. 957-969, at pp. 957-961.

²²⁰ Ibidem, at pp. 965-969.

CIL rule (for instance, because a State acquired an interest in the rule only after its formation),²²¹ though this still seems to be a minority view.²²²

Those opposed to the concept of the persistent objector point out that the *Asylum* case related to regional custom only.²²³ This in itself seems to be a rather weak argument as the essence of the concept and the *Asylum* case lies in the fact that the ICJ acknowledged that *a State can carve itself* out of a rule of CIL.

It is quite clear that the US in its international environmental and trade relations has chosen to consciously and explicitly object to treating the precautionary principle as a rule of CIL (e.g. in its arguments before the WTO dispute settlement bodies, or during the negotiations of the Climate Change Convention²²⁴), or to ratify key MEAs which contain references to the precautionary principle (e.g. the Cartagena Protocol). Moreover, the US has been ‘objecting’ to it during the *formation process* of CIL.

Nevertheless, Trouwborst argues that States such as the US would not be able to rely on the persistent objector exception given that it has adopted the precautionary principle with varying degrees domestically and at times in international fora (e.g. the US favoured its application to the listing procedure of CITES at the 1994 COP).²²⁵ This position is not entirely convincing given that the State has not expressed itself domestically regarding its position in the *international* sphere, and that several court decisions have ruled ‘against’ the precautionary principle,²²⁶ nor tenable since the author presumes that the precautionary principle already became a rule of CIL around the time of the signing of the Rio Declaration, and that the US would be ‘too late’ to object.²²⁷ Moreover, this type of “schizophrenia” of a State’s position between the international and domestic plane may be disturbing, but certainly not unusual,

²²¹ Guzman A. T., Saving CIL, supra note 192, at pp. 167-171.

²²² See e.g. ILA Report, supra note 114, at p. 27; Trouwborst A, supra note 15, at p. 282.

²²³ See e.g. D’Amato A., The Concept of Custom in International Law, pp. 130, 1971, cited in Guzman A.T., Saving CIL, supra note 192, at p. 165.

²²⁴ See e.g. Trouwborst A., supra note 15, at p. 280.

²²⁵ Ibidem, at p. 281.

²²⁶ See e.g. Percival R. V., supra note 18, at p. 73 (such as in the *Corrosion Proof Fittings v EPA* case, in which according to the author the Fifth Circuit almost adopted a “reverse precautionary principle”, by requiring that for a known harmful substance, the lack of certainty regarding the costs and benefits of all regulatory alternatives shall be used as a reason for not regulating it).

²²⁷ Trouwborst A., supra note 15, at pp. 268 and 276.

nor contrary to any rule of international law.²²⁸ This is not a mere situation of having a different set of experts negotiating the various treaties and who out of naiveté agree to different outcomes,²²⁹ but must be seen as an acceptable freedom of a State to choose its international position, which may be influenced by several other factors.²³⁰

C. *Disagreement galore and its repercussions on the precautionary principle debate*

There are several important comments to be made at this stage, both regarding the CIL theory in general, and its specific repercussions on whether or not the precautionary principle has attained a CIL status. As Guzman puts it, the fact that there are only a few aspects upon which commentators agree is the “notorious theoretical weakness” of CIL.²³¹ Though CIL appears a straightforward enough source of public international law, “upon closer analysis, it almost mystically transforms into a perplexingly complex theoretical dilemma”.²³²

1. *Inherent circularity of the psychological element*

One of the fundamental challenges being the “inherent circularity”²³³ of the traditional view of CIL which requires the presence of *opinio juris* at the stage of the *formation* of CIL, given that the genuine belief that a particular rule is binding and already law presupposes that the existing rule (perceived to be binding) would already have to be formed, which in turn requires a prior psychological element to become binding.²³⁴

²²⁸ See Pauwelyn J., *supra* note 7, at p. 369 (referring to the fact that some developing countries are opposed to trade restrictions on GMOs, but at the same time argued vehemently at the time of negotiations of the Cartagena protocol to grant leeway to States wanting to protect themselves against GMO imports).

²²⁹ See e.g. Pauwelyn J., *supra* note 7, at p. 368-369 (on the fiction of a State’s one and indivisible consent, irrespective who was deputed to negotiate a particular treaty on behalf of a State).

²³⁰ The study of such factors would go beyond the scope of this paper.

