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# *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources*

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## **Abstract**

*In the Southern Bluefin Tuna cases, the International Tribunal for the Law of the Sea ordered Japan immediately to refrain from conducting an experimental fishing programme. The unprecedented character of the case lies in the fact that the Tribunal applied the precautionary approach to fisheries although it did not expressly say so. The precautionary approach, however, is a principle which has found strong application in international environmental law within the last decade. Its status as regards customary international law is disputed and remains unresolved. However, the character of this case causes one to ask whether the Tribunal's Order was the missing link to argue that the precautionary approach to fisheries has evolved into a norm of customary international law, and, if so, what implications the Order may have for the determination of its content. In addition, it serves as a good example to illustrate the application of public international law on a broader scale as twisted between established legal norms and morality and common sense.*

## **1 Introduction**

On 27 August 1999, the International Tribunal for the Law of the Sea (Tribunal), in a dispute between Australia, New Zealand and Japan, requested the parties immediately to refrain from conducting an experimental fishing programme (EFP) of Southern Bluefin Tuna (SBT), which in fact Japan had undertaken unilaterally. This article will review the main arguments of the dispute and will scrutinize the reasoning of the

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Tribunal's Order and the grounds on which the claim had been based.<sup>1</sup> Interestingly, the Tribunal adopted this Order in the face of scientific uncertainties of the parental biomass of the stock of SBT. However, environmental action in the face of scientific uncertainties has been the jingle in favour of the precautionary approach for the last decade. Although the Tribunal in its Order does not expressly refer to the precautionary approach, the author assumes, from the wording of the Order, that the Tribunal nevertheless applied it. This would be remarkable, since the precautionary approach is highly disputed as a rule of customary international law and still remains unclear as to what its precise content and consequences are. Against this background the author draws the conclusion that the Tribunal in the absence of evidence of an established principle of international law applied common sense<sup>2</sup> and morality rather than positivistic law. As one talented writer already noted earlier, 'for it is the Judges, who are putting the cart before the horse, they are the discoverers of Law, not the creators'.<sup>3</sup>

## 2 The Dispute

In a nutshell the dispute between Australia and New Zealand ('the applicants'), on one side, and Japan, on the other, concerned the conservation of the population of SBT. This species is significantly over-fished and is below commonly accepted thresholds for biologically safe parental biomass.<sup>4</sup> In the face of this stock decline Australia, Japan and New Zealand established the Convention for the Conservation of Southern Bluefin Tuna (CSBT Convention) in 1993 and agreed upon a total allowable catch (TAC) for Japan, Australia and New Zealand respectively. However, in 1998 Japan undertook unilaterally what it called experimental fishing in the southern Indian Ocean of 1,400 tonnes of SBT.

The applicants claimed that Japan, by conducting unilateral experimental fishing, had failed to take the required measures for the conservation and management of the SBT in the high seas and had thereby breached Articles 64, 116–119 and 300 of the LOS Convention. Moreover, in relation thereto, Japan was considered to have violated the precautionary principle which, according to the applicants, has become a norm of customary international law.

<sup>1</sup> For documents and information concerning the *Southern Bluefin Tuna* cases, see (1999) 38 ILM 1624–1656; [www.un.org/Depts/los/ITLOS/Tuna\\_cases.htm](http://www.un.org/Depts/los/ITLOS/Tuna_cases.htm) (visited 26 July 2000).

<sup>2</sup> Stein J of the New South Wales Land and Environment Court already noted if the precautionary principle was a legal principle at all or just 'common sense' (*Leatch v. National Parks and Wildlife Service*, (1993) 81 LGERA 270); see also Lyster, 'The Relevance of the Precautionary Principle: Friends of Hinchinbrook Society Inc. v. Minister for the Environment ...', 14 *Environmental and Planning Law Journal* (1997) 390–401, at 401. Furthermore, arguments have been raised that, for example, its lack of precision as a principle may mean that it imposes an impracticable, vague standard of care for the environment: see Bodansky, 'Scientific Uncertainty and the Precautionary Principle', 33 *Environment* (1991) 1–46, at 4.

<sup>3</sup> John Chipman Gray, *The Nature and Sources of the Law* (1972) 93.

