Confounding Conventional Wisdom: Political not Principled Differences in the Transatlantic Regulatory Relationship[1]

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

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

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The empirical shortcoming has to do with neither the beef hormones nor the GMO dispute demonstrating what it is purported to. The tendency is to depict these WTO complaints as reflecting fundamental differences in the two parties' approaches to regulation, with the US advocating 'sound science' and the EU advocating the 'precautionary principle.' While the US and EU are to an extent responsible for fostering the perception of competing principles, detailed analyses of the prime exhibits invoked to support this conventional wisdom reveal sharply different approaches to risk management within the EU and EU policy outcomes that reflect messy political processes. The EU's regulations, therefore, are more political than principled. Moreover, contrary to how the WTO complaints are normally depicted, how the US pursued those complaints actually supports the characterisation of the transatlantic relationship as tolerant.

In developing this argument, this article draws together research conducted for three previous research projects. One on the early days of the transatlantic dispute over genetically modified crops conducted when I was a BP Transatlantic Jean Monnet Fellow at the Robert Schuman Centre for Advanced Studies at the European University Institute. One for the European Commission's Directorate General for External Relations on the state of the transatlantic relationship ten years after the signing of New Transatlantic Agenda.[2] One on the EU's use of WTO dispute settlement, which was funded by the British Academy.[3] In all the article draws on 28 not-for-attribution interviews with trade officials, regulators and business groups on both sides of the Atlantic. Regulators and trade officials were asked about their perceptions of sources of regulatory differences. Trade officials were also asked about what influences their decisions to initiate WTO complaints. Business group representatives were asked about their views of the origins of trade barriers, whether and how they sought to address them and what they perceive to influence trade officials' decisions about how to

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pursue trade barriers. These different perspectives were triangulated with each other and documentary sources.

The article begins by setting out the significance of trade barriers stemming from public health and environmental regulations in the transatlantic relationship and the particular challenges of resolving them. It then describes the established conventional wisdoms about the transatlantic relationship. It then exposes in turn the methodological and empirical shortcomings that underpin those conventional wisdoms. It concludes by drawing out the implications of the analysis and reassessing the transatlantic regulatory relationship.

The distinctive politics of regulatory trade barriers

Excluding the European Union itself the transatlantic economic relationship is the largest, broadest and most intensive international economic relationship in the world. As tariffs have been reduced through successive rounds of multilateral trade negotiations, regulatory differences have become increasingly significant obstacles to transatlantic trade in goods (Commission 2008c: 9; USTR 2008: 213). Because regulations are statutory requirements governing products' characteristics or how they are produced, products that do not meet those requirements cannot be sold where the regulations apply. If regulations governing the same product are different in two markets, a product that complies with the rules of its home market may well be excluded from the other market; thus the regulatory difference impedes trade. Although there are a wide variety of regulatory barriers that affect transatlantic trade in goods, most of the most problematic concern public-health and environmental rules (Ahearn et al 2008: 34; Atlantic Council 2002; Brittan 2000; Pollack 2003b: 596).[4]

Trade barriers stemming from public-health and environmental rules are particularly difficult to resolve because they are politically distinctive. As with other regulatory trade

[4] Author's interview with a US trade official (6 January 2005).

barriers, the adverse trade consequences of public-health and environmental rules are usually unintended side-effects of policies intended to realise other, domestic policy objectives. Because public-health and environmental rules are seen as having direct relevance for all citizens of a polity, however, they are widely regarded as being more politically salient than other types of regulation or traditional trade measures (Ahearn et al 2008: 34; Damro and Sbragia 2003; Kahler 1995: 56; Pollack 2003a: 71; Scharpf 1999).

Consequently, the political calculus of liberalising trade by removing such barriers is distinctive (Evans 2003; Young 2007b). Traditional trade liberalisation through removing tariffs entails concentrated costs for protected firms and their workers and diffuse benefits for consumers. Where public-health and environmental regulations impede trade, however, liberalisation also entails diffuse costs for citizens in the form of potentially reduced safety or environmental protection thereby undermining political support for liberalisation.[5] The difficulty of resolving such disputes is evident in the very few transatlantic public-health and environmental regulatory disputes resolved through negotiations despite over a decade of effort within the framework of the New Transatlantic Agenda (see Commission 2005a, 2005b).

Conventional wisdom or conventional folly?

Two reinforcing conventional wisdoms have emerged that characterise the transatlantic regulatory relationship:

1. That the US is hostile to regulation while the EU favours stringent (precautionary) public health and environmental regulation; and
2. That the relationship, in part as a consequence, is highly conflictual.

I shall develop each of these conventional wisdoms in turn before turning to their flaws.

[5] Although trade liberalisation within the EU has been achieved by agreeing stringent common rules ('positive integration') (for a survey of the literature see Young 2007a: 383-5), the common expectation in the international setting is that regulatory barriers will simply be removed ('negative integration').

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

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

This fundamental difference in risk aversion has been cited to explain transatlantic regulatory differences in newspapers (see, for example, *The Economist*, 22 September 2007; *Financial Times*, 22 July 2003: 16; *The Wall Street Journal*, 23 April 2002) and opinion-shaping magazines, such as *Foreign Policy* (Tama 2004) and *The National Interest* (Kogan 2004). It has also been invoked by US business interests keen to challenge EU regulations (see, for example, NAM 2004; NFTC 2003) and environmental groups seeking to defend them (see, for example, Amicus Coalition 2004; Greenpeace 2003, 2006). This conventional wisdom is also echoed by European Commission officials. In 1999 then Trade Commissioner Pascal Lamy was quoted as saying, 'In the US they believe that if no risks have been proven about a product, it should be allowed. In the EU we believe something should not be authorized if there is a chance of risk' (cited in Charnowitz 2000: 185, fn 180). Other Commission officials have echoed similar views in academic texts (see, for example, Abbott

2003: 564-5; Christoforou 2004). In interviews a few US government officials also pointed to such fundamental differences contributing to transatlantic regulatory disputes.[6] The view that transatlantic regulatory disputes are rooted in fundamentally different approaches to risk is also found in some academic work (see, for example, Devereaux et al 2006: 81; Laïdi 2008: 3; Newell 2003: 61-2; Tehrani 2008: 137).