²³¹ Guzman A. T., *Saving CIL*, *supra* note 192, at p. 123 and references.

²³² Slama J. L., *supra* note 15, at p. 605. (“At the heart of this dilemma is the concept of *opinio juris* sive necessitates”).

²³³ *Ibidem*, at p. 124, footnote 44, (referring to the critique by D’Amato A. in his work *The Concept of Custom in International Law*).

²³⁴ See also: *ILA Report*, *supra* note 114, at p. 33 (“States actively engaged in the *creation* of a new customary rule may well wish or accept that the practice in question will give rise to a legal rule, but it is logically impossible for them to have an *opinion juris* in the literal and traditional sense, that is, a belief that the practice is *already* legally permissible or obligatory.”).

This has led some authorities to suggest that in the context of the formation of CIL no separate proof of the existence of the subjective element would be required above and beyond State practice,²³⁵ whereas others seek to strengthen the psychological element.²³⁶ Yet others point out that the importance of the psychological element can only be traced back to a few ICJ cases, whereas the ICJ has almost ignored it in other cases,²³⁷ and consequentially, the focus should be on State practice alone.²³⁸ It is fair to observe at this stage that doctrine is highly divided, that the ICJ case law has not always been consistent by not equally scrutinizing both the State practice and the psychological element in all the cases presented before it²³⁹ – but, importantly, the World Court has never “overruled” the requirement of the presence of both elements during the formation of CIL.

²³⁵ ILA Report, *supra* note 114, at p. 13 and Part III, in particular comment 16, at pp. 32-34; see also Akehurst (1979) (the practice of States need not be accompanied by a genuine belief that it is already law) and Kunz (1953) (there is an inherent fallacy in the notion of *opinion juris* inasmuch as it requires that a State should feel itself bound by a customary rule at the time of its formation, when it is really not bound, as it is merely usage) referred to in Singh G., *International Law*, *supra* note 188, at p. 29.

²³⁶ Guzman A.T., *Saving CIL*, *supra* note 192, at pp. 146-149; see also Cheng B., *supra* note 191.

²³⁷ ILA Report, *supra* note 114, at p. 41; Byers M., *Introduction – Power, Obligation, And Customary International Law*, Volume 11, *Duke Journal of Comparative and International Law*, 2001, pp. 81-88, at p. 83.

²³⁸ Trouwborst A., *supra* note 15, at p. 252, fn. 1733 (referring to the Gulf of Maine case, the Anglo-Norwegian Fisheries case, the *Nottebohm* case, the Libya-Malta Continental Shelf case, and the Barcelona Traction case). See *contra*: Slama J.L., *supra* note 15, at p. 645 (referring to additional cases in which the ICJ did pay due attention to the psychological element, including: *Military and Paramilitary Activities in & against Nicaragua* case, *Continental Shelf case (Libya v Malta)*, *Gulf of Maine case*, *Western Sahara (Advisory Opinion)*, *Fisheries Jurisdiction (Gr.Br. & N.I. v Iceland)*, *Barcelona Traction case*, and other cases before *Continental Shelf case*). Note, how the authors do rely on some of the same cases to substantiate their respective point of view.

²³⁹ See also Kelly P., *supra* note 202, at pp. 476-477 (“In deciding the cases based on analogy, based on equitable principles. And past judicial opinions, the I.C.J. is endorsing the use of judge-made law, not finding customary law”) arguing further at p. 478 (“When faced with a paucity of state practice, the Court should declare a *non-liquet* (refusal to decide) situation, announcing that there are no applicable principles of CIL”).

2. *Evidence in support of the State practice element*

Turning to State practice, the picture is equally blurred. There is disagreement over its overall importance, how widespread the practice among States must be, and which forms of evidence may be used.²⁴⁰ A stringent view holds that only physical acts of States can count as State practice,²⁴¹ whereas others submit that treaties, public statements by heads of state, domestic laws, domestic court decisions, drafts of the International Law Commission, UN General Assembly Resolutions, recitals in international instruments, pleadings before international tribunals, etc. should also be admissible as evidence.²⁴² The ILA Report supports a liberal view of *admissibility* of evidence in support of State practice by drawing the attention to the fact that the *weight* (convincingness) of the various material may still vary.²⁴³ It is, for instance, quite obvious that pleadings before international bodies would heavily be influenced by the arguments that are best to be made to win a case or put up a credible defense, much in the sense of a lawyer's training before courts domestically, who are trained to argue "both ways", depending on their clients position. But this still leaves the question at large – what weight should indeed be attributed to the different types of state practice?²⁴⁴ Kelly aptly observes that the study of State practice in particular and CIL in general is not so much the result of an inductive methodology, based on empirical studies, but the result of "deductive conclusions of international law writers, judges, and advocates".²⁴⁵