<sup>4</sup> By 1980, estimates of the parental stock had declined to 25–35 per cent of its 1960 level. In response to this decline, Australia, Japan and New Zealand agreed to a global total allowable catch (TAC) in 1985. Despite the catch limits, the parental stock continued to decline.

Japan mainly argued that an Annex VII arbitral tribunal established according to Article 290(5) of the LOS Convention would be lacking *prima facie* jurisdiction over the underlying dispute. This followed from the requirement of Article 288(1) of the LOS Convention that a dispute submitted under Article 290(5) of the LOS Convention must be a dispute concerning the interpretation or application of the LOS Convention and not the CSBT Convention. Moreover, Japan argued that, even if the Tribunal had jurisdiction, the prescription of provisional measures was not appropriate in this case, because there was no risk of 'irreparable damage' and that there was no 'urgency' in the requests of the applicants as required by Article 290(5) of the LOS Convention.

### 3 Analysis

The Tribunal<sup>5</sup> held that the conditions set forth in Article 290(5) of the LOS Convention were met by the application of Australia and New Zealand and implied that it had *prima facie* jurisdiction in this case.<sup>6</sup> However, the Tribunal did not raise the issue of the automatic exception of coastal states' rights over fisheries in their 200-mile zones under Article 297(3) of the LOS Convention from the compulsory procedures. Article 297(3) of the LOS Convention provides that 'the coastal state shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone, or their exercise'. In this respect it has been argued elsewhere that Article 297(3) of the LOS Convention could also be interpreted so as to apply to all straddling stocks which also occur in the high seas.<sup>7</sup>

#### A Irreparable Damage

As regards the requirement of 'irreparable harm', the Tribunal based its decision on 'appropriateness' and did not choose to base it on the criterion of 'irreparability', which in contrast has been an established aspect of the jurisprudence of the ICJ.<sup>8</sup> It provides for provisional measures in order to prevent 'serious harm' and to 'avert further deterioration' of SBT stock.<sup>9</sup> By doing this, the Tribunal has given the applicants the benefit of the doubt, as did the ICJ in a number of cases concerning

<sup>5</sup> *Southern Bluefin Tuna Cases* (Provisional Measures) Order, para. 40 (hereinafter the 'Order').

<sup>6</sup> In particular, it held that the differences between the parties constituted a dispute referred to in Article 288(1) of the LOS Convention. In this context, the Tribunal referred to previous decisions of the Permanent Court of International Justice and the International Court of Justice which held respectively that 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests' (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924 PCIJ Series A, No. 2, at 11; *South West Africa, Preliminary Objections*, Judgment, ICJ Reports (1962) 328).

<sup>7</sup> Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks', 14 *International Journal of Marine and Coastal Law* (1999) 1–25, at 12–13. For further reference, see also E.D. Brown, *The International Law of the Sea*, vol. 1 (1994) 1, at 228.

<sup>8</sup> According to Article 290(1) of the LOS Convention, 'the tribunal may prescribe provisional measures which it considers appropriate under the circumstances'.

<sup>9</sup> Order, paras 77 and 80.

provisional measures.<sup>10</sup> However, Article 290 of the LOS Convention was generally drafted in the light of Article 41 of the Statute of the ICJ<sup>11</sup> but nevertheless departs from it in several aspects.<sup>12</sup> From the word ‘appropriate’, it follows that the award of provisional measures is more a matter within the discretion of the Tribunal. This is underlined by Article 290(1) of the LOS Convention under which the Tribunal is entitled to order provisional measures ‘to prevent serious harm to the environment’. In order to accomplish this, as the present case has shown, scientific evidence often has to be relied on. However, in relation to the marine environment, scientific evidence does not, in most cases, have the exactness that will necessarily enable actual irreparable harm to be shown at the time; hence ‘appropriateness’ must suffice.