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

CW2 The prevalence of trade wars

As a former senior European Commission trade official (Abbott 2003: 563) noted, there is a 'general perception' of 'one [transatlantic] trade war after another.' WTO complaints figure prominently in academic texts on the transatlantic economic relationship (see, for example, Cowles 1997; Kahler 1995; McGuire and Smith 2008, Ch. 3; Peterson 2004; Petersmann and

[6] Author's interviews with US government officials (11 and 12 January 2005).
[7] The 1992 (Maastricht) Treaty on the European Union incorporated the precautionary principle as one of the principles to be taken into account in EU environmental policy (Art. 174(2)).

Pollack 2003 (eds); Pollack and Shaffer 2006; Steffenson 2005, Ch. 7; Vogel 1997; Woolcock 1991). To be fair most of these authors acknowledge that trade disputes should be expected in an economic relationship as large and complex as the one between the EU and the US. Moreover, regulatory disputes are not the only WTO complaints that attract scholarly attention, with those over the EU's banana trade regime, US steel safeguards, and the US's Foreign Sales Corporation (FSC) tax break featuring particularly prominently (see, for example, McGuire and Smith 2008; Peterson 2004; Steffenson 2005). In addition, many authors also spend considerable time discussing the myriad efforts at regulatory cooperation since the launch of the New Transatlantic Agenda in 1995 (Andrews et al 2005 (eds); Bermann et al 2000 (eds); Cowles 1997; Peterson 2004; Peterson and Young 2007; Pollack 2005; Steffenson 2005).

Nonetheless, with respect to regulatory differences the EU and US have been depicted as 'trading blows' (Woolcock 1991), being 'über-competitors' (Carlame 2007: 303), engaging in regulatory 'competition' (Kupchan 2003: 212-13), 'conflict' (Cowles 1997: 8) and 'rivalry' (Ahern et al 2008: 35), and experiencing 'system friction' (Pollack 2003b: 595). The Atlantic Council (2002: 8), therefore, identified as its second 'myth' about the transatlantic regulatory relationship that trade disputes pit the 'pro-environment' EU against the 'anti-environment' US; a view articulated by the Amicus Coalition (2004), Carlarne (2007) and Greenpeace (2003, 2006).

Mutually reinforcing conventional wisdoms

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

Ahearn 2007; Carlarne 2007; NFTC 2003; NAM 2004; Thompson 2003). The Bush administration's hostility to addressing climate change and resistance to the EU's efforts to promote adoption of the 'precautionary principle' in international agreements also played a role (Atlantic Council 2002).[8]

Second, the perception that that regulatory differences are persistent and universal is seen by some as encouraging the US to be more aggressive in challenging EU measures that may not have great economic significance before the WTO in order to discourage it from adopting more precautionary regulations (Ten Eyck et al 2004: 266; Murphy and Levidow 2006: 7). Thus transatlantic regulatory WTO complaints serve as evidence supporting the conventional wisdom that that the US and EU have fundamentally different approaches to public health and environmental regulations and that their differences are so fundamental arguably encourages WTO complaints.

Two conventional follies

Because WTO complaints are central to both conventional wisdoms, both are rooted in the same methodological and empirical problems. The methodological problem is one of selection bias, considering only those disputes that achieve the prominence of WTO complaints. To an extent this is a manifestation of the 'availability heuristic,' a psychological phenomenon in which people tend to evaluate the frequency or the probability of events by the ease with which relevant instances come to mind (Tversky and Kahneman 1973; 1974). This means that more easily recalled events tend to be thought to be more common or likely than less easily recalled ones, even if this is not the case.

[8] The US government's position is not complete hostility to the idea of precaution, rather it argues that existing international rules, including those of the WTO, adequately acknowledge the right of governments to exercise precaution and that the balance between scientific uncertainty and the potential for benefit or harm being evaluated on a case-by-case basis (Atlantic Council 2002: 5). The leaders of the EU (European Council 2000, point 4) also think that WTO rules allow sufficient scope for members to exercise precaution.

CW1 -- that the precautionary approach that the EU supposedly adopted in measures challenged in the high-profile WTO complaints and the US's apparent antipathy to it holds for all regulatory decisions -- is informed by the 'availability heuristic.' CW1 goes beyond a focus on the probability of events to generalise from the readily available examples (WTO complaints) to the many, lower profile regulatory differences (Wiener 2004: 75). In the vast majority of cases the act of generalisation is implicit.[9] CW2 about the conflictual nature of the transatlantic regulatory relationship is a more straight-forward manifestation of the 'availability heuristic,' in which the overwhelming focus on the WTO complaints that there have been rather than considering those issues that have not become WTO complaints, creates the impression of extensive conflict. Generalisations based on this type of selection bias, however, are methodologically unsound (King, Keohane and Verba 1994: 129; Moses and Knutsen 2007: 114).

The beef-hormone and GMO disputes are highly atypical as they represent the only two transatlantic public health and environmental regulatory disputes to have been pursued through adjudication before the WTO.[10] In contrast, examination of the Commission's and USTR's annual reports on the other's trade barriers reveals a great many environmental and public health rules that have provoked concern, but that have not escalated, despite being longstanding sources of irritation (see Table 1).

Insert Table 1 about here

[9] Greg Shaffer and Mark Pollack (2005: 172) are rare in explicitly 'resist extrapolating' from their study of GMOs to the relative importance of precaution in the EU and US.

[10] Another WTO complaint was the EU's challenge to a US ban on poultry imports, which was resolved at the consultation phase (USTR 2009). The US filed a WTO complaint in January 2009, in the final days of the Bush administration, against the EU's ban on antimicrobial treatment of poultry. At the time of writing (April 2009) it is too soon to tell whether and how it will be pursued, particularly give the subsequent change in the US administration. In any event, this dispute is too recent to have shaped the conventional wisdoms. Another dispute involved a US challenge to EU restrictions on aircraft retrofitted with 'hushkits' to comply with noise limits, which was addressed through mediation by the International Civil Aviation Organisation (ICAO) and resolved as part of an overall agreement on new ICAO standards and policies (Abbot 2003).