3. *Treaties as a source of CIL*

To which extent treaties can be used as a source to create CIL is also subject of debate.²⁴⁶ Most authors agree that treaties can be used as evidence of State practice. However, turning to the prerequisite psychological element, some authors submit that the parties must unambigu-

²⁴⁰ Guzman A. T., Saving CIL, supra note 192, at p. 125.

²⁴¹ D'Amato A., The Concept of Custom in International Law, 130(1971) cited in Guzman A.T., Saving CIL, supra note 192, at p. 126 and in Kelly P., supra note 202, at pp. 500-507 (for elaborate analysis).

²⁴² Guzman A. T., Saving CIL, supra note 192, at p. 126; ILA Report, supra note 114, at pp. 13-16.

²⁴³ ILA Report, supra note 114, comment 3, at p. 13.

²⁴⁴ Kelly P, supra note 202, at pp. 503-504. ("(...) the modern theory provides no guidance on the relative weight of the many different types of state practice and how to weigh conflicting examples of practice.")

²⁴⁵ Kelly P., supra note 202, at 475.

²⁴⁶ See for a theoretical overview Slama J.L., supra note 15, at pp. 631-635.

ously indicate that they consider the treaty is *codifying* CIL,²⁴⁷ that there can not be a presumption that a treaty is codifying CIL,²⁴⁸ and that it can *only be binding on the parties to the treaty*.²⁴⁹ The ILA Report concedes that “what States do in pursuance of their *treaty* obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a *customary rule*”.²⁵⁰ This is highly relevant for the precautionary principle, as most proponents of it being treated as a rule of CIL refer to the number of MEAs that contain precautionary language, without assessing whether States feel a compliance pull *outside* the treaty regime. The ILA Report further clarifies that there can not be a presumption that a succession of similar treaty provisions gives rise to a new customary rule.²⁵¹ In the context of the WTO, for instance, it can be stated that the Most Favored Nation Principle and National Treatment Principle, though found in many regional and bilateral free trade agreements, are not a reflection of an underlying CIL but of the desire of States to be bound by “additional legal obligations beyond those provided by CIL”.²⁵² It is, hence, only in exceptional cases that a multilateral treaty gives rise to new customary rules “of its own impact”, and only if there is a clear intention of the parties to create new customary law.²⁵³

4. Empirical analysis

As Guzman points out, even if the above wrinkles were to be ironed out, it would still remain impossible to observe all relevant evidence from *all* relevant States (including situations where one has to analyze ‘omissions’ by States to comply with CIL).²⁵⁴ Byers further notes that there are no countries that track their practices as a matter of priority or allo-

²⁴⁷ As per Akehurst, referred to in Guzman A.T., *Saving CIL*, supra note 192, at pp. 162-163.

²⁴⁸ ILA Report, supra note 114, comment 21, at pp. 43-44.

²⁴⁹ As per Wolfke, referred to in Guzman A.T., *Saving CIL*, supra note 192, at p. 162-163.

²⁵⁰ ILA Report, supra note 114, comment 24 at p. 46.

²⁵¹ *Ibidem*, comment 25 at p. 47-48; and comment 26 at pp. 49-50.

²⁵² Guzman A.T., *Saving CIL*, supra note 192, at p. 162; See also Palmetier D. and Mavroidis, *The WTO Legal System: Sources of Law*, Volume 92 *American Journal of International Law*, July, 1998, pp. 398-413, at p. 407 (“But the WTO, like GATT before it, is grounded in agreement, not in custom, and questions of custom are therefore likely to be rare”).

²⁵³ ILA Report, supra note 114, comment 27 at p. 50.

