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PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

by Yoona Cho*

The World Trade Organization (“WTO”) encourages its members to fully exhaust negotiations and consultations before bringing a case before its Dispute Settlement Body.¹ Indeed, a majority of all WTO disputes are resolved in consultations,² allowing its members to gain accountability, “save face,” and preserve sovereignty. The International Tribunal for the Law of the Sea (“ITLOS”), an international environmental dispute resolution body, should follow the lead of the WTO in requiring a pre-dispute consultation period and encouraging its members to resolve differences outside of the Tribunal’s dispute settlement process.³ Although the WTO sets a fine example in the area of consultations and dispute settlement, it sets a less impressive and less relevant standard on the precautionary principle. In contrast to the WTO, the ITLOS should continue to deftly define and employ the precautionary principle to increase its authority and protect ocean resources.

The precautionary-like principle that WTO members may invoke is set forth in Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures.⁴ It allows members to make a final decision on the safety of a product when faced with insufficient scientific data.⁵ It also requires the members to actively seek new information and to review the measures within “a reasonable period of time.”⁶ In reality, this approach has failed to achieve much success within the WTO system. The debate over the use of the precautionary principle presented itself in WTO cases such as the beef hormone debate where the European Communities (“EC”) tried to ban all hormone-treated beef from the United States, and in the EC Biotech Products dispute where the EC attempted to ban all genetically modified food and seed.⁷ In these decisions, the WTO rejected the use of the precautionary principle.⁸ Similarly, when Japan tried to ban American apples from entering its domestic market by invoking Article 5.7, the Appellate Body of the WTO ruled that determination of “reasonable period of time” was on a case-by-case analysis and that Japan had failed to meet the requirement for reviewing its measures.⁹

In contrast to the treatment the precautionary principle has received at the WTO, the precautionary principle has been instrumental to achievements in the area of international environmental law. When scientists began linking the use of chlorofluorocarbons to ozone depletion, the use of the precautionary principle in an international agreement galvanized and justified global action.¹⁰ The Montreal Protocol forced the international community to take cost effective actions to deal with irreversible consequences even in light of scientific uncertainties.¹¹ Effective implementation of environmental law needs to proceed in

spite of scientific uncertainties in order to prevent irreversible damage.

The ITLOS has successfully increased its legitimacy by demonstrating an effective formula through incorporation of the precautionary approach in its judgments.¹² In the Southern Bluefin Tuna case, the ITLOS encouraged the parties to act with “prudence and caution” in order to ensure conservation of marine life.¹³ In 1999, its decision revealed a precautionary approach and became the first instance of an international judicial decision employing this notion.¹⁴

To avoid overuse of the precautionary approach, which could result in diminished legitimacy, the ITLOS established a clear threshold in the Mixed Oxide Fuel plant case (“MOX”).¹⁵ MOX involved a dispute over marine pollution between the United Kingdom (“UK”) and Ireland in which Ireland requested that ITLOS stop the UK from releasing radioactive waste from the MOX plant into the Irish Sea, amongst other provisional measures.¹⁶ The Tribunal took this opportunity to clarify the extent and limits in the use of the precautionary approach. In doing so, the Tribunal emphasized the requirement of indicating the seriousness of the potential harm to the marine environment.¹⁷ The ITLOS ruled that Ireland had failed to meet the necessary threshold in demonstrating the urgency and the seriousness of the potential harm.¹⁸

The Tribunal’s judgment in the MOX plant case was in line with Montreal Protocol’s Principle 15, in which the precautionary approach was narrowly construed.¹⁹ In order to invoke the precautionary approach, the harm to be prevented cannot be general, but has to be identifiable and clear. Furthermore, the threat must pose serious or irreversible damage to the environment.

The precautionary principle is not without its constraints. There is a threshold that the parties have to prove in order for the Tribunal to use the approach.²⁰ Effective international environmental law requires a precautionary approach, and the existence of scientific uncertainties should not hinder society from taking effective actions today. The willingness of the ITLOS to employ the precautionary approach in its judgments has not only demonstrated its appreciation and concern for environmental issues, but has also given it legitimacy and a workable formula to enhance its role.

Endnotes: Precautionary Principle in the International Tribunal for the Law of the Sea *continued on page 90*

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¹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter Understanding on Rules].

² DENCHO GEORGIEV & KIM VAN DER BORGH, REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT *System* 80 (2006).

³ Understanding on Rules, *supra* note 1.

⁴ See WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493, *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [hereinafter WTO Agreement].

⁵ *Id.*

⁶ *Id.*

⁷ See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (follow link for “Appellate Body Report” and download report from new window) [hereinafter *Hormones*]; see Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (Sept. 29, 2006), *available at* http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/293R-00.doc [hereinafter *Biotech Products*].

⁸ See *Hormones*, *supra* note 7; see also *Biotech Products*, *supra* note 7.

⁹ See Appellate Body Report, *Japan—Apples*, WT/DS245/AB/R (Nov. 26, 2003), *available at* http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/245ABR.doc.

¹⁰ See The Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29, *available at* <http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf> [hereinafter Montreal Protocol].

¹¹ *Id.*

¹² See TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 225 (2009).

¹³ See Southern Bluefin Tuna (Nos. 3 & 4) (New Zealand v. Japan; Australia v. Japan), 117 I.L.R. 148 and 119 I.L.R. 508 (Int’l Trib. L. of the Sea 1999) *available at* http://www.itlos.org/start2_en.html (follow link under “Proceedings and Judgments” to “List of Cases”); see also PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 275 (2003).

¹⁴ STEPHENS, *supra* note 12, at 225.

¹⁵ See The MOX Plant Case (Ireland v. United Kingdom), 126 I.L.R. 334 (Int’l Trib. L. of the Sea 2001) *available at* http://www.itlos.org/start2_en.html (follow link under “Proceedings and Judgments” to “List of Cases”); see also STEPHENS, *supra* note 12, at 237.

¹⁶ STEPHENS, *supra* note 12, at 237; see also M. Bruce Volbeda, *The MOX Plant Case: The Question of “Supplemental Jurisdiction” for International Environmental Claims Under UNCLOS*, 42 Tex. Int’l L.J. 211, 213 (2006).

¹⁷ STEPHENS, *supra* note 12, at 237.

¹⁸ STEPHENS, *supra* note 12, at 237.

¹⁹ Montreal Protocol, *supra* note 10.

²⁰ STEPHENS, *supra* note 12, at 237-38.