An even smaller number of measures has been raised by each side in the WTO committees that oversee the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements, which govern the adoption of environmental and public health regulations, respectively (see Figure 1). It is worth noting that other countries, particularly China, have expressed many more concerns about EU and US regulations than they have about each other's. For example, 56 EU SPS measures were raised as being of 'specific concern' between 1995 and 2007, but the US was involved in only 17 of those; 24 US SPS measures were raised, with the EU involved in only nine (WTO 2008b).[11]

Moreover, there are a great many regulatory measures adopted by both sides that have not prompted even this level of concern. Both parties have notified large numbers of potentially trade-impeding regulations (and conformity assessment procedures) to the WTO's TBT and SPS Committees. During 1995-2007 the US notified 530 measures to the WTO's TBT Committee and 1,745 measures to the SPS Committee, while the EU (excluding notifications by individual member states) notified 356 TBT measures and 320 SPS measures (WTO 2008a and SPS Information Management System). Moreover, this understates the number of potential regulatory barriers as the individual EU member states are also active regulators. Between 1999 and 2007 EU member states notified 61 SPS measures (Commission 2008a), and between 1995 and 2007 the 15 states that were members of the EU for that whole period notified 1,592 TBT measures (WTO 2008a).

This reveals that only a tiny proportion of EU and US regulations prompt concern by the other party, let alone WTO complaints. Like an iceberg, therefore, the vast majority of the regulatory relationship is below the 'waterline.' Unlike an iceberg, where the danger is what you do not see, the danger here is assuming that what you do not see is the same as what you do.

[11] The TBT Committee does not systematically report issues of concern raised prior to 2005.

Insert Figure 1 about here

The shortcoming of generalising from the most visible cases is compounded by an empirical one. The WTO complaints that are normally taken as confirming the conventional wisdoms do not demonstrate what they are purported to, either as examples of the EU's risk aversion or the US's aggression in challenging regulatory barriers. Strikingly, most of the academic literature that analyses these transatlantic disputes in detail does not make these mistakes. The empirical shortcoming, however, appears in pieces that seek to generalise about the state of the transatlantic relationship and are the product of focusing on differences in regulatory outcomes (in CW1) and on the existence of a WTO complaint (in CW2). As discussed below, analyses of the political processes leading to those regulatory outcomes and WTO complaints actually confound the conventional wisdoms.

The next two sections of the article take each conventional wisdom in turn. In each case it examines both how consideration of the full range of regulatory activity in the EU and US paints a different picture of the regulatory relationship than that painted by a focus on only WTO complaints and how detailed analysis of the prime exhibits for the conventional wisdoms do not actually support their claims.

Countering CW1: Not sound science versus the precautionary principle

The conventional wisdom suggested by a focus on only the high-profile transatlantic WTO disputes implies that the US should not have any public health or environmental regulations that impede trade. Looking beyond the transatlantic disputes, however, yields a different picture. The US too has stringent public-health and environmental rules, as the EU's litany of US rules that impede trade (see Table 1); the 'specific trade concerns' regarding US rules

raised in the TBT and SPS Committees; and the number of notifications by the US to those Committees suggest (see also, Hammit et al 2005; Kahler 1995; Vig and Faure 2004; Vogel 1997; Weiner 2004; Weiner and Rogers 2002). This suggests that the transatlantic regulatory relationship is not nearly as lop-sided as the conventional wisdom depicts.

Rather than the US simply being less risk averse than the EU, as CW1 suggests, there are three distinct qualifications regarding their respective attitudes towards risk. One concerns differences in priorities. Another concerns change over time. The third concerns differences within each of the polities. Although these qualifications are often depicted as alternatives, they essentially reinforce each other. The first two qualifications are based primarily on assessments of regulations, the outputs of political processes, while the third emphasises that regulatory decisions are contested. It is, therefore, not surprising that the stringency of regulations varies across issues or over time.

The first qualification to the conventional wisdom that the US is less risk-averse than the EU is that they actually differ with regard to which risks they prioritise (Wiener 2004: 74; Wiener and Rogers 2002: 319). Hammitt et al (2005: 1223), for instance, found that US regulations tend to be more precautionary than the EU's with respect to pollution and medication/medical treatment, while EU rules are more precautionary with regard to food/agriculture, human disease/health, toxic substances and ecological risks. The two polities' rules were equally precautionary with respect to consumer protection. Even within these broad categories there are marked differences with respect to which risks are regulated stringently. With regard to food safety, for example, the US rules tend to be more precautionary than the EU's with regard to potential carcinogens and traditional foods, such as raw milk cheeses and cured meets (Vogel 2003: 562).[12] One Commission regulator described the US approach to many aspects of food safety as 'very precautionary and

[12] For an overview of precaution in US food safety see FDA and DoA (2000).

distortive'.[13] The EU, by contrast, tends to be more precautionary with regard to new food technologies, including the use of hormones, genetic modification and irradiation (Vogel 2003: 562). Thus the two high-profile WTO complaints that inform CW1 both happen to concern issues about which the EU is more precautionary than the US.

The second qualification to CW1 is that the relative stringency of US and EU regulation has changed over time. US regulations tended to be more precautionary than the EU's into the 1980s, but that the EU has adopted more precautionary rules than the US since 1990 (Christoforou 2004: 18; Mavroidis 2003; Vig and Faure 2004: 1; Vogel 2003: 561-2 and 579). The volume of US notifications to the TBT and SPS Committees, discussed above, however, testifies to continued regulatory activism (see also Wiener 2004). Nonetheless, almost all of the US federal measures that the EU has raised as trade barriers – including the poultry ban, CAFE payment, Marine Mammal Protection Act, shrimp/turtle, BSE-related restrictions, and restrictions on drift-net fishing – were adopted prior to 1990. Meanwhile, most of the EU's measures about which the US objects -- including the bans on rBST and hormone treated beef; GMO approvals; and the Registration, Evaluation, and Authorization of Chemicals (REACH) regulation -- have been adopted since the late 1980s.