²⁵⁴ *Ibidem*, at p. 163.

cate the sufficient funds towards such demanding task.²⁵⁵ Even international courts and tribunals, including the ICJ,²⁵⁶ falter and often do not (can not?) undertake the necessary comprehensive empirical scrutiny of State practice.²⁵⁷ This may partly explain the reluctance of WTO panels and the Appellate Body to launch itself into an analysis whether the precautionary principle has crystallized into CIL.²⁵⁸ The other part may be explained by their reluctance to brush too closely to some of the trade and environment negotiating items placed on the agenda of the Doha Round.²⁵⁹ Other authors also point at the risk of overburdening the WTO Dispute Settlement mechanism with cases involving non-trade related concerns, which it may not feel able to resolve.²⁶⁰

D. *Stocktaking of the CIL theory and the precautionary principle*

1. Overlooking the CIL theory

This brief discussion only illustrates that there is no underlying and coherent theory of CIL available at present, which leads some authors to propose a new and comprehensive CIL theory,²⁶¹ others to attack CIL based on their observation that it does not affect the behavior of States,²⁶² and yet others to seek its elimination as a source of public international law all together given that it is vague and incoherent and in-

²⁵⁵ Byers M., *Custom, Power and the Power of Rules*, pp. 107, 1999, cited in Guzman A.T., *Saving CIL*, supra note 192, at p. 126.

²⁵⁶ Kelly P., supra note 202, at p. 469 (“Even the International Court of Justice (“I.C.J.”), in most cases, declares rules of law without investigating the attitude of states on the legal character of a customary norm or undertaking an investigation of the actual practice of the majority of states”).

²⁵⁷ Guzman A.T., *Saving CIL*, supra note 192, at p. 127; Kelly P., supra note 202, at p. 472.

²⁵⁸ That said, the Appellate Body has taken note of customary international law rules, such as in the *US-Line Pipe* case, where it referred to the concept of State responsibility as a rule of CIL. See Pauwelyn J., supra note 7, at p. 271.

²⁵⁹ This is not to question the ‘independence’ of Panelists and Appellate Body Members. See for an interesting analysis: Charnovitz S., *Judicial Independence in the World Trade Organization*, in *International Organizations and International Dispute Settlement: Trends and Prospects*, Transnational Publishers, 2002, pp. 219-240, available at www.worldtradelaw.net.

²⁶⁰ See e.g. Shaw S and Schwartz R., supra note 111, at p. 2.

²⁶¹ See e.g. Guzman A.T., *Saving CIL*, supra note 192.

²⁶² See Goldsmith J. L. and Posner E.A., *Understanding the Resemblance Between Modern and Traditional Customary International Law*, Volume 40, *Virginia Journal of International Law*, 2000, pp. 639-672.

consistent, bound to lead to inconsistent judgments.²⁶³ Though analyzing these profound and often substantiated critiques would go beyond the scope of this paper, it is a crucial aspect that almost all authors claiming that the precautionary principle has acquired CIL status tend to overlook. In fact, most authors tend to cherry-pick certain elements from different CIL theories, chose to ignore ratio from certain ICJ judgments that do not fit their claim, while failing to mention that many aspects are still fluid, as CIL at present is almost “a matter of taste”.²⁶⁴ In the context of the precautionary principle, many authors tend to focus on the State practice element alone, in particular by referring to the numerous MEAs that have been ratified²⁶⁵ (while brushing over the inconclusive issue whether treaties as proof of CIL must integrate pre-existing CIL or not), domestic court pronouncements in a handful of States,²⁶⁶ and domestic applications²⁶⁷ (failing to notice e.g. how OECD countries are only now slowly adopting legislation integrating the precautionary principle).²⁶⁸ At times the knotty issue is by-passed by simply stating that the precautionary principle can “attach itself to Principle 21 of the

²⁶³ Kelly P., *supra* note 202, at p. 452 (of course, the argument to eliminate CIL runs through the entire article – concluding at p. 543 “CIL, as a source of international law, should therefore be discarded.”) (Kelly seeks to strengthen the case for treaties instead, particularly at pp. 530-543).

²⁶⁴ *Ibidem*, at p. 451 (“Under the indeterminate and manipulable theory of CIL, all of these positions are tenable.”), and at p. 500 (“Controversy is inevitable because the elements of CIL legal theory are empty vessels in which to pour one’s own normative theory of international law.”).