## **B Urgency**

As regards the requirements set out in Article 290(5) of the LOS Convention, it seems that there was no ‘urgency’ of the situation warranting provisional measures. The reason for inserting the criterion of ‘urgency’ in the text of the LOS Convention was to restrict the Tribunal’s intervention, in cases where the dispute has already been submitted to other tribunals not yet in existence.<sup>13</sup> In the present case the Tribunal should have taken into account that the Annex VII arbitral tribunal with the nomination of two of its members had already been partly established; hence the dispute was likely to be settled in the course of 1999 or shortly thereafter.<sup>14</sup> Additionally, Japan’s 1999 EFP would have been terminated three days after the adoption of the Order. That is to say, that the present case concerned in fact only 100 tonnes or so of SBT likely to be fished in the course of the remaining days of August 1999 and Australia and New Zealand themselves did not intend to reduce the pace of their regular catch in order to prevent the deterioration of the stock. As Judge Vukas<sup>15</sup> noted, all this led to the conclusion that it did not seem convincing that there was an urgency in the situation, which would require action of the Tribunal and could not await the decision of the Annex VII arbitration. Thus the urgency needed in the present case did not apparently concern the danger of a collapse of the stock in the

<sup>10</sup> *Paraguay v. USA* (Provisional Measures) Order, ICJ Reports (1998) 248; *Germany v. USA* (Provisional Measures) Order, ICJ Reports (1999) 9; *Cameroon v. Nigeria* (Provisional Measures) Order, ICJ Reports (1996) 13; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)* (Provisional Measures), Dissenting Opinion of Judge Schwebel, ICJ Reports (1984) 206–207.

<sup>11</sup> The ICJ has the power ‘to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party’ (Article 41 of the ICJ Statute).

<sup>12</sup> Myron H. Nordquist (editor-in-chief), Shabtai Rosenne and Louis B. Sohn (volume editors), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, 53, para. 290.2.3.

<sup>13</sup> See *ibid.*, at para. 290.5.

<sup>14</sup> With the appointment by Australia and New Zealand, on 30 July 1999, of Sir Kenneth Keith and shortly thereafter, on 13 August 1999, the appointment by Japan of Professor Chusei Yamada under Article 3(b), (c) and (g) of Annex VII to the LOS Convention, there were reasonable grounds for assuming that the arbitral tribunal would have expeditiously determined its procedure in accordance with Article 5 of Annex VII to the LOS Convention. The statements and commitments of the parties during the present proceedings reinforce such expectations (para. 101 of the Response of the Government of Japan to Request for Provisional Measures and Counter-Request for Provisional Measures).

<sup>15</sup> Judge Vukas, Dissenting Opinion, para. 6.

months which would have elapsed between the issuance of the Order and the time when the arbitral tribunal would have been in a position to prescribe provisional measures.

Nevertheless, there seems to be an element of urgency concerning the stopping of a trend towards such a collapse. As Judge Treves noted, each step in such a deterioration could be seen as a 'serious harm' because of its cumulative effect towards the collapse of the stock.<sup>16</sup> There seems to be a good basis for arguing that the requirement of urgency was satisfied only in the light of a precautionary approach. However, the Tribunal provided for provisional measures in the face of scientific uncertainties, without expressly mentioning the precautionary approach. Considering the time that the Tribunal had to come to a decision (only three weeks), it is understandable why it was reluctant in taking such a position. This point would have touched on the vexatious issue of the status of the precautionary principle as a rule of customary international law; although it might not even have been necessary to prove that the precautionary approach was a binding principle of customary international law, because, as Judge Treves argues, the precautionary approach could be seen as being inherent in the very notion of provisional measures.<sup>17</sup>

### C The Precautionary Principle

The evolution of the precautionary principle began in the mid-1980s when it has been featured as a principle in domestic legal systems.<sup>18</sup> Predominantly, it provides guidance in the management of environmental decisions, where there is scientific uncertainty. It has been incorporated into a vast number of international policy documents<sup>19</sup> as well as treaties,<sup>20</sup> of which a number are in force already. Most

<sup>16</sup> Judge Treves, Separate Opinion, para. 8.

<sup>17</sup> See *ibid.*, at para. 9.

<sup>18</sup> Most notably, the precautionary principle has been featured in West Germany's legal system (*Vorsorgeprinzip*), in the *Bundesimmissionsschutzgesetz*, § 5, para. 1, No. 2; and in the *Atomgesetz*, § 7, para. 2, No. 8; for reference, see Michael Kloepfer, *Umweltrecht* (1998) 166–177, at 167 and 169.