The comparative literature on transatlantic regulation suggests that contingent factors shaped differences in regulatory approaches since 1990. In particular, a number of regulatory failures in Europe in the 1980s and 1990s – including the Chernobyl nuclear disaster , the Sandoz river fire, BSE, dioxin, and AIDS-tainted blood – contributed to public distrust of regulation and gave European policy makers strong incentives to err on the side of caution (Ahearn 2007: 26; Christoforou 2004: 31; Vogel 2003: 572-3).[14] The variance in the relative stringency of US and EU regulations over time and across issues is inconsistent with a deep-

[13] Author's interview, 15 March 2005.
[14] Author's interview with a Commission regulator 16 September 2003.

rooted cultural difference with respect to risk aversion (Vogel 2003: 580; Wiener 2004: 91; Wiener and Rogers 2002: 339).

The third qualification to CW1 – that attitudes towards risk vary within the two polities – helps to explain variation across issues and over time. Murphy and Levidow (2006: 1 and 8) explicitly criticise many of the existing accounts of the transatlantic dispute over GMOs for treating the EU and the US as the units of analysis, which, they argue, leads to 'a tendency to stereotype the EU and the US and to imply that a consensus has emerged in each one.' By contrast, studies of regulatory policy-making within each polity emphasise how contested regulations are (see below).

With regard to EU policy-making much of the focus tends to be on the different policy preferences of the member states, which are usually assumed to be informed by the preferences of the parties in government and the strength of environmental and consumer groups and business interests (for a review see Young 2010). Significantly, Jasanoff (2005; 2008) has identified significant differences in the preference for precaution within and between EU member states. Because the EU's treaties permit member states to maintain stringent national environmental and public health regulations, subject to certain conditions and judicial review, the drive to create the single European market by eliminating regulatory barriers to trade from the mid-1980s created a dynamic of 'trading-up' through which the product regulations of the more risk-averse states have tended to be adopted at the EU level (Vogel 1995; Young 2004; Young and Wallace 2000).[15] Thus it is not surprising that Eckley and Selin (2004: 98) found that the 'precautionary principle' has affected debates within and international pronouncements by the EU, but has had little impact on policy outcomes.

Political contestation has also shaped the contours and evolution of environmental and public safety regulation in the US, although the political dynamics have been very different.

[15] For a review of the literature on how the single European market process tends to lead to more stringent public health and environmental regulation, see Young (2007a: 383-5).

While interest group competition and institutional changes were crucial to explaining the contours of US environmental and public health regulation through the 1980s (Vogel 1989), subsequently the relative power of the political parties has been seen as the crucial factor. In particular, the Republican Party, which has become resistant to public-health and environmental regulation, used its control of at least one house of Congress (1995-2007) and/or the Presidency (2001-09), to impede and in some cases roll-back US regulatory legislation (Lazarus cited in Hammitt et al 2005; Vig and Faure 2004: 7; Vogel 2003: 578). The Democratic Party, by contrast, is seen as much more favourably disposed towards public health and environmental regulation. In part reflecting different balances of political power at the sub-federal level, there are profound differences among the US states in their approaches to particularly environmental legislation (see *The Economist*, 25 January 2007). State-level initiatives and the marked shift in US policy on climate change in the wake of the success of the Democratic Party in the 2008 elections (see *The Economist*, 14 March 2009) lend credence to the thesis that US environmental and public health regulation is shaped more by politics than by a fundamental attitude towards risk.

Empirical shortcomings: Politics rather than principle

Although there are exceptions (see, for example, Krenzler and MacGregor 2000: 314-5), the vast majority of detailed analyses of the EU decision-making processes leading to the ban on hormone-treated beef and the adoption and application of GMO approval procedures do not explain the outcomes in terms of fundamental risk-aversion. Rather, they provide additional support for the view that transatlantic regulatory differences reflect political rather than principled differences. CW1's focus on regulatory outcomes, therefore, tends to exaggerate the underlying differences.

The beef-hormone dispute was due to the EU banning the use of growth promoting hormones permitted in the US because of concerns that their residues could adversely affect human health. The ban had its origins in highly publicised health scares stemming from prohibited hormones used in raising livestock. At the time the EU's member states had very different assessments of the safety of five other hormones used in raising beef; the Italian and Luxembourg governments banned all five; the British and Irish governments permitted all five, and the Danish, French and German governments permitted the use of some (*Agence Europe*, 29/30 September 1989, p. 9; Vogel, 1997). These differences impeded the free circulation of beef within the EU, which was particularly problematic given the objective of eliminating regulatory barriers to trade (creating a single European market) by 1992 (Vogel 1997).

The European Commission, the EU's supranational executive, initially proposed banning only the two synthetic hormones but permitting the controlled use of the three natural hormones. In the face of stiff opposition from consumer groups, the European Parliament and most of the member states, however, the Commission revised its proposal to ban the three natural hormones as well (Princen 2002; WTO 1997: para II.29). Some governments opposed the ban, but were outvoted. Moreover, the Parliament 'regret[ted]' that the Commission had proposed banning the two synthetic hormones without waiting for scientific committee reports, but still welcomed the ban because their safety had not been conclusively proven.[16] The adoption of the beef hormone ban, while perhaps reflecting a precautionary approach on the part of the European Parliament and some member states, reveals significant differences with regard to precaution within the EU. It was the EU's institutional framework – both the drive to create the single European market and the EU's decision rules – which resolved the internal political contest in the form of a precautionary regulatory outcome.

[16] *EC Official Journal*, C288/158 11 November 1985, Point E.

The adoption, development and application of the EU's GMO approval procedures were also characterized by the need to reconcile different approaches to regulation within the Commission and among the member states. The resulting procedures were also markedly different from those in the US, with the US treating GM crops and foods as 'substantially equivalent' from non-GM varieties and, therefore, not requiring specially regulatory procedures and the EU regarding them as inherently different and requiring a distinctive approval process (see Pollack and Shaffer 2009, Young 2001). The EU's approach is thus more precautionary than that adopted by the US.

