

2007

Food Safety, South-North Asymmetries, and the Clash of Regulatory Regimes

Obijiofor Aginam

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Food and Drug Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Obijiofor Aginam, Food Safety, South-North Asymmetries, and the Clash of Regulatory Regimes, 40 *Vanderbilt Law Review* 1099 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol40/iss4/9>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Food Safety, South-North Asymmetries, and the Clash of Regulatory Regimes

Obijiofor Aginam*

GIVE US THIS DAY OUR DAILY BREAD . . . The prayer is thus not purely a collection of spiritual recitals It turns . . . to the mundane requirements of food, clothing, shelter—what would, in human rights parlance, be called economic rights. . . . We must also take account of the word “daily.” There is here a clear injunction against anti-social conduct such as hoarding or cornering the market in essential commodities.

– C.G Weeramantry¹

ABSTRACT

This Article explores the globalization of food safety concerns driven by the phenomenon of economic globalization, and the “legalization” of food safety disputes within the rules-based architecture of the World Trade Organization (WTO). Focusing on the interaction between WTO norms and the treaties of other multilateral organizations, the Article discusses the implications of the “clash of food safety regulatory regimes” for South-North asymmetrical relations between the rich and poor countries. The Article also discusses global economic

* Ph.D., Associate Professor of Law, Carleton University, Ottawa, Canada (on leave); Director of Studies, Policy and Institutional Frameworks, United Nations University centre, Tokyo, Japan. This Article is based on a paper the Author presented at a symposium, “From Hand to Mouth, Via the Lab and the Legislature: International and Domestic Regulations to Secure the Food Supply,” organized by the Vanderbilt Journal of Transnational Law, February 16, 2007, Vanderbilt University Law School, Nashville, Tennessee, USA. The Author would like to thank Jamie Allyson Lang and the other members of the Board of Editors for an invitation to the symposium. The Author would like to acknowledge the comments and questions on his presentation by the other invited speakers, Vanderbilt law school students and professors, and other participants in the symposium. However, the Author is responsible for any shortcomings in the Article. This Article is inspired, in many ways, by a broader research project that the Author is presently undertaking on aspects of human security, trade, and global governance of public health in an interdependent world that is funded by the Social Sciences and Humanities Research Council of Canada (SSHRC).

1. C. G. Weeramantry, *On Earth as it is in Heaven: A Vision of World Order for the 21st Century*, 2 TUL. J. COMP. & INT’L L. 169, 176–77 (1995).

diplomacy and the emerging WTO jurisprudence on the Agreement on Sanitary and Phyto-Sanitary Measures (SPS) disputes. This Article explores both the perceived and actual marginalization of most developing and least-developed countries by the embedded structural impediments and onerous obligations in food safety disputes. The Article discusses the European Union's embargo on fresh fish from East African countries following a cholera outbreak and argues for mutually reinforcing linkages between the SPS and pre-existing food-safety-related norms, standards, and agreements of other multilateral organizations, including the emerging "norm" of the precautionary principle.

TABLE OF CONTENTS

| | | |
|------|---|------|
| I. | INTRODUCTION: THE CRUX OF THE ARGUMENT..... | 1100 |
| II. | OVERVIEW OF THE SPS AGREEMENT..... | 1103 |
| III. | FOOD SAFETY DISPUTES AND THE CLASH OF REGULATORY REGIMES AT THE WTO | 1109 |
| IV. | SOUTH-NORTH ASYMMETRIES AND THE POLITICS OF TRADE AND FOOD SAFETY DIPLOMACY..... | 1111 |
| V. | EPILOGUE: TOWARDS A HUMANE FOOD SAFETY REGIME | 1113 |

I. INTRODUCTION: THE CRUX OF THE ARGUMENT

The globalization of food safety and health concerns, partly driven by the phenomenon of economic globalization and the "legalization" of food safety disputes within the rules-based architecture of the World Trade Organization (WTO), has raised complex regulatory questions within the mandate of relevant international organizations. This clash of food safety and health regulatory regimes implicates the South-North² asymmetrical relations between the rich and poor countries, global economic diplomacy, and the emerging jurisprudence of the WTO on the

2. The Author uses the term "South-North" throughout this Article as suggested by Ivan Head. Ivan L. Head, *ON A HINGE OF HISTORY: THE MUTUAL VULNERABILITY OF SOUTH AND NORTH* 7 *passim* (1991). Head preferred "South-North" as a more accurate reflection of the current international system because "North-South is itself misleading for it lends weight to the impression that the South is the diminutive." *Id* at 14.