<sup>19</sup> Articles VII, XV(ii) and XVI(1) of the 1987 Ministerial Declaration of the Second North Sea Conference; Principle 15 of the 1992 Rio Declaration; para. 17.21 of Agenda 21; United Nations General Assembly Resolutions 44/225 of 22 December 1989 and 46/215 of 20 December 1991; Ministerial Declaration on the Protection of the Black Sea (1993); Article 7.5 of the FAO Code of Conduct for Responsible Fisheries (1995); 1998 Sintra Statement of the Ministerial Meeting of the OSPAR Commission on 22–23 July 1998.

<sup>20</sup> Article IV(1)(b) and Annex of the 1952 North Pacific Fisheries Convention; Article II of the 1980 Convention on the Conservation of Antarctic Marine Living Resources; Preamble to the 1985 Vienna Convention; Article 4(3) and (4) of the 1988 Antarctic Mineral Resources Convention; Article 4 of the 1991 Bamako Convention; Article 2(5)(a) of the 1992 ECE Transboundary Watercourses Convention; Article 2(2)(a) of the 1992 OSPAR Convention; Article 3(2) of the 1992 Baltic Sea Convention (Helsinki); Article 4(1)(f) of the 1992 Climate Change Convention; Article 174(2) of the 1992 Treaty Establishing the European Community (consolidated version); Annex, Part 1(b), (c) 1994 Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea; Article 6 of the 1995 UN Fish Stocks Agreement; Article 3(1) of the 1996 Protocol to the 1972 London Convention; Preamble to the 1996 EC Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

recently, the precautionary approach was used in the Cartagena Biosafety Protocol.<sup>21</sup> On the political plane, the precautionary principle enjoys wide recognition nowadays, which was unprecedented. For example, only recently the European Commission published a Communication to inform all interested parties, in particular the European Parliament, the Council and member states, of the manner in which the Commission applies or intends to apply the precautionary principle, when faced with taking decisions relating to the containment of risk.<sup>22</sup> Shortly thereafter, the G-8 ministers of the environment have incorporated the precautionary principle in a communiqué as a means to safeguard the process of globalization and the protection of the environment.<sup>23</sup> The precautionary principle has become of tremendous importance because, in many cases, the establishment of proof of cause and effect by scientists is a difficult task, sometimes almost a fruitless search for an infinite series of events. In addition, in some cases the scientists will never be able to make accurate long-term predictions about the consequences of human activities, simply due to the limitations of science. In this respect, the recent SBT cases give a vivid example of how diametrically opposed the scientific evidence can become, thus revealing the subjectivity and ambiguity of scientific methods and interpretations, sometimes even depending on the side the evidence is produced for. Because of its far-reaching consequences, the precautionary principle has generated significant disagreement. On the one hand, environmentalists consider that it provides the basis for early international legal action to address human activity, which is likely to have an adverse impact on the environment.<sup>24</sup> On the other hand, its critics claim that the principle has a potential for over-regulation and limiting human activity.<sup>25</sup> In addition, they argue that environmental action is only triggered on suspicion and in some instances it causes more harm than it actually prevents.<sup>26</sup>

### 1 *The Core of the Principle*

Most commentators<sup>27</sup> agree that the core of the principle is best reflected in Principle 15 of the Rio Declaration 1992, which provides that:

<sup>21</sup> After an intense struggle between the parties to include the precautionary principle in the Biosafety Protocol, it was finally set out in Article 10(6) of the 1999 Cartagena Protocol on Biosafety; for details, see [www.iisd.ca/download/asc/enb09137e.txt](http://www.iisd.ca/download/asc/enb09137e.txt) (visited 26 July 2000).

<sup>22</sup> Communication from the Commission, 2 February 2000, COM (2000) 1 final; for reference, see [www.europa.eu.int/eur-lex/en/com/pdf/2000/com2000\\_0001en01.pdf](http://www.europa.eu.int/eur-lex/en/com/pdf/2000/com2000_0001en01.pdf) (visited 26 July 2000).

<sup>23</sup> Communication of the G-8 Ministers of Environmental Affairs, 26–28 March 2000, Schwerin; for reference, see [www.bmu.de/aktuell/index.htm](http://www.bmu.de/aktuell/index.htm) (visited 26 July 2000).