This outcome, however, was the product of political competition between those in the Commission and among the member states who advocated a pro-biotechnology approach and those in the Commission and among the member states that favoured a more precautionary approach (Patterson 2000; Pollack and Shaffer 2009). Although the EU's approval process was slow, it worked at first, but in 1998 the member states stopped considering approvals. Although the Commission had the authority to approve GM varieties, it did not do so because it was concerned about antagonising the member states and public opinion. [17] In addition, during 1997-98 several member states prohibited the sale or cultivation of even EU-approved varieties of GM crops. In 1999 several member states declared that they would not approve any new GM crops until more stringent procedures were adopted (Council 1999). In order to get the approval process going again, the Commission initiated a series of reforms, which, because they had to placate the most reluctant member states, meant that the EU further tightened its regulation of genetically modified crops (Pollack and Shaffer 2009; Young 2004). The reforms extended the regulatory framework to include GM animal feed; placed greater emphasis on precaution and on environmental risk assessment based on common principles; limited approvals to 10 years (which may be extended upon review); eliminated

[17] Author's interviews with a Commission regulator (4 December 2000) and trade official (10 January 2001).

the assumption that foods derived from GM crops but no longer containing genetic modification are 'substantively equivalent' to existing foods; required traceability, monitoring, and labeling throughout the production process; and (from April 2007) prohibited any residues of non-EU approved GMOs in food or feed. The reforms also require that decisions be based on a scientific risk assessment,[18] but broaden the factors that can be considered in approving GMOs to include the 'consumer interest' and 'other legitimate factors' (Pollack and Shaffer 2009: 241).

In 2004 the EU resumed approving GM crop varieties for sale (not cultivation), but these approvals have been on the Commission's initiative as there have not been enough member states in favour. The splits amongst the member states over the approval for sale of genetically modified soybean A2704-12 are typical. On 12 February 2008 in the Standing Committee on the Food Chain and Animal Health 13 member states' representatives voted in favour of approving the GM soybean, eight voted against, five abstained and one was not represented (Commission 2008b). As with the ban on hormone-treated beef, therefore, the EU's GMO approval process reflects the outcome of political competition among actors within the EU with different views of the relative desirability and riskiness of agricultural biotechnology.[19]

The preceding discussion underlines that attitudes towards risk regulation are not monolithic within either the US or the EU. Moreover, the differences between the US's and EU's approaches to regulation are much less stark than CW1 suggests. Both the US and the EU acknowledge the need for precaution, particularly when regulating new technologies that

[18] The Commission had systematically sought scientific risk assessment since at least 1997 when responsibility for approvals passed to the Directorate General for Health and Consumer Protection (Author's interview with a Commission trade official, 10 January 2001).

[19] It is worth noting that this is how many US regulators and interest groups came to see the origins of the EU's GMO rules. Author's interviews with US government regulators (9 and 11 January 2001; 13 January 2005) and trade officials (11 and 12 January 2005), and representatives of a transatlantic business association (8 January 2001) and US trade associations (9 and 11 January 2001).

might affect human health or the environment (Atlantic Council 2002: 5).[20] This is not to say that there are no differences in regulation between the EU and the US, there clearly are, and not only with respect to the level of risk aversion.[21] These differences, however, are not the product of profoundly different attitudes towards risk, but reflect the outcomes of different political processes. Transatlantic regulatory differences, therefore, are more of scale than of type.

Countering CW2: Tolerance, not trade wars

The tendency to depict the transatlantic regulatory relationship as highly conflictual (CW2), in some respects, reflects a more straightforward example of the 'availability heuristic' than CW1. Here the high-profile disputes are not taken to reflect underlying regulatory differences, but to characterize the nature of the relationship; the perception of the frequency of conflict is distorted by the few high-profile disputes. Strikingly, WTO complaints regarding regulatory barriers are more likely to escalate to formal adjudication than are other types of complaint (Busch and Reinhardt 2003: 475; Guzman and Simmons 2002). This finding, however, has to be treated with caution as the analysis is based on only those trade disputes that become formal WTO complaints; a significant selection bias, again based on the most readily available cases (Busch and Reinhardt, 2002). The vast number of regulatory barriers, including many that have been long-standing irritants, that have not become transatlantic WTO complaints, suggests that the transatlantic relationship is characterized by tolerance, more than by conflict.

[20] The US government's intervention on discussions within the UN's Codex Alimentarius, which sets international food safety standards, on Working Principles for Risk Analysis, 'endorse[d]' that 'precaution has been and should remain an essential element of risk analysis in the formulation of national and international standards,' and went on to state, 'The United States believes that precaution is essential throughout risk analysis, including risk assessment, risk management and risk communication' (FSIS 2000: 3).

[21] The US, for example, tends to make greater use of market incentives, while the EU relies more heavily on command and control measures. US regulations are usually adopted as administrative decisions while in the EU they take the form of legislation. In the US there is greater faith in ex-post monitoring and producer liability, while the EU emphasises ex-ante regulation. Both sides adopt rules with extraterritorial implications, albeit on different issues. See also Wiener (2004); Woolcock (1991).

Although a comprehensive analysis of why only a few regulatory barriers have been the subject of transatlantic WTO complaints is beyond the scope of this article, the literature on WTO complaints suggests several possible, reinforcing explanations. Four particularly important considerations seem to inform the decision to initiate (or not) a WTO complaint: the value of the impeding measure (Allee 2003; Bown 2005a, b; Shaffer 2003; Sherman 2002); the likelihood of winning the complaint and securing compliance (Allee 2003; Bown 2005a, 2005b); the potential political repercussions of initiating a complaint (Bown 2005b; Guzman and Simmons 2005); and the danger of setting a precedent that constrains one's own regulatory autonomy (Bown 2005a; Busch and Reinhardt 2002; Shaffer 2003).