Agreement on Sanitary and Phyto-Sanitary Measures (SPS)³ disputes. This Article explores both the perceived and actual marginalization of most developing countries, especially those in Africa, by the embedded structural impediments and onerous obligations in food safety disputes. A litany of seminal works on the transition from the General Agreement on Tariffs and Trade (GATT) to the WTO in 1995 documents well how a legally enforceable dispute-settlement procedure transformed the international trade architecture from trade in goods to trade in services, intellectual property, and sanitary and phytosanitary measures.⁴

Although the multiple dynamics of the rules-based international trade architecture built on the institutional pillars of the WTO have been intensely debated by academic scholars and global civil society groups,⁵ the real question is no longer whether free trade is good or bad for countries, but rather whether the contemporary rules of free trade are fair, humane, transparent, and even-handed in the context of South-North asymmetries. Has the scope of global trade agreements extended and intruded into areas and sectors that impede social policy in the national domain of countries? Did the “single undertaking” package, in which every member accepted all WTO agreements, enclose the domestic policy space, especially in developing countries, for certain aspects of social policy and provision of public goods? In adjudicating disputes, do the dispute settlement mechanisms of the WTO create effective and mutually-reinforcing linkages between the SPS and the pre-existing and related food-safety norms, standards, and agreements of other multilateral organizations—including the emerging “norms” of the precautionary principle and sustainable development? This Article explores these

3. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1867 U.N.T.S. 493 (1994) [hereinafter SPS].

4. See, e.g., JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1997) (examining the elaborate rules which govern international economic relations in the wake of the Uruguay Round); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (2d ed. 1999) (comparing and contrasting various aspects of international trade, with special attention paid to the transition from GATT to the WTO and the resulting rules' effect on areas such as agriculture, intellectual property, environment, and domestic health regulation).

5. See, e.g., JACKSON, *supra* note 4, at 319–37 (looking at weaknesses of international trade policy insofar as it applies to developing countries). *But cf.* CATHERINE BUTTON, *THE POWER TO PROTECT: TRADE, HEALTH AND UNCERTAINTY IN THE WTO* (2004) (examining the intersection of WTO trade rules and domestic health protection regimes); TREBILCOCK & HOWSE, *supra* note 4 (charting the development of the WTO and the multiple areas of trade affected by the new rules of international trade); Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000) (discussing the WTO's constraints on domestic regulation in the context of food safety).

questions in the context of the food safety disputes at the WTO involving the SPS Agreement, the perceived or real marginalization of developing countries in these disputes, and the paradoxical convergence and collapse of existing international norms in SPS disputes and WTO law.

The Article is divided into five Parts. Part I gives an overview of the argument: the globalization of food safety concerns due to economic globalization raises complex regulatory questions in the context of South-North asymmetries. Part II presents an overview of the SPS Agreement, which came into force with the establishment of the WTO as one of the Uruguay Round trade agreements.⁶ The overview focuses on the most “controversial” provisions of the SPS Agreement on risk assessment and scientific evidence for domestic SPS measures. Part II also argues that the enforcement of the SPS, through the Dispute Settlement Mechanisms at the WTO, is problematic because of the lack of a “cohesive, epistemic community on issues of transnational biotechnology.”⁷ Focusing on some of the SPS disputes that have been adjudicated by the WTO dispute settlement panels and appellate bodies, Part III explores the actual or perceived marginalization of pre-existing food-safety related norms and agreements by the WTO. Deploying what the Author refers to as the “paradoxical convergence and divergence of norms and conventions on trade-related issues,” Part III assesses the interaction of the SPS Agreement, the Codex Alimentarius Commission’s standards on food safety established by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), and the Convention on Biological Diversity. Leading international law scholars have explored the convergence and divergence of these norms under the rubric of “fragmentation of international law.”⁸ Part IV discusses the import ban on fresh fish imposed by the European Community (EC) on East African countries prompted by outbreaks of cholera in those countries. Given that the EC ban was not based on any scientific evidence that would make the

6. SPS, *supra* note 3.

7. Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT’L L. J. 47, 135 (2001).

