

The precautionary principle in fisheries law international essay

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INTRODUCTION.

Fishing operations around the world have rapidly expanded since the 11th century with rapid population growth, increasing demand for fish, development of urban markets, long distance trade and the introduction of new technologies.[1] This development in fisheries has been accompanied by new regulations regarding vessel ownership and control and the transfer of fishing rights in trade agreements between states. The result is that, fishing vessels can now venture into areas outside their jurisdiction and no longer confined to fishing grounds around a port or state territory.[2] Along with the growth of fisheries industry is the development of the framework for fisheries management. This has firstly, given rise to the promotion of optimum utilization and long term sustainable use of fishery resources over the exploitation of new and existing fishery resources.[3] Secondly, marine habitats and ecosystems are receiving attention in conservation objectives[4]. Thirdly, sustainable fisheries management is gaining prominence thus increasing the role that relevant State and non-State actors must play in the realization of sustainability in the fisheries sector.[5] In spite of all these developments, many global fishery stocks are depleted and over-exploited despite these attempts to manage and conserve fisheries. The 2008 data from the FAO estimate that 58 per cent of stocks are fully exploited, 28 percent are over-exploited and 3 percent are depleted with the ten top species accounting for 30 per cent of the world marine capture fisheries, all fully exploited. About 60 per cent of the twenty -three tuna stocks have been fully exploited with 35 percent possibly overexploited or depleted. In the light of global climate change, it is feared marine systems

will be impacted negatively increasing the already existing pressure on fishery resources.[6]These statistics however have been seen by many scientists and researchers as underestimated as and worse than the statistics portray.[7]On the contrary, some States and researchers believe that this is a pessimist view and global fishery resources may not be on the verge of collapse as is being estimated. However, it is not surprising to see many actors in the fishery sector disagree on the current global fish stocks due to the ignorance and scientific uncertainty that accompanies many complex ecosystems like the sea. The need for scientific research though an important component of guiding action and decisions is limited in gathering conclusive evidence regarding the actual status of global fishery resources. As has been advocated in many other sectors of international environmental law such as in the area of climate change where states agreed to apply the Precautionary Principle(PP) in the reduction of greenhouse gases[8], there is increasing consensus to apply this principle in the management and conservation of fishery resources bearing in mind the concept of intergenerational equity. Despite the fact that the PP is touted as important and necessary in the achievement of sustainability in fisheries, the exact definition, legal content and status like many other international principles is unclear and often subject to controversy. As was rightly stated: Though the precautionary principle and other principles like polluter pay and preventive principle have achieved some success in national, EC and International environmental law, neither case law or doctrine has succeeded in unraveling the mystery of their legal status.[9]The ambiguity associated with the precautionary principle has generated a myriad of questions begging to be

answered. What class does this principle fall into? Does it display the characteristics of normative principle? Should it be treated as a complete rule? Is it precise enough to allow for legal effects to be deduced? Does it call for the adoption of more precise rules? This unresolved controversies regarding the precautionary principle will inadvertently have an effect on the level of implementation it can achieve wherever it is applied and in this case, in commercial fisheries. This essay thus seeks to examine the present state of the implementation of the precautionary principle in fisheries law. It will achieve this by looking at how the principle has been referred to and applied in legal instruments and case law concerning fisheries. It will further look at the problems and limitations of the precautionary principle and how effectively it can applied centering primarily, on the need for redefinition to promote sustainability in fisheries. It must, however, be noted that the scope of this essay is limited to the use of precautionary principle in commercial fisheries.

THE CONCEPT OF THE PRECAUTIONARY PRINCIPLE.