Whether it is worth pursing a regulatory measure depends in large part on how much trade it prevents. Strikingly, only a very small proportion of the regulations notified by the two polities to the WTO's TBT and SPS Committees appear to be raised as matters of concern by firms, as reflected in the Commission's and USTR's annual reports on trade barriers. This may be because the regulations do not present a particular problem for them; the regulations may be sufficiently similar to domestic rules or the firm's own standards so as not to hinder trade or they may be accommodated by an easy and relatively inexpensive change in design or production. [22] Moreover, according to both industry[23] and government[24] sources firms often do not recognise trade barriers as such, or at least do not recognise that they are actionable under multilateral trade rules (see also Commission 2007). Further, firms often prefer to try to resolve matters directly with the foreign government in question.[25] Such considerations are likely to be particularly pronounced in the transatlantic relationship given the extremely high degree of interpenetration between the EU and US economies, reflected in

[22] Author's interviews with a British trade association representative (11 September 2003) and a senior Commission trade official (18 September 2003).
[23] Author's interview with a British business association representative (21 May 2003).
[24] Author's interview with a British trade official (21 May 2003).
[25] Author's interviews with a British trade official (21 May 2003); a European trade association representative (16 September 2003) and a senior Commission trade official (18 September 2003).

very high levels of mutual foreign direct investment and, associated, intra-firm trade (Hamilton and Quinlan 2005). Thus it would seem that the vast majority of environmental and public health regulations adopted by both the EU and the US cause only minimal trade friction.

If a regulation does impose significant economic costs, there is the crucial question of whether it is permitted under WTO rules. Subject to procedural requirements, the WTO's rules give governments a considerable degree of regulatory autonomy, including with regard to the level of risk they are willing to accept (DeSombre and Barkin, 2002; Esserman and Howse, 2003; Hoberg 2001; Marceau and Trachtman 2002; Neumann and Türk 2003; PIU 2000; Pollack and Shaffer 2009; Young 2005; Young and Holmes 2006). As a result, it is perfectly possible for a regulation to impede trade, but to still be compatible with WTO rules. As government officials do not want to lose complaints they bring, they bring them very selectively, targeting only the most clear-cut violations of WTO rules (Allee 2003).[26]

If trade officials think a complaint is winnable, they also weigh the political implications of initiating and winning it. Because initiating a WTO complaint is seen as an aggressive act, the WTO dispute literature notes that states are, ceteris paribus, less likely to initiate a complaint against a country with which they have close relations (Bown 2005b; Guzman and Simmons 2005). As noted earlier, public health and environmental regulations are particularly politically salient and so challenging them might be especially disruptive to good relations. As a consequence, trade officials may think twice before initiating a WTO complaint against a regulatory measure that has strong domestic support. Trade officials also consider whether by successfully challenging a foreign government's rule they might establish a precedent that applies to their own policies (Shaffer 2003; Young forthcoming

[26] Author's interview with a Commission trade official (17 September 2003).

a).[27] These considerations can affect whether a measure is challenged at all, but also the legal grounds on which it is challenged (Shaffer 2003: 104-5).[28]

There are thus a series of layered considerations that may explain why so few public health public health and environmental regulations are challenged in the context of the transatlantic relationship. First, they many not impose sufficient costs on the other's firms to make action worthwhile. Even if they do, the regulations may be consistent with WTO rules and so not be actionable. Even if the costs are significant and the case seems winnable it might still not be worth initiating because doing so might damage the wider relationship or winning the complaint might have adverse implications for one's own regulatory activity. That CW1 is incorrect is crucial to the likelihood of winning and concern about avoiding precedents being relevant in transatlantic WTO complaints. If the US were as hostile to environmental and public health regulation as CW1 suggests, it would have resisted, rather than supported, ensuring that governments' regulatory autonomy was safeguarded in WTO rules. Moreover, it would be unconcerned about setting precedents that constrain its own regulatory activity.

Empirical shortcoming: Surgical strikes, not all-out assaults

Contrary to many depictions (see, for example, Amicus Coalition 2004; Bernauer 2003: 167; Greenpeace 2003, 2006 ; Guzman 2004-05: 32; Ramjoué 2007: 420), the US's WTO complaints against the EU's ban on hormone-treated beef and moratorium on approvals of genetically modified crops were not all-out assaults on the precautionary principle, but were actually fairly narrow challenges to the EU's measures.[29] Moreover, how the US pursued these complaints reflects the considerations discussed above; what is permissible under WTO

[27] Author's interviews with a Commission trade official (17 September 2003); and European trade association representatives (16 and 17 September 2003).
[28] Author's interview with a Commission regulator (16 September 2003).
[29] With respect to beef hormones, author's interview with a Commission trade official (24 March 2004).

rules, seeking to avoid setting awkward precedents and, to a limited extent, by consideration of political repercussions.

In its challenge to the EU's ban on hormone-treated beef,[30] the US accepted that the EU had the right under the SPS Agreement to set the level of protection it considered appropriate, although it argued that the ban was 'arbitrary and unjustified,' because the EU permitted the use of other additives that posed similar risks (WTO 1997: 37).[31] Another key argument was that there was no scientific evidence that the hormones were unsafe when used appropriately. This was relevant to the principle of precaution as the EU justified its action on there being reason to doubt that the hormones were safe because evidence of their safety was incomplete. The Commission's (subsequent) guidance on the precautionary principle, however, states that recourse to it 'presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty (Commission 2000: 3). The US also argued that the ban was really motivated by the EU not wanting to increase beef production given existing costly surpluses generated by the Common Agricultural Policy. The WTO's Appellate Body ruled that the EU's bans were incompatible with WTO rules because they were not based on a risk assessment, but in this and subsequent judgments it has allowed a significant degree of discretion with the management of identified potential risks - what level of risk is acceptable and how that level is realized - even when there is uncertainty about the scientific evidence of the risk involved (PIU 2000: 94; Skogstad 2001: 494-5).