8. See, e.g., Chairman of the Study Group on Fragmentation of Int’l Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, delivered to the Int’l Law Comm’n*, UN Doc. A/CN.4/L.682 (Aug. 9, 2006) [hereinafter *Fragmentation of International Law UN Report*] (issuing recommendations to assist in solving the problems which result from disparities between legal regimes); G. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919 (1999) (noting fragmentation inherent in the lack of a centralized “judicial power”); John Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT’L L. & POL. 823 (1999) (examining fragmentation of international law specifically in the context of the WTO).

ban SPS compliant, the Author argues that the ban exemplifies the South-North asymmetry between rich and poor nations.⁹ These East African countries lacked the capacity to challenge the EC before the WTO because they had an insignificant share of international trade compared to the EC.¹⁰ Part V concludes by “problematizing” the challenges of humanizing food safety concerns at the WTO in the context of South-North disparities. The time has come for the WTO to address the “democratic deficit” that is created by the enforcement of free trade rules on food safety issues. One way to do this is to take pragmatic steps towards implementing the various provisions of trade agreements that codify the principle of “Special and Differential Treatment” for developing and least developed member countries of the WTO.

II. OVERVIEW OF THE SPS AGREEMENT

The SPS is one of the Uruguay Round trade agreements negotiated alongside the establishment of the WTO in 1995.¹¹ The preamble to the SPS Agreement re-affirms that no Member of the WTO “should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.”¹² The SPS Agreement seeks to establish “a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade.”¹³ The SPS Agreement also desires to “further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring

9. SPS, *supra* note 3, art. 2.2 (verifying that the SPS requires scientific grounds for bans); Press Release, Food and Agric. Org. of the U.N., FAO: Import Ban on Fish Products From Africa “Not the Most Appropriate Answer,” PR 98/21 (Mar. 25, 1998) [hereinafter FAO Import Ban] (asserting that the WTO’s ban was scientifically unsupported).

10. Amin Alavi, *African Countries and the WTO’s Dispute Settlement Mechanism*, 25 DEV. POL’Y REV. 25, 34 (2007).

11. SPS, *supra* note 3.

12. *Id.* pmbl. ¶ 1.

13. *Id.* ¶ 4.

Members to change their appropriate level of protection of human, animal or plant life or health.”¹⁴

Like most WTO agreements, the SPS Agreement attempts to draw a line of distinction between protectionism and genuine domestic measures and policies necessary to protect human, animal, or plant life or health.¹⁵ This balance is always delicate given the long list of disputes over the interpretation of Article XX(b) of GATT 1994 heard by various WTO Panels as well as its Appellate Body.¹⁶ Thus far, in the WTO jurisprudence on food safety disputes, the most contentious issues on the SPS seem to revolve around the “Basic Rights and Obligations of WTO Members” in Article 2, the harmonization of national and relevant international SPS measures in Article 3, and the requirement of risk assessment in Article 5.¹⁷ WTO members, under Article 2, shall ensure that any sanitary and phytosanitary measure is applied 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 provided in paragraph 7 of Article 5.¹⁸ Article 2(3) codifies

14. *Id.* ¶ 6.

15. See M. Trebilcock & J. Soloway, *International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body Under the SPS Agreement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC 537 (Daniel L.M. Kennedy & James D. Southwick eds., 2002) (discussing the SPS's intended balance between protectionism and genuinely protective policies); Howse, *supra* note 5 (defending the SPS provisions as mechanisms which enhance rational democratic deliberation as to what constitutes risk and how risk can be controlled).

16. See TREBILCOCK & HOWSE, *supra* note 4, at 397–98 (discussing Article XX(b) of GATT 1994); see also WHO and WTO Secretariat, *WTO Agreements and Public Health: A Joint Study by the WHO and WTO Secretariat*, at 30–31, VII-2002-6,000 (Aug. 20, 2002), available at http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf (demonstrating the importance that the WTO has always placed on health exceptions by listing the forms those exceptions take in different treaties, including GATT's Article XX(b)); BUTTON, *supra* note 5, at 24–41 (suggesting that, despite its textual limitations, Article XX(b) was interpreted such that it offered protections parallel to those of the SPS); ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 11–12 (2000) (explaining Article XX's justification of measures that would normally be incompatible with GATT, if such measures can be defended from the perspective of particular public policy needs).

17. TREBILCOCK & HOWSE, *supra* note 4, at 145–47 (discussing the contentious provisions of the SPS in detail); see also *id.* at 155–60 (detailing important WTO Panel/Appellate Body decisions surrounding interpretations of SPS provisions).