²⁶⁵ See e.g. most recently Bridgers M., *Genetically Modified Organisms and the Precautionary Principle: How the GMO Dispute Before the World Trade Organization Could Decide the Fate of International GMO Regulation*, *Temple Environmental Law and Technology Journal*, Volume 22, Spring 2004, pp. 171-193, at p. 187 (“Given the fact that there is overwhelming support of the precautionary principle in various domestic and international instruments and that the precautionary principle was most probably applied in each case out of a sense of legal obligation, there is a strong indication that the precautionary principle is customary law.”); See also: Sands P., *supra* note 18, at p. 212 (“The legal status of the precautionary principle is evolving. At a minimum, however, there is sufficient evidence of state practice to justify the conclusion that the principle, as elaborated in the Rio Declaration and the Climate Change and Biodiversity Conventions, has now received sufficiently broad support to allow a good argument to be made that it reflects a principle of customary law.”); and Cameron J., *supra* note 21, at p. 124 (“These international legal instruments evidence state practice and, within their spheres, *opinio juris*.”).

²⁶⁶ See e.g. Trouwborst A., *supra* note 15.

²⁶⁷ See e.g. Cameron J., *supra* note 21.

²⁶⁸ See Ellis J., *supra* note 34, at p. 449.

Stockholm Declaration”, the latter being undoubtedly – so it is argued – a rule of CIL.²⁶⁹ Most disturbing is, however, the ‘short-cut’ analysis of the psychological element, where most authors propose a circular argument according to which States feel bound to comply with the precautionary principle since they ratified an MEA, whereas the real question, of course, lies in whether States even *outside* any environmental treaty regime would feel obliged to comply with the precautionary principle, the infringement of which would trigger the responsibility of States. The few authors who did raise this fundamental question tend to be discredited now for having raised this question pre-1992, that is pre-Rio²⁷⁰, while the fact remains that even post-Rio no empirical studies of State practice have been undertaken, beyond the listing of the MEAs which contain precautionary language (comprehensive and laudable as such research may be²⁷¹). It is worth recalling that the approach towards customary rules is empirical and not normative, commanding a clear distinction between *lex lata* (law as it is) and *lex ferenda* (law as it should be).²⁷²

Bodansky captured it aptly by stating that the claims about customary international environmental law “reflect a different conception of customary international law – one that focuses on what states *say* rather than what they *do*”.²⁷³ He critically observed that scholars “pay lip service to the traditional account” of CIL,²⁷⁴ and apply an all together different methodology not based on surveys of state behavior, but solely on the various resolutions and treaties in which the putative customary norm appears, which would only be an appropriate methodology if “a state’s statements and actions are congruent”, which, however, is seldom the case.²⁷⁵

That said, the precautionary principle is a very important – if not, crucial – principle that influences and sets the tone of many international envi-

²⁶⁹ Cameron J., *supra* note 21, at p. 133. According to Principle 21 states have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Text available at www.unep.org.

²⁷⁰ See Trouwborst, *supra* note 15, at pp. 261-275.

²⁷¹ See the thorough analysis of Trouwborst A., *supra* note 15.

²⁷² Bodansky D., Customary (And Not So Customary) International Environmental Law, Volume 3, *Indiana Journal of Global Legal Studies*, 1995, pp. 105-119, at p. 109.

²⁷³ *Ibidem*, at p. 112.

²⁷⁴ *Ibidem*.

²⁷⁵ *Ibidem*, at pp. 113-115.

ronmental negotiations and MEAs,²⁷⁶ and has been a vital principle in the development of domestic environmental law in many countries. The point being made is merely that in an effort to stress its importance and substantiate that it has acquired a CIL status, too many authors fail to pay due attention to the CIL theory.

2. *Awaiting a judgment by the ICJ*

The ICJ's comprehensive analysis of the status of the precautionary principle would be very welcome at this stage and probably carry most weight for future disputing States. Furthermore, it would not easily be dismissed as being an international body which is too "regime-specific" such as ITLOS or the WTO.²⁷⁷ A judgment by the World Court would, of course, only be binding *inter partes*, but it is clear that if it were to affirm the existence of a rule of CIL in a case between two states, this position would "have a certain impact above and beyond the two states concerned".²⁷⁸

Such a judgment by the ICJ would also be welcome from a general perspective, given that the case law of the ICJ pertaining to CIL is still limited to a handful of cases.²⁷⁹ An increasing number of ICJ judgments on CIL may help clarify many of the still remaining grey areas of CIL. Though some renowned CIL scholars and harsher critics of the ICJ itself, lament that even the ICJ is not getting the CIL theory right, misapplies tests, and that, hence, its judgments are not always of much value.²⁸⁰ Nevertheless, in the present international legal order, the ICJ is still our best bet.²⁸¹

²⁷⁶ Ibidem, at p. 119.