These clarifications of WTO disciplines shaped the substance of the US's subsequent WTO complaint against the EU's GMO approval procedures (USTR 2004: 1),[32] as did

[30] For a summary of the arguments, see Roberts (1998: 388-92).
[31] In its response to the EU's challenge to it not lifting its sanctions in the wake of the EU's revised rules, the US again did not challenge the precautionary principle, but complained that the EU's bans were still not based on adequate risk assessment (USTR 2005).
[32] Author's interviews with US trade officials (11 and 14 January 2005).

concerns about establishing awkward precedents.[33] The timing of the complaint was shaped by concern about adverse political repercussions, with the complaint being delayed until after the conclusion of conventional fighting in the 2003 Iraq War so as not to put off European allies (Baucus 2003: 4; Pollack and Shaffer 2009: 179). The complaint did not challenge the basis on which the EU approves GM crops nor, despite considerable political pressure, did it challenge the EU's traceability and labeling requirements (see Young forthcoming b). Rather it focused on the EU's 'moratorium' on approvals and the refusal of some member governments to accept GM crops that have been approved by the EU (USTR 2004, 1).[34] It argued that the 'moratorium' constituted an 'undue delay' and than it and the individual member state bans had not been based on risk assessments. Thus the challenge was to the EU's failure to apply its own procedures and to enforce its own rules rather than to the substance of or principles underpinning those procedures. The WTO panel found that the moratorium violated WTO rules, but only because it led to undue delays, and that the member states' bans violated WTO rules because they were not based on risk assessments. Notably, neither the EU nor the US appealed the ruling. The details of the two high profile WTO complaints, in addition to being rare exceptions, therefore, suggest a much more constrained contestation than is commonly depicted.

Conclusion

This article has argued that the two prominent conventional wisdoms about the transatlantic regulatory relationship – that it is highly conflictual and that the conflicts are rooted in profoundly different approaches to regulation – are ill-founded. First, they are based on implicit selection bias, a manifestation of the 'availability heuristic,' and generalise from the

[33] One US trade official noted that while one could 'find fault' with the EU's approval procedures, one could also find fault with US rules (Author's interview, 14 January 2005).
[34] Author's interviews with US trade officials (11 and 14 January 2005) and agricultural officials (11 January 2005).

extreme and rare cases of full-blown WTO complaints about regulatory trade barriers to the whole of the transatlantic regulatory relationship. Looking beyond the regulation of hormone-treated beef and the approval of genetically modified crops reveals a more varied, and less asymmetrical transatlantic regulatory relationship. Second, the cases that inform the conventional wisdoms do not actually support the claims made. The disputes are not clear-cut contests between 'sound science' and the 'precautionary principle.' The adoptions of the EU's ban on hormone treated beef and its approach to the approval of genetically modified crops were the products of political competition among actors with very different approaches to the regulation of risk. The regulatory outcomes therefore reflect the hurly burly of politics rather than neat application of a regulatory principle. Moreover, the US's WTO complaints against the hormone-treated beef ban and the EU's moratorium on approvals of genetically modified crops did not challenge the precautionary principle.

Although the EU and the US do adopt different regulations and these differences can and do impede trade and create trade tensions, this article argues that these differences are not rooted in profoundly different approaches to regulation between the two polities. Different approaches to the regulation of risk exist within each polity and the ensuing political competition within each polity produces regulatory outcomes of different stringency across issues and over time. While this distinction may not seem great, it has great consequence. Because both polities sometimes regulates stringently each is more tolerant of the other doing so. Rather than being characterised by conflict or cooperation, therefore, the transatlantic regulatory relationship is really one of tolerance, in which the vast majority of regulatory differences are not resolved; neither amicably nor through litigation.

More broadly, this article should serve as a cautionary tale about the dangers of relying on obvious cases when describing and explaining political phenomena. WTO complaints are both the most visible disputes and the most atypical. Generalising from them

gives both a distorted picture of the transatlantic relationship and suggests misleading explanations for regulatory differences. These misperceptions can then influence policy by making accommodation seem harder and confrontation more necessary.

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Table 1 Transatlantic regulatory barriers

Type of measure	*EU concerns about the US*	*US concerns about the EU*
Environment	Shrimp/Turtle Legislation (EU third party) Reformulated gasoline (EU third party) Marine Mammal Protection Act (challenged under GATT) Corporate Average Fuel Economy (CAFÉ) (challenged under GATT) Ban on harp-seal fur coats Magnuson-Stevens Fishery Conservation and Management Act (drift-net fishing) Certification on Fisheries (yellow fin tuna) Recreational Marine Pre-clearance inspection program (Apples and pears) Pathogen Free Regions: Restrictions on the import of Fresh Fruit and Vegetables Standards and certification of plants established in growing media Hardy Nursery Stock Restrictions on Spanish Clementines	AGRICULTURAL BIOTECHNOLOGY PRODUCTS* Hushkits Regulation (challenged before ICAO) rBST** Ban on Fur From Animals Caught in Leg-Hold Traps Triple Superphosphate Fertilizer standard Restrictions on Wood Packaging Material Registration, Evaluation, and Authorization of Chemicals (REACH) Restriction of the Use of certain Hazardous Substances (RoHS) Waste Electrical and Electronic Equipment (WEEE) Battery Directive Draft Directive on Electrical and Electronic Equipment (EEE) Accelerated phase-out of ozone-depleting substances and greenhouse gases
Public health	BAN ON IMPORTS OF POULTRY AND POULTRY PRODUCTS Public Health Security and Bioterrorism Preparedness and Response Act Electrical and Electronic Equipment Barriers Pharmaceutical and Herbal Products (FDA Approval) Pasteurized Milk Products (Grade A)/ Import Milk Act Refrigeration and labelling of shell eggs Restrictions foie grass (state and municipal level) Pressure Equipment Regulation Sanitary measures on live oysters Rules on the import of bovine animals Mature Meat Products Non-cominglement requirements	EU HORMONE DIRECTIVE POULTRY MEAT RESTRICTION: ANTI-MICROBIAL TREATMENT Gas Connector Hoses Pressure Equipment Directive (PED) Roofing Shingles Anchor Bolts Aflatoxin Limits Draft Directive on Aircraft Certification Directive on gelatin for human consumption EU Directives 2002/46/EC and 2006/37/EC (vitamins and health food products) Animal by-products legislation Transmissible Spongiform Encephalopathies (TSE) Regulations
Other	Section 232 of 1962 Trade Expansion Act Cumbersome inspection and approval procedures National Organic Products Non-use of International Standards Digital Terrestrial Television Fastener Quality Act (FQA) Nutrition Labeling and Education Act Non-recognition of regionalization	Care Labeling Standard Electromagnetic Compatibility (EMC) Restriction Affecting US Wine Exports Framework Directive Promoting Eco-Design for Energy Using Products