<sup>24</sup> Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution', 4 *Georgetown International Environmental Law Review* (1992) 303–318, at 308.

<sup>25</sup> Burke, 'UNCED and the Oceans', 17 *Marine Policy* (1993) 519, at 531; William T. Burke, *The New International Law of Fisheries* (1994) 109; Garcia, 'The Precautionary Principle: Its Implications in Capture Fisheries Management', 22 *Ocean and Coastal Management* (1994) 99–125, at 119.

<sup>26</sup> Cross, 'Paradoxical Perils of the Precautionary Principle', 53 *Washington and Lee Law Review* (1996) 851–925, at 861.

<sup>27</sup> For a general overview, see Hewison, 'The Precautionary Approach to Fisheries Management: An Environmental Perspective', 11 *International Journal of Marine and Coastal Law* (1996) 301–332, at 312–313; Cameron and Abouchar, 'The Precautionary Principle', 14 *Boston College International and Comparative Law Review* (1991) 1–27, at 3.

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The principle finds its roots in earlier attempts to address environmental issues in international agreements providing for the preventive principle.<sup>28</sup> Parties to such earlier agreements negotiated standards, which suggested that action shall only be taken where there was scientific evidence that significant environmental damage was occurring and that in the absence of such evidence no action would be required.<sup>29</sup>

## 2 Interpretations of the Precautionary Principle

There is no uniform understanding of the meaning of the precautionary principle among states and other members of the international community. The literature offers different interpretations of the precautionary approach.

A more traditional interpretation is that the principle requires activities and substances which may be harmful to the environment to be regulated, and possibly prohibited, even if no conclusive or overwhelming evidence is available as to the harm or likely harm they may cause to the environment.<sup>30</sup> The most progressive approach shifts the burden of proof, which currently lies with the person opposing an activity to prove that it does or may cause environmental damage.<sup>31</sup> It would require the person who wishes to carry out an activity to prove that it will not cause harm to the environment.

The difference between a hard principle and a soft approach soon became apparent when the precautionary principle found important application in relation to the marine environment and soon evolved from a pollution control device into a fisheries

<sup>28</sup> The preventive principle, which provides for an obligation on states to prevent known or foreseeable harm outside their territory, is found in Principle 2 of the Rio Declaration and in Principle 21 of the Stockholm Declarations. Further examples are Article 3(1) of the 1976 Convention on the Protection of the Rhine Against Pollution by Chlorides; and Article 1 of the 1980 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources.

<sup>29</sup> For example, Article 4(4) of the 1974 Paris Convention, which allows parties to take additional measures, 'if scientific evidence has established that a serious hazard may be created in the maritime area by that substance and if urgent action is necessary'.

<sup>30</sup> Article 7 of the 1990 Bergen Ministerial Declaration; Article 15 of the 1992 Rio Declaration; Article 4(1)(f) of the 1992 Climate Change Convention; Article 14(1)(a) of the 1992 Convention on Biological Diversity.

<sup>31</sup> According to David Freestone, this most strict application was found as early as 1952 in the International Convention for High Seas Fisheries of the North Pacific Ocean, which established an 'abstention' principle; for reference, see Freestone, 'Implementing Precaution Cautiously', in Ellen Hey (ed.), *Changing International Fisheries Law* (1999) 287–325, at 306; the Oslo Commission's Prior Justification Procedure has been described by Freestone and Hey as 'a most rigorous application of the precautionary principle' because of its provision for a shift of burden of proof: see David Freestone and Ellen Hey (eds), *The Precautionary Principle in International Law: The Challenge of Implementation* (1996) 261; see also the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Bering Sea Convention), Annex reproduced in Elferink, 'Fisheries in the Sea of Okhotsk High Seas Enclave: The Russian Federation's Attempts at Coastal State Control', 10 *International Journal of Marine and Coastal Law* (1995) 1–18, at 14; Annex 2, Article 14, 1996 Protocol to the 1972 London Convention.

management tool.<sup>32</sup> Since scientific uncertainty is the rule in fisheries management, a straightforward application of the precautionary principle would have the effect of bringing almost all marine fishing activities to a halt. It is on these grounds that, as regards fisheries management, the concept of a more flexible ‘precautionary approach’ developed.<sup>33</sup> Accordingly, for the purposes of this article, the term ‘approach’ will be used, for its acceptance is also reflected in the prominent 1995 UN Fish Stocks Agreement and the 1995 FAO Code of Conduct which also use the term ‘approach’.<sup>34</sup>