It is arguably widely accepted that Principle 15 of the Rio Declaration of 1992 encompasses the core meaning of the precautionary principle. It states that " where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". In other words, the environment must be protected when in doubt as captured by the saying " In dubio pro natura".[10]Owing to the reason that States and other members of the international community due to different interests perceive

threat at different levels, there is no uniform understanding of what this principle means or to what extent it can be applied. To be more precise, the understanding of 'serious and irreversible damage' may differ by individual, which can result in inconsistencies in its application. There have also been debates as to whether it should be considered a "principle" or an "approach" with countries like the United States preferring the latter and the European Union, the former. This essay will however use terms 'principle and approach' interchangeable as synonyms since the core principle of precaution is existent and equally relates to the management and conservation methods in fisheries. Despite this note, how both terms have been perceived and used will be elaborated in later sections to give a complete view of the inconsistencies in its application. In the next section, the present state of implementation in terms of reference in relevant legal fishery instruments will be analyzed and discussed to ascertain the status and extent to which the principle has been applied.

THE PRESENT STATE OF THE PRECAUTIONARY PRINCIPLE IN FISHERIES

Relevant Legal Instruments

1. 1 THE UNITED NATIONS LAW OF THE SEA CONVENTION (LOSC) The 1982 LOSC represents a framework that seeks to create a balance between the rights of flag States such as the freedom of navigation and that of coastal states especially in the territorial Sea and the EEZ.[11] Furthermore, it sets forth the rights and obligations of States and others international stakeholders for the conservation and sustainable use of marine resources in the different maritime zones. Under Article 56(1), coastal states have the

sovereign right to explore, exploit, conserve and manage the natural resources whether living or dead within their Exclusive Economic Zone (EEZ). In doing so, they must take into account the best scientific evidence available to them in the determination of the Total Allowable Catch (TAC) to prevent over-exploitation and ensure effective conservation and management of their living resources.[12] Coastal states are further obliged to prevent over-exploitation by considering fishing patterns, interdependence of stocks and internationally recommended minimum standards to ensure that populations of harvested species are maintained at levels that enhance the production of the Maximum Sustainable Yield (MSY). [13] Though the Convention advocates for the use of "best scientific evidence available" in the exploitation and utilization of fishery resources, it fails to explicitly refer to the precautionary principle though it is implied. [14] This thus gives States the discretionary power to apply the principle in whatsoever way they chose bearing in mind the scientific data available. The question of what the Convention states in the absence of scientific evidence however cannot be overlooked. Does the Convention contain provisions that favour exploitation or conservation of fisheries with respect to the PP?[15] It has been argued that conservation remains a primary obligation of the LOSC but only relies on scientific evidence to determine the TAC and MSY. The LOSC as the primary convention relating to fisheries and the use of the sea is not conclusive on its stance towards the precautionary principle. Growing pressure of fishery resources therefore required the formulation of the UN Fish Stocks Agreement to complement the LOSC. This move was highly influenced by United Nations Conference on Environment and Development

(UNCED) Agenda 21, which sought to promote the effective implementation of the LOSC on the issue of straddling and highly migratory fish stocks.[16]1.

2 THE 1995 UN FISH STOCKS AGREEMENT (UNFSA)The United Nations General Assembly (UNGA) in 1993 found it necessary to convene a conference on straddling and highly migratory fish stocks in line with the provisions of the LOSC[17]. The UNFSA is one, if not the most important agreement amongst many international fisheries agreements setting out the obligations of states regarding the sustainable use of straddling fish stocks and highly migratory fish stocks on the high seas and within national jurisdiction. In the bid to develop a more effective fisheries regime, it has strengthened the role in Regional Fishery Management Organizations (RFMO's) - an important governance entity in fisheries management whose role will be discussed in late section with respect to the PP. Again, it complements the 1993 FAO Compliance Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the 1995 FAO Code of Conduct for Responsible Fisheries. The UNFSA sets a precedent as the first global fisheries agreement requiring a precautionary approach to fisheries management. In Article 6, it states that, " States shall apply the precautionary approach widely to the conservation, management and exploitation of straddling and highly migratory fish stocks to protect marine living resources and preserve the marine environment". Paragraph 2 of Article 6 specifies that states must exercise caution when information is uncertain, unreliable or inadequate. It also outlines the method by which States should apply and implement the PP obligating States to, inter alia, obtain and disseminate the best scientific

information,[18]as well improve knowledge on the impacts of fishing on non-target species and their environment.[19]They are required to also enhance monitoring of target and non-target where their status is of concern and revise conservation and management measures in light of new information.

