THE SOUTHERN BLUEFIN TUNA PRECAUTIONARY PRINCIPLE AS A TOOL FOR CLIMATE JUSTICE ENFORCEMENT

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ABSTRACT

The Precautionary Principle is examined in this article as a model for enforcing climate justice through the management of the critically endangered Southern Bluefin Tuna (SBT). When there is scientific ambiguity regarding the possible danger of an action, the Precautionary Principle calls for a cautious approach to decision-making. According to the notion of climate justice, priority should be given to those who are most impacted by climate change despite having the least to do with its cause. A successful application of the Precautionary Principle to ensure the conservation and sustainable use of a natural resource can be seen in the SBT case. The Precautionary Principle can be applied to climate change to support policies that lower greenhouse gas emissions and lessen the effects of the changing climate on vulnerable populations. Its limitations and difficulties, such as the lack of agreement on the proper level of caution and potential conflicts with other social and economic objectives, must be carefully considered in order for it to be applied successfully.

Keywords: Precautionary Principle, Operationalization, Climate Justice, Challenges, Implementation

Introduction

Climate justice has received more and more attention in recent years as an essential component of combating climate change. The idea of climate justice is based on the realisation that although climate change is a global issue, it disproportionately affects weaker groups of people who are frequently least to blame for it. Low-income neighbourhoods, native peoples, and small island developing states are just a few of these demographics. The management of endangered species, the use of genetically modified organisms, and the regulation of dangerous compounds are only a few environmental situations where the Precautionary Principle has been used. Because it serves as a successful illustration of how to apply the Precautionary Principle to ensure the protection and sustainable use of a natural resource, the application of the Precautionary Principle in the (Southern Bluefin Tuna) SBT instance is particularly significant. The Precautionary Principle can be applied to climate change to support actions that lower greenhouse gas emissions and lessen the effects of the changing climate on vulnerable populations. Carbon taxes, for instance, can be put in place to encourage the reduction of greenhouse gas emissions. Market incentives for decreasing emissions can be created using emissions trading schemes. Subsidies for renewable energy sources may be offered to aid in the switch to low-carbon energy sources. The SBT case can also provide light on the difficulties and restrictions associated with using the Precautionary Principle. The lack of agreement on the proper degree of caution to use in decision-making when there is scientific ambiguity is a significant problem. The Precautionary Principle may also occasionally be at odds with other social and economic objectives like job creation or economic expansion.

The Precautionary Principle's application in the SBT case can serve as a model for the enforcement of climate justice, but doing so successfully will require thorough evaluation of its difficulties and constraints. We can give priority to the needs of vulnerable people and guarantee a sustainable future for everybody by taking a careful approach to decision-making in the face of scientific uncertainty.

Critical Analysis

What was the Southern Bluefin Tuna case?

The Southern Bluefin Tuna Case involves a dispute between Australia and Japan over the management of the Southern Bluefin Tuna fishery in the Southern Ocean. The case was brought

before the International Court of Justice (ICJ) in 1999 by Australia, which claimed that Japan was violating its obligations under the United Nations Convention on the Law of the Sea (UNCLOS) by overfishing Southern Bluefin Tuna.

The Southern Bluefin Tuna is a valuable fish species that is highly prized for its meat and is in high demand in the sushi market. However, the species has been heavily overfished, with stocks estimated to be at only 5% of their original size. This has led to concerns about the long-term sustainability of the species and the need for effective conservation measures. In the case, Australia argued that Japan was in breach of its obligations under UNCLOS by failing to adopt effective conservation and management measures for Southern Bluefin Tuna. Australia argued that the precautionary principle should be applied to the management of the fishery, meaning that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The precautionary principle is a fundamental principle of international environmental law that seeks to prevent environmental harm in situations where scientific knowledge is uncertain or incomplete. It recognizes that in situations of uncertainty, decision-makers should err on the side of caution to prevent harm to the environment. The ICJ ultimately found in favor of Australia, stating that Japan had breached its obligations under UNCLOS by failing to adopt effective conservation and management measures for Southern Bluefin Tuna. The court also held that the precautionary principle was applicable to the management of the fishery, and that Japan had failed to take sufficient measures to ensure the long-term sustainability of the species.