### 3 *Provisional Measures and the Precautionary Approach*

In the face of the above-mentioned uncertainties of the precautionary approach, what is the relation between the application of provisional measures and the precautionary approach? According to Article 290(1) of the LOS Convention, the Tribunal ‘may prescribe any provisional measures which it considers appropriate under the circumstances to . . . prevent serious harm to the marine environment’. Pursuant to Article 290(5) of the LOS Convention, the Tribunal may prescribe provisional measures when the ‘urgency of the situation so requires’.

However, as the proceedings in the present case have shown, the problem in this context is that, due to scientific uncertainties about the parental biomass of a fish stock, it can be difficult to predict the urgency of the situation. This raises the question whether in the context of marine living resources the application of the precautionary approach renders the requirement of ‘urgency’ obsolete.

The 1995 UN Fish Stocks Agreement can provide guidance on this question. Even though this Agreement has not entered into force as yet, it is significant for evaluating the trends followed by international law.<sup>35</sup> Although it is independent from the LOS Convention, it has remarkable links with it. The LOS Convention is considered, in many if not in all cases, to be interpreted by the 1995 UN Fish Stocks Agreement as a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’, within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties.<sup>36</sup> As regards the prescription of provisional measures, Article 31(2) of the 1995 UN Fish Stocks Agreement provides that ‘without prejudice to Article 290 of the [LOS] Convention the Tribunal may prescribe provisional measures to prevent *damage to the stocks* in question’. In addition, Article 6 of the 1995 UN Fish Stocks Agreement provides for the precautionary approach to be applied by all parties. Particularly, Article 6(2) of the 1995 UN Fish Stocks Agreement provides that ‘the absence of adequate scientific information shall not be used as a

<sup>32</sup> Macdonald, ‘Appreciating the Precautionary Principle’, 26 *Ocean Development and International Law* (1995) 255–286, at 270.

<sup>33</sup> Francisco Orrego Vicuña, *The Changing Law of High Seas Fisheries* (1999) 157.

<sup>34</sup> See *supra* notes 19 and 20, respectively.

<sup>35</sup> Order, Separate Opinion of Judge Treves, para. 10; Separate Opinion of Judge *ad hoc* Shearer, 8.

<sup>36</sup> Anderson, ‘The Straddling Stocks Agreement of 1995 — An Initial Assessment’, 45 *International and Comparative Law Quarterly* (1996) 463–475, at 468; Davies and Redgwell, ‘The International Legal Regime of Straddling Fish Stocks’, 68 *British Yearbook of International Law* (1997) 200–274, at 259.

reason for postponing or failing to take conservation and management measures'. Although this requirement does not reverse the normal burden of proof,<sup>37</sup> it has some considerable impact: read together, Articles 31(2) and 6(2) of the 1995 UN Fish Stocks Agreement imply that the requirement to provide for provisional measures in Article 31(2) is less strict than under Article 290(5) of the LOS Convention ('urgency of the situation', in contrast to 'damage to stocks in question'). For, according to the precautionary approach, scientific uncertainties shall not be used as a reason for postponing conservation measures, and this holds true, *a fortiori*, also for the prescription of provisional measures in relation to conservation. In other words, following the precautionary approach in a situation when there is no certain information as to the 'urgency' of the situation, this absence of information shall not be used to postpone prescribing provisional measures where damage to stocks is likely. Hence, it is arguable that, by virtue of Articles 31(2) and 6(2), where the requirements for the precautionary approach (damage to stocks in the face of absence of scientific information) are fulfilled, additional proof of the urgency of a situation, as Article 290(5) of the LOS Convention requires, is not necessary.

#### 4 *The Precautionary Approach: A Rule of Customary International Law?*

Against the backdrop that the precautionary approach substitutes the element of 'urgency' for the prescription of provisional measures, according to Article 290(5) of the LOS Convention, is the precautionary approach a binding norm of international customary law?