[20]1. 21 Determination of Precautionary Reference PointsThe UNFSA also spells out management measures in the setting of stock -specific reference points[21]with Annex II referring to " precautionary reference points" such as target reference point and limit reference points. Target reference points such as the maximum sustainable yield (MSY) seek to meet or define management objectives in line in biological, social and economic considerations. Limit reference points on the other hand identifies safe biological limits for harvesting.[22]Though an improvement from the LOSC on its explicit reference to the PP and precautionary reference points, it is silent on what must be done for example, the invocation of a fishing moratorium when these limits are exceeded. For this reason, it has been somewhat criticized for not being complete in its provisions regarding the PP.

[23]1. 3 THE 1993 COMPLIANCE AGREEMENTThe duty of flag States in the conservation of living resources on the high seas has been emphasized in both the 1982 LOSC and the 1995 UNFSA and features as the central theme in this agreement.[24]The problems of " flags of convenience" as identified by Agenda 21 is a precursor for the formulation of this agreement mainly to deter the reflagging of vessels and ensure compliance to fishing activities on the high seas.[25]Explicit reference to the PP is absent in this agreement however, the broader aim of ensuring compliance to high seas fishing - an area that has suffered greatly due to the law of the commons can be seen as

complementary to the provisions outlined in the LOSC and the UNFSA since both endorse the conservation and the sustainable use of fishery resources. THE FAO CODE OF CONDUCT ON RESPONSIBLE FISHERIES The FAO in 1995 developed a voluntary code of conduct on responsible fisheries, which was intended to guide members and non-members, global and regional organizations, governmental and non-governmental organizations and all persons with a stake in the conservation and management of fisheries. As part of its guiding principles, it endorses the PP in the conservation, management and exploitation of living aquatic resources-- directing it to States and regional fishery management organizations and arrangements and stressing on the use of the best scientific evidence available. It elaborates on the use of scientific evidence by requiring States to, inter alia; take into account uncertainties relating to the size and productivity of the stocks, reference points and stock conditions in relation to such reference points. As a non-binding code, its explicit reference to the PP and reference points as it appears in the UNFSA is a good development for fisheries mainly because it has been influential in the formulation of agreements in many regional fishery management organizations such as the 2009 South Pacific Regional Fisheries Management Organization (SPRFMO). 1. 5 REGIONAL FISHERY ARRANGEMENTS The duty to cooperate and exchange information that can result in the effective conservation has made RFMO's an important element in the achievement of sustainability in fisheries as seen in the LOSC, [26]UNFSA and FAO Code of Conduct for Responsible fisheries. The appearance of the precautionary approach in many regional fishery agreements is absent and this may arguably be attributed to some

conventions pre-dating the UNFSA or the fact that many members of these RFMO's are not party to the UNFSA. However, it has been observed that RFMO's established after 1995 explicitly apply the precautionary approach in their administration.[27]Some few fishery bodies have widely adopted the precautionary approach with some like the APFIC actively discussing how it should be applied. They include: Asia- Pacific Fishery Commission(APFIC)Commission for the Conservation of Antarctic Marine Living Resources (CCMALT)[28]International Pacific Halibut Commission(IPHC)International Commission for the Conservation of Atlantic Tunas(ICCAT)North Atlantic Salmon Conservation Organization(NASCO)Northwest Atlantic Fisheries Organization(NAFO)South East Atlantic Fisheries Organisations (SEAFO)Nonetheless, the issue remains that many fishery resources within the jurisdiction of many RFMO's are overexploited despite the mandate given by the UNFSA and the reference to precaution in some of these arrangements. These RFMOs though have committed to using target and limit reference points have been hindered by difficulty in implementation. For example, the Only two of the five major tuna RFMOs—the Inter-American Tropical Tuna Commission (IATTC) and the Western and Central Pacific Fisheries Commission (WCPFC)—have committed to applying target and limit reference points, but neither has implemented them to date.[29]In view of the failure of many RFMO's to live up to their mandates, the United Nations General Assembly in its 2006 ' Sustainable Fisheries' Resolution' exhorted RFMO's to strengthen their mandates and inculcate measures that are outlined in their organizational arrangements as well as international instruments and agreements like UNFSA in fisheries