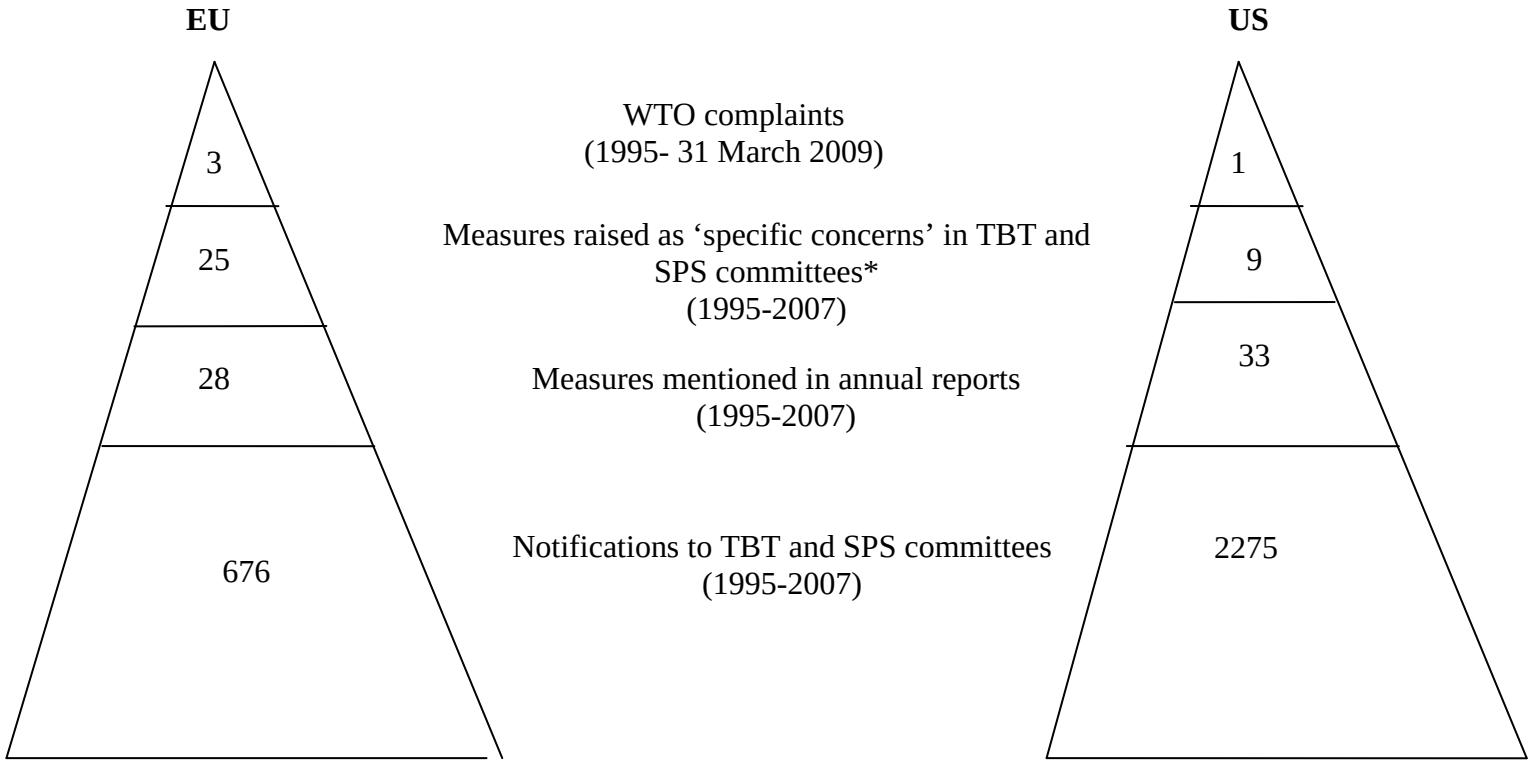
Notes: Issues in small caps have been the subject of a WTO complaint.

* There are also public health issues associated with the dispute over GMOs, but the main area of difference has to do with cultivation and protecting the environment

** rBST does not appear in the USTR's reports, but it is commonly recognised as one of the emblematic transatlantic disputes (Vogel 1997; Wiener and Rogers 2002). Although there were consumer health concerns, animal welfare was a more important motivation.

Sources: Commission 'United States Barriers to Trade and Investment: Reports' 1997-2008 (available by searching on http://trade.ec.europa.eu/doclib/cfm/doclib_search.cfm?action=search); USTR *National Trade Estimate Reports* 1996-2007 (available by searching http://www.ustr.gov/Document_Library/Section_Index.html).

Figure 1 Transatlantic regulatory 'icebergs'



Sources: WTO complaints are from the WTO's dispute settlement gateway. Concerns raised in the TBT committee are from the committee's annual reports covering 2005-08 (see note) and for the SPS committee annual reports covering 1995-2007. The concerns raised in the Commission's and the USTR's annual reports are listed in Table 1. The notifications to the TBT and SPS Committees are from WTO (2008a and b), respectively.

Notes: The figures for the EU exclude member state measures.

Figures for concerns raised in the TBT Committee are incomplete because they were not provided prior to the 2006 report (covering 2005). I included 'previously raised' concerns listed in the 2006-2009 reports. In addition, the US raised WEEE and RoHS at the same time. They counted separately here.