Importance of Precautionary Principle with regards to Climate Change

In the case of climate change, the precautionary principle requires that governments and policymakers take proactive measures to reduce greenhouse gas emissions and prevent further damage to the planet's climate system. This is because the consequences of inaction could be catastrophic, with potential impacts ranging from rising sea levels and more frequent extreme weather events to food and water shortages, displacement, and social and economic disruption. The precautionary principle has been enshrined in several international agreements, including the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, which recognize the need for precautionary action to address climate change. The principle is also supported by scientific evidence, including the reports of the

Intergovernmental Panel on Climate Change (IPCC), which provide clear evidence of the risks posed by climate change and the urgency of action. There are several examples as to where the application might be beneficial.

1. **The regulation of greenhouse gas emissions:** The precautionary principle is a key factor in the regulation of greenhouse gas emissions. The principle holds that in the face of uncertainty about the potential harms associated with certain actions, decision-makers should take a cautious approach that prioritizes prevention of harm. In the case of greenhouse gas emissions, the precautionary principle is used to guide regulatory decision-making by emphasizing the need to reduce emissions in order to prevent harm to the environment and human health.

   The ***European Union's Emissions Trading System (ETS)*** is an example of the application of the precautionary principle in the regulation of greenhouse gas emissions. The ETS sets a cap on the amount of greenhouse gases that can be emitted by certain industries and requires companies to purchase permits to emit above that level. This approach is based on the precautionary principle and is intended to prevent harm to the environment and human health by reducing greenhouse gas emissions.[1]

2. **The development of renewable energy:** The precautionary principle is also a key factor in the development of renewable energy technologies. Renewable energy technologies can help to mitigate the impacts of climate change by reducing greenhouse gas emissions and decreasing reliance on fossil fuels.

   The precautionary principle is used to guide decision-making in the development of renewable energy technologies by emphasizing the need to assess and address potential risks before deploying new technologies. For example, the development of wind farms must take into account the potential impact on bird populations and other wildlife. The precautionary principle is used to ensure that potential risks are assessed and addressed before new technologies are deployed.[2]

[1] Nash, Jonathan Remy. "Standing and the Precautionary Principle." Columbia Law Review 108, no. 2 (2008): 494–527. http://www.jstor.org/stable/40041763.
[2] Singh, C. P. (2010). THE PRECAUTIONARY PRINCIPLE AND ENVIRONMENT PROTECTION. Journal of the Indian Law Institute, 52(3/4), 467–483. http://www.jstor.org/stable/45148535

3. **The protection of vulnerable communities:** The precautionary principle is also used to protect vulnerable communities that are most at risk from the impacts of climate change. The precautionary principle is used to guide decision-making in the development of strategies to protect these communities by emphasizing the need to prioritize prevention of harm.[3]

   One example of the application of the precautionary principle in the protection of vulnerable communities is the use of ***"green infrastructure" strategies***. Green infrastructure involves using natural systems like wetlands and forests to absorb and manage stormwater. This approach is based on the precautionary principle and is intended to protect vulnerable communities from the potentially devastating impacts of climate change.[4]

4. **The development of climate adaptation plans:** The precautionary principle is also used to guide the development of climate adaptation plans[5], which are designed to help communities and ecosystems adapt to the impacts of climate change. Climate adaptation plans are designed to protect people and infrastructure from the impacts of climate change by anticipating and preparing for potential impacts.

   For example, ***the city of New York has developed*** a comprehensive climate adaptation plan that includes measures like elevating buildings, installing green roofs, and improving coastal protections. This approach is based on the precautionary principle and is intended to protect people and infrastructure from the impacts of climate change.

The precautionary principle has important implications for governance and decision-making in the context of climate change. Effective implementation of the principle requires a shift towards more participatory and inclusive decision-making processes that involve a range of stakeholders and perspectives. This can help to ensure that the potential risks and uncertainties

[3] DICKSON, BARNABAS. "The Precautionary Principle in CITES: A Critical Assessment." Natural Resources Journal 39, no. 2 (1999): 211–28. http://www.jstor.org/stable/24888497.
[4] Feintuck, Mike. "Precautionary Maybe, but What's the Principle? The Precautionary Principle, the Regulation of Risk, and the Public Domain." Journal of Law and Society 32, no. 3 (2005): 371–98. http://www.jstor.org/stable/3557238.
[5] Weiss, Edith Brown, Richard Stewart, Shinya Murase, Daniel Bodansky, Michael J. Glennon, Catherine Tinker, and Alexandre Kiss. "New Developments in International Environmental Law." Proceedings of the Annual Meeting (American Society of International Law) 85 (1991): 401–27. http://www.jstor.org/stable/25658595.

associated with climate change are fully considered, and that decisions are made in the best interests of present and future generations.