management. This, they are to do, by taking into account the best scientific information available and by applying the precautionary and ecosystem approach for the long-term management, conservation and sustainable use of marine living resources.[30]Write more on issues identified from Sands page 417. 1. 6 CONVENTION ON BIOLOGICAL DIVERSITY (CBD)The CBD refers to the precautionary approach in Paragraph nine of the preamble stating that ‘ where there is a threat of significant reduction or loss of biodiversity, lack of full scientific evidence should not be used as a reason for postponing measures to avoid or minimize such a threat’. The need for precaution is encouraged in Article 14 where it advocates for environmental impact assessments for projects that are likely to have adverse impacts on biological diversity.

Relevant Case Law

As has been seen in the varying references to the precautionary principle in the relevant legal instruments relating to fisheries management discussed previously, there is no doubt that disputes will arise between States due to varying interests and different discretionary powers regarding the application of the precautionary principle. In such cases, international judicial bodies such as the International Court of Justice have to decide the merits of the case. In this section, three cases that test the precautionary principle will be discussed. SOUTHERN BLUEFIN TUNA CASES (NEW ZEALAND V. JAPAN, AUSTRALIA V. JAPAN)This is a dispute where Australia and New Zealand initiated arbitral proceedings against Japan alleging that it had breached its obligations under Article 64 and 116-119 of the LOSC in relation to the conservation and management of southern bluefin tuna stocks under a

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unilateral experimental fishing programme. This particular species was significantly over-fished and had thus fallen below biologically safe thresholds and was the precursor for the establishment of the Convention on the Conservation of Southern Bluefin Tuna (CSBT) in 1993 in an effort to ‘ensure, through appropriate management, the conservation and optimum utilization of southern Bluefin tuna’.[31]The Commission established under the Convention under its mandate had determined the Total Allowable Catch (TAC) and its allocation among the members of the convention[32]based on the scientific information available. Japan that had earlier sought an increase in the TAC failed to agree with Australia and New Zealand who argued that the tuna stocks had not recovered fully for an increase in TAC based on scientific evidence. The experimental fishing programme initiated by Japan in 1998 was thus seen as a way for Japan to increase its national allocation despite the reservations raised by Australia and New Zealand. Australia and New Zealand in their application to the International Tribunal of the Law of the Sea (ITLOS) claimed that Japan, inter alia, failed to employ conservation measures to restore tuna stocks to levels that could produce the maximum sustainable yield (MSY). Again, that it had failed to honor its obligations under the LOSC to conserve and manage the southern Bluefin tuna in light of the precautionary principle. Interestingly, the Tribunal was of the view that scientific uncertainty regarding the status of southern bluefin tuna should urge parties to be prudent and cautious to ensure effective conservation and prevent serious harm to the southern Bluefin tuna[33]and thus ordered Japan to refrain immediately from conducting its experimental fishing program. This decision by the Tribunal in the face of many international