18. SPS, *supra* note 3, art. 5.7.

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and

the well-known Most Favoured Nation (MFN) principle by providing that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail."¹⁹ On harmonization of SPS measures, Article 3 provides:

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.²⁰ Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.²¹

Because of the complexity of risk assessment requirements in SPS disputes, the SPS Agreement has detailed provisions on such

review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

19. *Id.* art. 2.3.

20. Note 2 of the SPS Agreement appears here. The text of the Note reads:

For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Id. art. 3.3 n.2.

21. *Id.* art. 3.1–3.4.

assessment. Article 5(1) provides that WTO “members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”²² In assessing risks, member states “shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; the existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”²³ Article 5(3) further provides that

in assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.²⁴

When “determining the appropriate level of sanitary or phytosanitary protection,” WTO members shall “take into account the objective of minimizing negative trade effects.”²⁵ On the need for consistency in various SPS measures of various WTO members, Article 5(5) provides:

[W]ith the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.²⁶

The other SPS provisions on risk assessment require member states to maintain the least trade-restrictive SPS measures²⁷ and, “where relevant scientific evidence is insufficient,” to

22. *Id.* art. 5.1.

23. *Id.* art. 5.2.

24. *Id.* art. 5.3.

25. *Id.* art. 5.4.

26. *Id.* art. 5.5.

27. *Id.* art. 5.6.

provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.²⁸

Article 5(8) provides that:

when a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.²⁹

Article 5 of the SPS Agreement, addressing risk assessment, is one of the most detailed and controversial articles in the SPS Agreement and has been the subject of almost all SPS disputes at the WTO since 1995.³⁰ This is partly because risk is extremely difficult to regulate effectively. Risk regulation in the context of trade-related food safety disputes is often driven by cultural differences in a multicultural world, as well as human manipulation of nature through the use of emerging biotechnology. These motivations often bump into the domain of the precautionary principle and uncertainty, especially when science does not have definitive and conclusive answers. Despite the seminal works of the leading scholars on risk,³¹ there does not appear to be any consensus on how risk regulation should balance risk, precaution, and uncertainties. Additional lacunas exist in the international legal context: a comprehensive international treaty on risk and biotechnology is lacking, and no consensus exists on the obligatory character of the normative provisions of international environmental laws that codify the time-hallowed principle of precaution.³² The implications of these voids, as

28. *Id.* art. 5.7.

29. *Id.* art. 5.8.

30. See Trebilcock & Soloway, *supra* note 15, at 557–58 (detailing the contentious history of SPS art. 5).

31. See, e.g., ULRICH BECK, *ECOLOGICAL POLITICS IN AN AGE OF RISK* (1988) (noting that ecological risks pose problems which require a new system of risk management); ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (1986) (hypothesizing modern industrial society's increasing need for complex risk calculations); NATURE, RISK AND RESPONSIBILITY: DISCOURSES OF BIOTECHNOLOGY (Patrick O'Mahony ed., 1999) (examining the effect of biotechnology on pre-existing risk calculations); CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLES* (2005) (rejecting the "precautionary principle" and re-evaluating the interactions between fear, danger and the law).

32. For an insightful analysis of the tensions between food safety, risk assessment, and the precautionary principle, see generally BUTTON, *supra* note 5;

Murphy observed, are the lack of a “cohesive, epistemic community on issues of transnational biotechnology.”³³ This has left the regime of the WTO as the undisputed champion to address the issue of trade bans, but with only “limited ability to assess the scientific basis of those bans.”³⁴ Murphy rightly concluded that the WTO regime

[i]s a reactive regime, closely scrutinizing trade restrictions (and typically striking down those purportedly based on environmental concerns). It is unable to consider broader issues, such as the fairness of allowing developed states to export genetically modified products derived from materials of developing states. Other global regimes, embodied in the WIPO, the FAO, or the UNDP, have limited resources and a limited mandate to effect change in this area.³⁵

Focusing on the recent WTO panel’s ruling in the *EC-Biotech*³⁶ dispute that characterized a broad range of health and environmental concerns as risks of an SPS nature, Peel observed that such thinking has “potential implications for the inter-relationship between the SPS Agreement, TBT Agreement, and GATT” within the WTO, as well as the relationship “between the WTO and overlapping environmental regimes.”³⁷ The actual or perceived marginalization of these other global regimes by or within the WTO regime—a phenomenon that leading international lawyers have explored as “fragmentation” of the discipline³⁸—is addressed in the next section as the “clash of regulatory regimes.”