Implementation of the Precautionary Principle in the Context of Climate change and Environmental Management

The precautionary principle has been the subject of numerous debates, with scholars and experts exploring different aspects of this guiding principle. Among the key topics of discussion is the impact of the precautionary principle on the burden of proof,[6]which refers to the responsibility of the party making a claim to provide evidence to support their position. There have also been debates on the relationship between the precautionary principle and science, as well as its role in decision-making processes.[7]

One of the earliest debates about the precautionary principle was centered around whether it had become a customary international law. This debate has been extensively researched and analyzed, with many experts concluding that the principle has not yet achieved the status of customary international law.[8] Despite this, the precautionary principle remains a critical consideration in many areas of decision-making, such as environmental regulation, public health, and technological innovation.[9] The question needs to be raised around the effective operationalization and implementation of the Precautionary Principle.

Challenges with operationalizing of the Precautionary Principle

There are substantial challenges to determining how to operationalize the precautionary principle. Despite wide application in international treaties and declarations, the principle

[6] J Peel, 'When (Scientific) Rationality Rules: (Mis)application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19 Journal of Environmental Law 103–120; E Fisher, Risk Regulation and Administrative Constitutionalism (Hart, 2007).

[7] E Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (1992) 4 Georgetown International Environmental Law Review 303–318, 304; S Marr, The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law (Martinus Nijhoff, 2003) 17–21.

[8] Gullett (1997), above (n 9), 57; D Anton, 'The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS case no. 17)' (2011) 7(2) McGill International Journal of Sustainability Law and Policy 241–257, 244; L Chen, 'Realizing the Precautionary Principle in Due Diligence' (2016) 25 Dalhousie Journal of Legal Studies 1.

[9] J Ellis, 'Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle' (2006) 17 European Journal of International Law 445–462, 449. See, for example, A Trouwborst, Evolution and Status of the Precautionary Principle in International Law (Kluwer, 2002). Indeed, development of international environmental law jurisprudence confirms that the precautionary principle extends the preventive requirements of the 'due diligence' obligation with respect to causation of transboundary environmental harm.

remains ill-defined and offers little practical direction for decision-making absent further steps to operationalize [10]The principle standing alone leaves questions unanswered, such as the level and type of harm that would justify action, the amount of knowledge needed to justify action, the types of actions that would be appropriate as precautionary measures, and under what circumstances these would be appropriate."

Most formulations of the principle either rule out action or describe reasons (e.g., lack of scientific certainty) for avoiding it. Or, if calling for precautionary action, the scope or content of such measures can vary from complete prohibition to increased oversight and monitoring. Often, activities are simply delayed until further scientific evidence can be gathered to demonstrate a lack of harm.[11]

Some of the challenges for operationalization can be seen as related to a multiplicity of uncertainty and risks, and lack of guidance as to which of these should guide action.[12] The principle can be "paralyzing" dictating neither regulation nor non-regulation, particularly where there are opposing environmental issues. Precaution against one type of risk can result in increases in other, countervailing risks.[13] The precautionary principle is commonly referred to in treaties' perambulatory provisions, in broad declarations without accompanying action, concrete obligations are occasionally alternatively imposed [14]through operational provisions or protocols. [15]

Misuse of Precautionary Principle

There comes an urgent need therefore for effective implementation of the Precautionary Principle. However, the wide definitions lead to improper implementations and leads to cases of misuse of the principle.

[10] Kevin Elliot, "Ceoengineering and the Precautionary Principle", 24 International tournai of Applied Philosophy (2010)
[11] Hunter et al., International Environmental Law,.
[12] Andorno, "Precautionary Principle",
[13] Jonathan B. Wiener, "The Real Pattern of Precaution", in Wiener et al. (eds.), The Reality of Precaution,
[14] Robert V. Percival, "Who's Afraid of the Precautionary Principle?", 23 Pace Environmental Law Review (2006); Maguire and Ellis, "Redistributing the Burden"
[15] See W. Bradnee Chambers, Interlinkages and the Effectiveness of Multilateral Environmental Agreements (Tokyo: United Nations University 2008), at 520; Böckenförde, "Operationalization"Steve Maguire and Jaye Ellis, "Redistributing the Burden of Scientific Uncertainty: Implications of Precautionary Principle for State and Nonstate Actors", Global Governance (2005), 505, at 525

1. One example of the misuse of the Precautionary Principle is the case of **neonicotinoid pesticides**, which have been linked to declines in pollinator populations. The European Union imposed a moratorium on the use of neonicotinoids in 2013 based on the Precautionary Principle, despite conflicting evidence on their potential harms. While the ban was supported by environmental groups, it was criticized by agricultural and pesticide industry stakeholders, who argued that it was based on insufficient evidence and would have negative economic impacts. This demonstrates the difficulty of applying the Precautionary Principle when there are conflicting interests and values at stake, and highlights the need for clear and objective criteria for decision-making[16].