observers was one taken in favor of the precautionary principle without referring to it explicitly. However, Japan raised an argument regarding the jurisdiction of the Tribunal to receive the claims preventing the case from proceeding to the merits.[34] Though an interesting case for the increasing recognition of the PP, it also raises questions about why caution is applied when referring to the PP. Why can it not receive explicit approval in many cases? ESTAI CASE (CANADA V. SPAIN) Canada, on May 1994 in an attempt to strengthen its Coastal Fisheries Protection Act, adopted legislation and measures to further augment its efforts at conservation the Green halibut – a straddling stock that was overfished and under the regulation of the North Atlantic Fisheries Organisation (NAFO). This legislation permitted Canada to take action in accordance with conservation of the Green halibut beyond its 200 nautical mile zone, which is more or less the high sea. In 1995, the European Union objected to the TAC prescribed by NAFO and unilaterally set its own TAC. In March 1995, the Spanish vessel Estai was boarded and inspected by Canadian inspectors on the high seas and further charged for breaching Canada's Coastal Fisheries Act concerning excessive fishing for Green halibut beyond Canada's 200 nautical mile zone. Spain brought the issue before the International Court of Justice (ICJ), which held that it had no jurisdiction to decide because Canada had invoked a reservation in the NAFO area that allowed Canada to enforce its conservation measures for conserving its straddling stocks beyond its EEZ.[35] In spite of the Court's lack of jurisdiction over this case, the majority of the Court disagreed with Spain over its actions and that Canada's action were based on conservation which is supported by many international fishery agreements like the 1995

UNFSA and the 1993 FAO Compliance Agreement.[36]Owing to the fact that the conservation and instruments like those that the UNFSA was referred to, the precautionary principle was arguably considered.

Analyses of Legal Instruments and Case Law In Relation To Extent of Implementation of the Precautionary Principle.

The legal instrument and case law discussed show that the precautionary principle is presently regarded and shows some good faith in its intentions to make sure the precautionary principle plays an integral role in fisheries management and conservation implemented. The varying levels of reference however does not auger well for fisheries management. From its silent presence in LOSC to its express, reference in the 1995 UNFSA, the FAO Code of Conduct for Responsible Fisheries and some Regional Fishery Arrangements and case law does not show a concerted effort to tackle the issue of overexploitation. The absence of the explicit referral to the PP in the LOSC convention is problematic considering it is the principal convention relating to the use of the sea in different maritime zones. Achieving sustainability in fisheries will mean that all relevant legal instruments must uphold the concept of the precautionary principle considering the vast uncertainty in the fisheries sector. Further, the reference to biological reference points like the MSY and TAC is encouraging and need to be strengthened by more elaboration in relevant fishery agreements. It is also a step in the right direction to see the MSY being considered a limit reference point instead of a target reference as exemplified in the UNFSA that states, " fishing mortality rate that generates MSY should be considered as a minimum standard for limit reference points." [37] Lastly, case law suggests

that unilateralism by some states can hurt conservation and the need for more reference to cooperation and how it can be applied to uphold precautionary measures in most conventions will do well to complement the work of other agreements in relation to the precautionary principle. Some commentators however have expressed the view that until the major limitations of the precautionary principle has been addressed, its relevance to contributing to sustainable fisheries will be incomplete.

PROBLEMS AND LIMITATIONS WITH THE PRECAUTIONARY PRINCIPLE

From the different wordings and varying degrees of reference and application of the precautionary principle in international fisheries law, it is indisputable that the precautionary principle needs a "makeover" in order to be effective in its purpose to prevent harm in the presence of scientific uncertainty and risk. The central problem that most members of the international community agree with is the ambiguity or vagueness of the precautionary principle especially regarding its definition. The question of what the precautionary principle means and requires, generally leads to a myriad of responses. Among more than twenty definitions of the precautionary principle, there are many incompatibilities^[38] due to wording, which translates into very significant differences in its application. Until date, it is still difficult to obtain a precise meaning leaving its application to discretion. In its discretionary use, reference has always been made to the use of the weak and strong precautionary principle.^[39] 2. 1 Strong vs. weak precautionary principle Different interests of stakeholders remain the principal reason for the emergence of the so-called weak versus strong