²⁷⁷ See e.g. Palmeter D. and Mavroidis P. C., supra note 252, at p. 413 ("Public international law has clearly made an important contribution to WTO law. It is not yet clear that the reverse will be true, that other international tribunals will begin to see the WTO, as reflected in its adopted reports, as a source of law. Given the growing quantity and high overall quality of those reports, however, it seems likely that it is only a matter of time before this recognition begins to take place, particularly with regard to evidentiary and procedural issues that could have wider application").

²⁷⁸ Stern B., Custom at the Heart of International Law, Volume 11, Duke Journal of Comparative and International Law, 2001, pp. 89-108, at p. 101.

²⁷⁹ See also Kelly P., supra note 202, at p. 525 ("Scholars place great emphasis on the quite limited number of international and domestic court and tribunal decisions on CIL, often treating dicta, concurring opinions, and even dissenting opinions as having great weight in determining customary norms.").

²⁸⁰ D'Amato A., Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits), Trashing Customary International Law, Volume 81, American Journal of In-

VI. Concluding remarks

Though there is no legal reason why the Panels or the Appellate Body should not take up the issue of whether the precautionary principle is CIL, there is an apparent reluctance to do so.²⁸² The main reasoning put forward by the WTO dispute settlement bodies is that it can resolve the disputes without it being necessary to cut this Gordian knot. This should not surprise, as the principle of ‘judicial economy’, according to which only those claims must be addressed which are necessary to resolve the matter at issue, plays a “prominent role” in WTO jurisprudence.²⁸³ This is a likely trend in future disputes as well, as there are very few instances where the WTO dispute would be irresolvable unless this conundrum is addressed. Furthermore, the present judicial lawmaking by the Appellate Body still faces “a hard political constraint”,²⁸⁴ and it would not be oblivious to the possible political fall-out it may have on the ongoing trade and environment negotiations. Moreover, one ought to

ternational Law, 1987, pp. 101-105 (concluding that “In my opinion, the Judgment is a failure of legal scholarship. It reveals the august judges of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.”); Kelly P., *supra* note 202, at p26 (“I have argued that the I.C.J. frequently creates law, which it terms customary by utilizing deductive methodologies rather than inductive.”).

²⁸¹ Lee J., *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, Volume 25, *Columbia Journal of Environmental Law*, 2000, pp. 283-340, at p. 313 (“Decisions that adjudicate questions of international law are persuasive evidence of the state of the law, with decisions of international tribunals given more weight than decisions of domestic courts, and decisions of the ICJ accorded the most weight”).

²⁸² Pauwelyn J., *supra* note 7, at p. 269 (the author points out that the WTO panels can and should refer *suo moto* to non-WTO rules in the *interpretation* of WTO provisions. In contrast, to refer to non-WTO rules as *facts* (such as a reference to an MEA), it must be pleaded by one of the parties to the dispute), and at p. 463-464 (the author further explains the importance of MEAs as *facts* (or evidence) which can be relied upon even in a dispute involving a WTO Member which is not a party to the MEA – for instance, when proving that a measure is ‘necessary’ under GATT Art. XX(b), though it may not be conclusive in the dispute and could be rebutted; whereas MEAs can only be *applicable law* between disputing WTO Members which are also party to the MEA).

²⁸³ Pauwelyn J., *supra* note 7, at p. 449 (referring to the *US-Shirts and Blouses* case in which the principle of judicial economy was explicitly referred to).

²⁸⁴ Steinberg R. H., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, Volume 98 *American Journal of International Law*, 2004, pp. 247-275, at p. 275.

recall that the WTO as a legal system remains by and large “member-driven”, which often inhibits judicial activism.²⁸⁵

As international environment and health disputes will become more prevalent before various international adjudicating bodies,²⁸⁶ there will be an ever increasing number of opportunities where an explicit ruling on the status of the precautionary principle can be expected. It is submitted that a judgment by the ICJ in this regard would radiate most authority. As we have seen, the WTO’s Appellate Body did refer to the fact that the ICJ had failed to identify the principle as a rule of CIL in the *Gabcikovo-Nagymaros* case, thereby confirming the view of many authors that the ICJ is still perceived as the most authoritative of international bodies.²⁸⁷ On the other hand, as pointed out by Pauwelyn, it is also the body with the least sense of judicial activism.²⁸⁸

For those who hope that such an authoritative adjudication, holding that the precautionary principle has indeed become CIL, would lead to the ability to “bind” States who have not ratified any MEA containing precautionary language – there may be bad news. Countries such as the US have clearly chosen as an international and preemptive policy to behave as a “persistent objector” during the formation of CIL. Therefore, unless the ICJ would reverse its stand and reject the theory of the persistent objector all together (and follow a certain stream of authors), it would be a valid defense for such a State.