KERRY H. WHITESIDE, *PRECAUTIONARY POLITICS: PRINCIPLE AND PRACTICE IN CONFRONTING ENVIRONMENTAL RISK* (2006) (comparing European and American applications of the precautionary principle in the area of environmental risk); Michele D. Carter, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy*, 6 MINN. J. GLOBAL TRADE 625 (1997) (examining the growth hormones dispute in context of the SPS framework); Gregory N. Mandel & James Thuo Gathii, *Cost-Benefit Analysis Versus The Precautionary Principle: Beyond Cass Sunstein’s Laws of Fear*, 2006 ILL. L.R.1037 (2006) (reconceptualizing the precautionary principle in light of Cass Sunstein’s LAWS OF FEAR critique); Murphy, *supra* note 7 (assessing the strengths and limits of existing international laws and structures in the area of biotechnology); *cf.* Howse, *supra* note 5 (defending the SPS provisions as mechanisms which enhance rational democratic deliberation as to what constitutes risk and how risk can be controlled).

33. Murphy, *supra* note 7, at 135.

34. *Id.* at 137.

35. *Id.*

36. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products, Reports of the Panel*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sep. 29, 2006) [hereinafter *EC-Biotech Panel Report*].

37. Jacqueline Peel, *A GMO by Any Other Name . . . Might Be an SPS Risk! Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, 17 EUR. J. INT’L L. 1009, 1012 (2007).

38. For a discussion of fragmentation of international law, see G. Abi-Saab, *supra* note 8 (affirming the possibility of a “judicial system” developing despite the fragmentation inherent in the lack of a centralized “judicial power”); *see also* Fragmentation of International Law UN Report, *supra* note 8 (issuing

III. FOOD SAFETY DISPUTES AND THE CLASH OF REGULATORY REGIMES AT THE WTO

One hallmark of the rules-based global trading system anchored by the governance architecture of the WTO is the supersonic expansion of global trade from goods into services, intellectual property, and sanitary and phytosanitary measures (food safety). In WTO jurisprudence on food safety disputes, there is a paradoxical convergence and divergence of norms and conventions on trade-related issues: the WHO and FAO jointly-administered Codex Alimentarius Commission standards on food safety, the UN Convention on Biodiversity and its Biosafety Protocol, and the Precautionary Principle in international “environmental” law, to name just a few norms and conventions.³⁹ In its first decade, the WTO has witnessed an astronomical crystallization of immutable trade norms and rules through its adjudicatory dispute-settlement mechanisms.⁴⁰ This crystallization has taken place with a speed unprecedented in the history of inter-governmental multilateral organizations.⁴¹ The crystallization of these norms in WTO jurisprudence has led to what one scholar calls “the international enclosure movement,” in which the erection of legal pillars on immutable trade norms and principles within a global civilization is driven by economic and corporate forces with less emphasis on protection of public goods and social policy in developing countries.⁴²

In this regard, some of the reports by the Dispute Settlement and Appellate Panels of the WTO are questionable. In the famous

recommendations to assist in solving the problems which result from disparities between legal regimes); Jackson, *supra* note 8 (examining how both evolving and existing theoretical concepts of international law apply in the context of the WTO, with a general overview of the major sources of fragmentation).

39. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (creating “advance informed agreement” procedures which countries use before importing or exporting “living modified organisms” resulting from biotechnology); United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 1760 U.N.T.S. 79, 143 (articulating a global strategy for sustainable development); Codex Alimentarius, Food and Agriculture Organization of the United Nations/World Health Organization Food Standards, Current Official Standards (2007), http://www.codexalimentarius.net/web/standard_list.do?lang=en (detailing multiple standards for food safety as conceived by the FAO and the WHO). One scholar of the precautionary principle in international ecology is WHITESIDE, *supra* note 32. See also BECK, *supra* note 31 (evaluating the precautionary principle and risk assessment in context of ecology).

40. See JACKSON, *supra* note 4, at 124–27 (explaining the development and implications of the dispute settlement process of the WTO).

41. See TREBILCOCK & HOWSE, *supra* note 4, at 94 (contrasting the smooth functioning of the WTO dispute settlement system with previous and co-existing mechanisms such as FTA and NAFTA).