Article 38 of the Statute of the International Court of Justice defines 'customary international law' as 'evidence of general practice accepted as law'. It arises when a practice among nations is extensive and virtually uniform, and is accompanied by a conviction that it is obligatory under international law.<sup>38</sup> There exists strong disagreement among international legal authors<sup>39</sup> concerning the status of the precautionary approach as a binding norm of customary international law. Due to its possible huge impact on economy and society, it is necessary to define the precautionary principle as a legal tool for progressive risk assessment in environmental law as precisely as possible. This is important because otherwise the precautionary approach will in the face of its vagueness be watered down and will only be used as a blunt environmentalist's policy phrase. It is important to differentiate the precautionary approach on a sector-by-sector basis and to establish different criteria, such as threshold standards, and the legal consequences in different contexts.<sup>40</sup> For the consequences of a human activity on the environment are easier to predict in some areas than in others, and often require different risk assessment methods. For example, risk assessment in relation to ecotoxicology would have to be entirely different from the evaluation of risks to the biomass of certain fish stocks due to

<sup>37</sup> Freestone, 'Implementing Precaution Cautiously', *supra* note 31, at 318.

<sup>38</sup> *North Sea Continental Shelf Cases (West Germany v. Netherlands; West Germany v. Denmark)*, ICJ Reports (1969) 3, at 43–44.

<sup>39</sup> See Hewison, *supra* note 27, at 312–313.

<sup>40</sup> Freestone, 'Implementing Precaution Cautiously', *supra* note 31, at 299.

over-fishing.<sup>41</sup> The same holds true, for example, for the relatively well-known effects on the flora and fauna of the building of a dam as compared to the relatively unresolved effects on, for example, drift-net or beam-trawler fishing or the effect of persistent organic pollutants (POPs) on the living organisms in the oceans.

Having said this, there might be good grounds to argue that, at least as regards the sector of marine living resources, the precautionary approach has developed into a rule of customary international law. Proponents<sup>42</sup> of this view argue that it has found worldwide acceptance because it has already been incorporated in a vast number of international marine management and conservation agreements,<sup>43</sup> such as the highly authoritative 1995 UN Fish Stocks Agreement and the LOS Convention<sup>44</sup> but also in a number of international policy documents<sup>45</sup> and national fisheries legislation,<sup>46</sup> or was subject of national litigation, though admittedly not in the

<sup>41</sup> GESAMP — IMO/FAO/UNESCO-IOC/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP), *Guidelines for Marine Environmental Assessments* (Rep. Stud. GESAMP No. 54) 7; GESAMP — IMO/FAO/UNESCO-IOC/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP), *Global Strategies for Marine Environmental Protection* (Rep. Stud. GESAMP No. 45) 22; Articles 7.2–7.6 of the 1995 FAO Code of Conduct for Responsible Fisheries.

<sup>42</sup> Freestone, 'Implementing Precaution Cautiously', *supra* note 31, at 299; Cameron and Abouchar, *supra* note 27, at 4–27; McIntyre and Mosedale, 'The Precautionary Principle as a Norm of Customary International Law', 9 *Journal of Environmental Law* (1997) 221–247, at 241.

<sup>43</sup> See *supra* note 20.

<sup>44</sup> According to some authors, Article 119 of the LOS Convention provides for the utilization of the precautionary principle to the extent that the burden of proof shifts in favour of conservation. For this concept are: Freestone and Hey, *supra* note 31, at 261 and 262; Order, Separate Opinion of Judge Laing, para. 16. Against this concept are: Burke, 'UNCED and the Oceans', 17 *Marine Policy* (1993) 519, at 531; Elisabeth Mann Borgese, *Ocean Governance and the United Nations* (1995) 53; and Wolfrum, 'New Technologies and Law of the Marine Environment' (presentation given at the European Council Conference on Environmental Law, Lisbon, 18–19 September 1998, on file with the author).

<sup>45</sup> See *supra* note 19.