This Chapter has not proposed a new CIL theory, but while assessing the status of the precautionary principle in public international law and reviewing the material written on the subject, one is almost startled by the fact that authors who build up an argument in favour of it do not dedicate the necessary time to offer a new CIL theory. This would be required, for under the classic CIL theory as it currently stands, one cannot convincingly argue that the prerequisite ‘psychological element’, by which States feel obliged to comply with the precautionary principle out of a sense of legal obligation, is met. Authors in favour of granting CIL status to the precautionary principle implicitly support a new CIL theory according to which, the psychological element is largely ignored, and

²⁸⁵ Pauwelyn J., *supra* note 7, at p. 152.

²⁸⁶ See Bodansky D., *supra* note 272, at p. 119.

²⁸⁷ Sands P., *Cross-Fertilization*, *supra* note 127; Pauwelyn, *supra* note 7, at p. 121.

²⁸⁸ Pauwelyn J., *supra* note 7, at p. 152 (“Court activism may be more readily expected, for example, from the European Court of Justice than from the ICJ. The WTO judiciary could posit itself somewhere in between (...”), see for examples at p. 421.

the State practice element – consisting, in casu, of the signing or ratifying of MEAs- would in itself create a new rule of CIL. However, under the current prevalent CIL theory this is not tenable.

While unraveling the various dicta of the ICJ judgment on the formation of a new rule of CIL, one necessarily stumbles on the fact that there is actually insufficient case law to form an absolute coherent CIL theory, and that almost every aspect of the prevalent CIL theory is challenged by authors, making it an interesting theoretical battleground but not furthering clarity. It would make a very exciting case for lawyers before the ICJ, but it cannot reasonably be argued that the outcome would necessarily be in favour of it granting CIL status.

This paper also provided an overview of the interpretation and application of the precautionary principle in the EU and the US. Though a few closely observed cases, such as the *GMO* dispute, indicate otherwise, the US has often interwoven precautionary concepts in its domestic policies. It is, however, clear that it is not ready to embrace it at international level. On the other hand, the Commission, the ECJ and the CFI have explicitly endorsed the precautionary principle. The interpretation and fine-tuning of the precautionary principle by the judiciary, which is gathering momentum in the EU, seems to be totally absent in the US.

Though, we conclude that the precautionary principle has not acquired the status of a rule of CIL, it must be stressed that it is a crucial policy tool which “cautions that regulatory policy should be pro-active in ferreting out potentially serious threats to human health and the environment”.²⁸⁹ Despite the outcome of this theoretical analysis, it must not be forgotten that it has exerted an impressive influence on policies at international, regional and domestic level, has been integrated in numerous environmental laws, and has been applied by many courts, which in itself is a victory and should satisfy many environmentalists.²⁹⁰

It is worth recalling that Judge Jimenez de Arechaga in the *Continental Shelf (Tunisia/Libya)* case in his Separate Opinion found that “even if a new accepted trend does not yet qualify as a rule of customary law, it may still have a bearing on the decision of the Court, not as part of the applicable law, but as an element in the existing rules or an indication of the direction in which such rules should be interpreted”.²⁹¹

²⁸⁹ Percival R. V., *supra* note 18, at p. 22.

²⁹⁰ See Ellis J., *supra* note 34, at p. 449.

²⁹¹ Cited in Pauwelyn J., *supra* note 7, at p. 262 (footnote 73).

Perhaps, unlike in Aesop's fable the morale of the story is not that equating the precautionary principle as a rule of CIL is an "impossible"²⁹² task, but it certainly would require an international adjudicating body to undertake quite a treacherous task by assessing the two prerequisite CIL parameters, that is, State practice and the psychological element, making a choice on the relationship between these two elements, and while doing so walking in the morass of international customary law, where a strong and coherent CIL theory is still amiss.

²⁹² Aesop. (Sixth century B.C.) Fables. The Belling of the Cat. "Then the old mouse said: 'It is easy to propose impossible remedies'".