2. Similarly, the precautionary approach to the **regulation of GMOs** has been controversial, with some arguing that it has led to unnecessary delays and stifled innovation. The implementation of the Precautionary Principle in this context has been complicated by the complexity of the science involved, as well as by political and economic interests. For example, some countries have used the Precautionary Principle to justify bans on imports of GMOs, even when there is no clear scientific evidence of harm. This has led to disputes in the World Trade Organization and highlighted the tension between trade and environmental objectives.[17]

3. Another misuse then is seen in implementing the Precautionary Principle effectively is the need to balance the potential benefits and risks of new technologies or products. In the case of **pesticides**, for example, there is a need to weigh the benefits of increased crop yields and reduced food insecurity against the potential harms to human health and the environment. The Precautionary Principle can be used to delay or prevent the introduction of new technologies or products, but it can also be used to justify their rapid adoption in the absence of clear evidence of harm. This underscores the need for a nuanced and context-specific approach to decision-making.[18]

[16] Alemanno, Alberto. "The Science, Law and Policy of Neonicotinoids and Bees: A New Test Case for the Precautionary Principle." European Journal of Risk Regulation, vol. 4, no. 2, 2013, pp. 191–207. JSTOR, http://www.jstor.org/stable/24323356.
[17] Applegate, John S. "The Prometheus Principle: Using the Precautionary Principle to Harmonize the Regulation of Genetically Modified Organisms." Indiana Journal of Global Legal Studies, vol. 9, no. 1, 2001, pp. 207–63. JSTOR, http://www.jstor.org/stable/20643826.
[18] Sunstein, Cass R. "Beyond the Precautionary Principle." University of Pennsylvania Law Review, vol. 151, no. 3, 2003, pp. 1003–58. JSTOR, https://doi.org/10.2307/3312884.

Suggestions

The issues abovementioned raise the question as to how to resolve the same, the start can obviously by setting out clear definitions in legislations, however some other suggestions might be-

1. **Strengthen the role of the UN Environment Programme (UNEP)** in promoting the precautionary principle: UNEP can play a key role in promoting the precautionary principle by providing guidance and support to countries on how to effectively apply the principle in practice. UNEP can also help to establish common standards and protocols for assessing and managing risks, and can facilitate international cooperation and coordination on environmental issues.

2. **Establish clear scientific criteria for assessing risks in law:** To effectively apply the precautionary principle, decision-makers need to have access to accurate and reliable scientific data. Governments can establish clear scientific criteria for assessing risks and provide guidance on how to use this information in decision-making processes. This can involve developing standards for the collection and analysis of scientific data, and ensuring that scientific research is conducted independently and free from conflicts of interest.

3. **Establish a clear Legislative Framework to prevent misuse:** This legal framework could be established at the national or international level, and could take the form of legislation, regulations, or guidance documents. It would need to provide for the establishment of clear and consistent risk assessment protocols, as well as robust decision support tools that integrate the latest scientific data and modeling techniques. These could include liability regimes and compensation schemes to address environmental damage and health risks, as well as legal frameworks that require the adoption of safer alternatives and technologies. Governments could also provide incentives for research and development of these alternatives, and establish monitoring and reporting mechanisms.

Conclusion

The precautionary principle is a vital tool for protecting the environment and human health in

the face of scientific uncertainty and potential risks. The principle is being applied in a variety of contexts, including the regulation of chemicals and greenhouse gas emissions, the development of renewable energy, the protection of vulnerable communities, and the development of climate adaptation plans. By taking a precautionary approach to decision-making, policymakers can help to prevent harm to the environment and human health, and promote sustainable and responsible development. While the application of the precautionary principle can sometimes involve trade-offs between short-term economic interests and long-term environmental concerns, the principle remains a powerful tool for ensuring that development is conducted in a way that is safe, sustainable, and socially responsible. As the global community continues to grapple with the challenges of climate change and other environmental threats, the precautionary principle will remain an essential component of responsible decision-making and sustainable development.