42. Peter Yu, *The International Enclosure Movement*, 82 IND. L.J. (forthcoming 2007).

Beef Hormones dispute, the Appellate Body of the WTO ruled that EC restrictions on imported hormone-fed beef from the United States and Canada were a violation of the SPS Agreement due to the lack of any scientific evidence and risk assessment.⁴³ After the *Beef Hormones* dispute, most of the subsequent cases on the SPS Agreement (including Australia's quarantine regulations on the import of fish,⁴⁴ Japanese domestic measures on quarantine requirements for agricultural products,⁴⁵ and Japanese requirements for imported apples from the United States⁴⁶) found domestic SPS measures to be inconsistent with the SPS Agreement.⁴⁷

These disputes arose between two or more industrialized members of the WTO. If the same set of facts arose between an industrialized WTO member and a developing or least-developed member, would the dispute settlement mechanism at the WTO provide for fair adjudication? Would the EC or United States accept scientific evidence on which an SPS measure is based from Sierra Leone, Haiti, or El Salvador? Where there are two conflicting pieces of scientific evidence, or where science is not conclusive about the health impact of certain food products, should the WTO panels uphold the precautionary principle?

So far, in all the WTO disputes on the SPS in which the precautionary principle has been raised, the panels have failed to uphold it as a rule of customary international law.⁴⁸ Specifically, in *Beef Hormones*, the Appellate Body of the WTO ruled that the precautionary principle does not override the specific provisions of the SPS Agreement.⁴⁹ In a recent study on the "Precautionary Principle and the WTO" commissioned by the UN University and Institute of Advanced Studies (UNU-IAS), Shaw and Schwartz concluded that

43. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter ABR Beef Hormones].

44. Appellate Body Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998) [hereinafter ABR Australian Salmon].

45. Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (Oct. 27, 1998) [hereinafter ABR Japan Agricultural Products II].

46. Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (Nov. 26, 2003) [hereinafter ABR Japan Apples].

47. ABR Japan Apples, *supra* note 46, ¶ 203; ABR Japan Agricultural Products II, *supra* note 45, ¶ 89–91; ABR Australian Salmon, *supra* note 44, ¶ 166.

48. ABR Japan Apples, *supra* note 46, ¶ 233 (reiterating the Beef Hormones arguments rejecting the precautionary principle); ABR Japan Agricultural Products II, *supra* note 45, art. 6, ¶ 44 (noting Japan's implicit reliance on the precautionary principle to interpret its scientific findings); ABR Beef Hormones, *supra* note 43, ¶ 123–25 (rejecting the argument that the precautionary principle is customary international law, or is codified within the SPS).

49. ABR Beef Hormones, *supra* note 43, ¶ 123–25 (rejecting the argument that the precautionary principle is customary international law, or is codified within the SPS).

[r]ecent interpretations in the WTO of the parameters surrounding the use of precaution . . . reveal that countries are permitted to take precautionary measures in certain circumstances, but that they face real challenges when defending a precautionary action before the WTO Dispute Settlement Body.⁵⁰

As the Author has previously argued, a disturbing phenomenon about the paradoxical convergence and collapse of multiple regulatory regimes into SPS disputes, as well as other WTO agreements like the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), is that countries—especially the developing and least-developed countries—are often compelled to abandon the obligations they undertook in other pre-existing international regimes and multilateral organizations on human rights, environmental protection, and public health.⁵¹ In classic international law parlance, these pre-existing obligations, going by the relevant provisions of the Vienna Convention on the Law of Treaties, should prevail over WTO obligations because they are first in time.⁵² This appears to be the unfortunate story of the various environmental treaties that codified the precautionary principle.

IV. SOUTH-NORTH ASYMMETRIES AND THE POLITICS OF TRADE AND FOOD SAFETY DIPLOMACY

South-North asymmetries impact food safety in very complex ways. Despite the emerging jurisprudence on the SPS Agreement, one notorious case is the ban imposed by the EC on the importation of fresh fish from East Africa after an outbreak of cholera in some East African countries located on the River Nile Perch and Lake Victoria.⁵³ Fidler argued that "despite the firm position of WHO and the Food and Agriculture Organization (FAO) that such import bans are not justified on public health grounds", the EC kept the ban for months.⁵⁴ The FAO reported that the fish exports of Kenya, Mozambique, Uganda, and Tanzania to the EC countries amounted to around 55,000 tons in 1996, which was collectively worth \$230 million.⁵⁵ For these countries, the EC is the most important market for these

50. SABRINA SHAW & RISA SCHWARTZ, UNU-IAS, *TRADING PRECAUTION: THE PRECAUTIONARY PRINCIPLE AND THE WTO* 11 (2005). See Peel, *supra* note 37, at 1025–28 (discussing the challenges of incorporating the precautionary principle into the SPS Agreement). See generally BUTTON, *supra* note 5 (analyzing the tensions between food safety, risk assessment, and the precautionary principle).