debate on the use of the precautionary principle. The use of the word ‘principle’, which is considered a strong version, has developed a negative undertone amongst most sectors in environmental law evidenced by the scarcity of the word ‘principle’ and a dash for its weaker counterpart ‘approach’ in most international agreements, ministerial declarations and other official documents. The strong version of the principle advocates that when an activity raises threats of harm and the cause and effect relationship cannot be understood, precautionary measures must be taken to prevent such an action. This version thus requires the performer of the activity to bear the burden of proof other than the public and many critics say it is rigid, inflexible and stifles sustainable development. However, there are still a few factions who endorse the use of the ‘principle’ like the European Union and environmental NGO’s and activists who assert that less is being done to conserve the world’s fisheries. The support of the principle by the European Commission is substantiated by the formal ‘Communication’ it issued in 2000 concerning the precautionary principle^[40] and fact that between 1992 and 1999 no less than 27 resolutions of the European parliament refer to this principle.^[41] The weak or softer version of the PP embodied by the term ‘approach’ is seen as less restrictive and context sensitive^[42] because it weights uncertainty and risk against other the benefits that may accrue from taking that risk. For example, the Rio Declaration 1992 refers to the precautionary approach in relation to cost effective measures. Here the burden of proof generally falls on those advocating precautionary action and is seen as allowing for more flexible administration of concerns that are context sensitive. For these reasons, the fishing industry^[43] and the U. S.

and Canada in trade disputes with the EU[44] have favored ' approach' over ' principle.' Reasons for the US aversion to the term principle stems from its legal connotations and the fact that is principles as source of law can be used to decide the merits of a case in a court of law.

IMPLICATIONS OF LIMITATIONS FOR FISHERIES MANAGEMENT AND THE WAY FORWARD

Current fishery statistics are discouraging and will continue to be if the role of precaution is not carefully defined. As mentioned already, the ambiguity with the PP hinders its full implementation and effectiveness. To ensure that fishery stocks are managed effectively, an in-depth definition of the precautionary principle must be conducted in fisheries especially with language and tone in many fishery agreements. In redefining or giving the principle, more precise definition using the three aspects of precautionary principle is advocated: threat dimension, uncertainty dimension, and action dimension.[45]Threat dimension: In the Rio declaration reference is made to ' serious or irreversible damage'[46], which is seen as a threshold of risk and potential harm. The UN Fish Stocks agreement as well as the FAO code of conduct do not specify the level of risk nor the potential damage. A good definition of precaution with relation to threat must elaborate on what constitutes the particular threat dimension mentioned and even go further to give examples at to what it may refer to. For example, irreversible damage may be explained to mean the extinction of species. Uncertainty dimension: The LOSC advocates for conservation measures in line with best scientific evidence available while the Rio declaration advocates for action when there is lack of scientific certainty. These both require the use of science to

determine the risk. A thorough definition of the PP must encompass the types or major scientific research that must be done before an action is taken such as environmental Impact assessments and risk based assessments. At the core of these is stock based assessment, which is necessary to define the biological reference points such as the MSY. Action dimension: This refers to what action should be taken in the event that damage occurs to a certain species that is overexploited or in danger of extinction. The UNFSA for instance fails to say what must be done when certain biological reference points are exceeded in its elaboration of the precautionary principle. An effective formulation of that spells out what should be done will auger well for fisheries management For example, a moratorium. Other measures. Cooperation- Measures to cooperate among states especially in the framework of regional fishery management organization must be encouraged as it forms an integral tool of exchange of knowledge, which is necessary to understand the complex nature of fisheries and also to prevent the proliferation of illegal, unreported and unregulated fishing.

CONCLUSION

Overfishing and lack of information on fish stocks due to scientific uncertainty continue to be a major trend plaguing the fishing. This trend is ongoing despite the many international fishing instruments and agreements that have been instituted to ensure conservation and sustainability in the fisheries sector. As such, the precautionary principle has been suggested as it advocates for erring on the side of caution when scientific certainty is lacking.