51. Obijiofor Aginam, *Between Life and Profit: Global Governance and the Trilogy of Human Rights, Public Health and Pharmaceutical Patents*, 31 N.C. J. INT'L L. & COM. REG. 901, 919 (2005–2006).

52. *Id.* at 920–21.

53. FAO Import Ban, *supra* note 9, ¶ 5.

54. DAVID FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* 80 (1999).

55. FAO Import Ban, *supra* note 9, ¶ 8, cited in FIDLER, *supra* note 54, at 80.

products.⁵⁶ According to the FAO, the decade before 2002 witnessed an unprecedented boom in the export of fish products for these countries. World fish exports reached about \$58.2 billion in 2002, and African fish exports exceeded the combined export revenues derived from key agricultural products such as coffee, tea, rubber, rice, meat, and bananas.⁵⁷ The economic consequences of the EC ban were, therefore, deleterious. In the case of Uganda, as noted by Stefano Ponte in a study for the Danish Institute for International Studies:

[F]ish exports are the second largest foreign exchange earner in Uganda. . . . From an export value of just over one million US\$ in 1990, the mighty Nile Perch had earned the country over 45 million US\$ just six years later. . . . From 1997 to 2000, the industry experienced a series of import bans, imposed by the EU on grounds of food safety. Despite claims to the contrary, the EU did not provide scientific proof that fish was actually 'unsafe'. Rather the poor performance of Uganda's regulatory and monitoring system was used as a justification.⁵⁸

Despite the widely held view that the EU did not provide any convincing scientific proof to support the bans, these East African countries, whose economies suffered because of the embargo, did not challenge the bans at the WTO for violating the SPS Agreement.⁵⁹ They lacked the capacity to file a complaint for an SPS violation against an economic giant such as the EU.⁶⁰ This scenario plays out with respect to almost all WTO agreements.⁶¹ Citing Bown and Hoekman, Alavi observed that one major obstacle to participation of the African Group in the WTO Dispute Settlement Mechanism, including SPS disputes, is that they lack the economic muscle to retaliate against their bigger trading partners.⁶² They are mostly small countries with an insignificant share of international trade; their resulting losses would exceed any possible gains.⁶³

56. *Id.*

57. Food and Agric. Org. of the U.N., FAO Fisheries Dept., *The State of World Fisheries and Agriculture*, at 6, 54 (2004).

58. Stefano Ponte, *Bans, Tests and Alchemy: Food Safety Standards and the Ugandan Fish Export Industry*, at ii (Danish Inst. for Int'l Studies, Working Paper No. 2005/19, 2005), available at http://www.diis.dk/graphics/Publications/WP2005/19_spo_bans_tests_alchemy.pdf.

59. Andrew Mold, *Non-Tariff Barriers—Their Prevalence and Relevance for African Countries* 13 (United Nations Econ. Comm'n for Africa, African Trade Policy Centre, Work in Progress No. 21, Oct. 2005), available at www.uneca.org/atpc/Work%20in%20progress/25.pdf.

60. Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 867–73 (2005), cited in Alavi, *supra* note 10, at 34.

61. Alavi, *supra* note 10, at 30–31.

62. Bown & Hoekman, *supra* note 60, at 863, cited in Alavi, *supra* note 10, at 34.

63. *Id.*

V. EPILOGUE: TOWARDS A HUMANE FOOD SAFETY REGIME

This Article concludes by problematizing the challenges of humanizing global food-safety concerns in the context of South-North disparities. The “international enclosure movement” suggests that human rights and other social values do not, at present, have indelible fingerprints on WTO jurisprudence.⁶⁴ The trade-related disputes on the SPS Agreement are no different. It is true that we live in a divided world. The prevailing South-North economic relations that drive trade-related food-safety disputes stand to exacerbate the gap between the rich and poor countries, and to sentence a sizeable percentage of vulnerable populations in the South to the penitentiary of hunger, malnutrition, and possibly preventable death. The weak institutions in most developing countries; the shrinking normative and policy space for the incubation, promotion, and distribution of public goods as a result of the globalization of markets; and the socio-economic inequalities between countries have, according to Rodrik, led to the dilemma of globalized markets built on largely local institutions.⁶⁵ How then should the “democratic deficit,” which is occasioned by accelerating economic globalization and experienced by most developing countries or least-developed countries of the South, be addressed? This Article argues that while free trade is important, trade norms, rules, and principles must be humane. It is important to recall Richard Falk’s admonition:

Integrative tendencies in international life, combined with the widely imagined future of a cyber world, ensure that a global civilization in some form will take shape early in the twenty-first century. But this probable world is a civilization only in a technical sense of being bound together by a high rate of interaction and real time awareness, with reduced relevance being attached to distance, boundaries, and the territorial features of the domains being administered by sovereign states. . . . The current ideological climate, with its neo-liberal dogma . . . suggest[s] that the sort of global civilization that is taking shape will be widely perceived, not as fulfillment of a vision of unity and harmony, but as a dysutopian result of globalism-from-above that is mainly constituted by economistic ideas and pressures.⁶⁶

Falk’s “economistic ideas and pressures” resonate in Weeramantry’s transplantation of the biblical “Our Lord’s Prayer” in the international legal context, where “Give us this Day Our Daily Bread” represents a “clear injunction against anti-social conduct such

64. Yu, *supra* note 42 (demonstrating the harms of the “international enclosure movement” through the example of the WTO’s TRIPs Agreement, which hurts the ability of developing countries to address national public health crises).

65. Dani Rodrik, *Governance of Economic Globalization*, in GOVERNANCE IN A GLOBALIZING WORLD 347, 348 (Joseph Nye & John D. Donahue eds., 2000).

66. Richard Falk, *The Coming Global Civilization: Neo-Liberal or Humanist*, in LEGAL VISIONS FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 15 (A. Anghie & G. Sturges eds., 1998).

as hoarding or cornering the market in essential commodities.”⁶⁷ This is exactly what the asymmetrical structure at the WTO in food-safety disputes seems to perpetuate, as exemplified by the EC embargo on fish from East African countries. This mindset of market colonialism in South-North economic relations is irreconcilable with the fundamental purposes of the Marrakesh Agreement of 1994—the constituent instrument that established the WTO and provides that the relations of WTO members in the field of trade and economic endeavor should be conducted with a view to raising the standards of living.⁶⁸ While the objective of the SPS Agreement—to strike a balance between the protection of human life and sheer protectionism—is infallible, science may not often have all the answers in the face of accelerating biotechnological advancements in the global food industry. Trade norms must therefore link neatly with and mutually reinforce other norms and agreements that advance human dignity. To achieve this objective, there is a need to develop effective and universal benchmarks. It is despicable, for instance, that the EU, which has fought against the importation of genetically modified organisms (GMOs) into European markets from North America,⁶⁹ would ban the importation of fresh fish from East African countries by hiding under the cover of both the SPS Agreement and questionable scientific evidence on the correlation between fresh fish and the cholera outbreak.⁷⁰ It is time for the WTO to take seriously the various provisions in its agreements that codify the Special and Differential Treatment for developing and least developed countries,⁷¹ especially with respect to those future food-safety dispute scenarios that are similar to the EU-East Africa fish ban.

67. Weeramantry, *supra* note 1, at 177.

68. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994).

69. See EC-Biotech Panel Report, *supra* note 36 (detailing and disputing the EU’s restrictions on GMO imports); Murphy, *supra* note 7, at 78–86 (discussing generally the EU’s hostility to GMOs and other forms of biotechnology).

70. FAO Import Ban, *supra* note 9, ¶¶ 2, 4.

71. See Simonetta Zarrilli, *WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries* (South Centre, Trade-Related Agenda, Dev. & Equity, Working Paper No. 3, 1999), available at <http://www.southcentre.org/publications/workingpapers/wp03.pdf>; see also Ponte, *supra* note 58 (examining the effects on Uganda of the EU/WTO’s demands for safety standards within the fish industry); Mandel & Gathii, *supra* note 32 (discussing how to balance the tension of risk analysis and the precautionary principle in WTO disputes including the SPS).