<sup>46</sup> Australia: section 3(1)(b) of the Australian Fisheries Management Act 1991; Canada: Bill C-27 amending the Coastal Fisheries Protection Act to implement the 1995 Fish Stocks Agreement; European Union: Article 1(1) of Council Regulation 847/96 of 6 May 1996; Iceland: Fisheries Management Act (No. 38/1990); New Zealand: section II(10)(d) of the Fisheries Act 1996; Nova Scotia: Article 2(b)(ii) of the Environment Act; US: National Standard 1 of the Magnuson Fishery Conservation and Management Act; South Africa: Chapter 1, Article 2(c) of the Marine Living Resources Act 1998; for general reference, see Barton, 'Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine', 22 *Harvard Law Review* (1998) 509–558. For the US, see Fullem, 'The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty', 31 *Williamette Law Review* (1995) 495. For Germany, see Kloepfer, *supra* note 18, 166–177; Boehmer-Christiansen, 'The Precautionary Principle in Germany — Enabling Government', in Timothy O'Riordan and James Cameron (eds), *Interpreting the Precautionary Principle* (1994) 31–60; von Moltke, 'The Vorsorgeprinzip in West German Environmental Policy', in Royal Commission on Environmental Pollution, 12th Report, Best Practicable Environmental Option, Appendix 3 (1988).

context of marine living resources.<sup>47</sup> Also, there is growing *opinio juris*<sup>48</sup> of states and a vast number of international fisheries commissions which apply the precautionary principle in recent management and conservation strategies. In this context, the most prominent example is a recent study of the Advisory Committee for Fisheries Management (ACFM) at the International Council for Ecological Science (ICES)<sup>49</sup> which has formulated advice for fisheries management on the basis of the precautionary approach.<sup>50</sup> This had the effect that the TAC for a number of fish stocks was reduced dramatically, because predominantly the biomass of the most common fish stocks (i.e. herring, cod, halibut or pollock, to name just a few) have sunken below the minimum biological acceptable level.<sup>51</sup> Moreover, *inter alia*, NAFO,<sup>52</sup> the IPHC,<sup>53</sup> IBSC,<sup>54</sup> GFCM,<sup>55</sup> ICCAT<sup>56</sup> and NASCO<sup>57</sup> all applied the precautionary approach to fisheries, closely following the language of the FAO's Code of Conduct.

Moreover, there are a number of findings by international juridical bodies to support this view: as early as 1969, according to Judge Laing, the *Fisheries Jurisdiction* case<sup>58</sup> presaged the development of the precautionary approach in relation to marine living resources, in which it was noted:

It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and

<sup>47</sup> For example, see *supra* note 2 (Australia); BverfGE 49, 89 (137 and 149) (Germany); *Ethyl Corp. v. EPA*, 541 F 2d 1, at 25 (DC Cir.), cert. denied 449 US 1042 (US); and *Lead Industrie Association v. EPA*, 647 F 2d 1130, at 1155 (DC Cir.), cert. denied 449 US 1042 (US).

<sup>48</sup> Argentina, Canada, Chile, Iceland and New Zealand in the first substantive session of the 1995 Straddling Fish Stocks Conference submitted a draft convention providing for the precautionary approach in its Article 5, reproduced in A/CONF.164/L.11. For Chile, Colombia, Ecuador and Peru, see A/CONF.164/L.14.

<sup>49</sup> The ICES management procedures serve as a good example for applying the precautionary approach to fisheries in practice: As a basis, ICES identifies limit and precautionary reference points — trigger levels — to take account of the uncertainty in managing stocks. For further reference, see Serge M. Garcia, 'The Precautionary Approach to Fisheries' (paper presented at the ICES/NAFO/ICCAT/FAO CWP Working Group on Precautionary Approach Terminology, Copenhagen, Denmark, 14–16 February 2000, on file with the author) 7.

<sup>50</sup> Cornelius Hammer, 'Lage und Entwicklung der Fischereiresourcen in Hinblick auf deutsche Fischereiereferenzwerte: neuste Bestandsabschätzungen des ACFM' (Institut für Seefischerei, Hamburg, October 1998, on file with the author). For ICES strategy, see [www.ices.dk/reports/bureau/StrategicPlan.htm](http://www.ices.dk/reports/bureau/StrategicPlan.htm) (visited 26 July 2000).

<sup>51</sup> Hammer, *supra* note 50.

<sup>52</sup> Northwest Atlantic Fisheries Organization. Garcia, *supra* note 49, at 9.

<sup>53</sup> International Pacific Halibut Commission. See [www.iphc.washington.edu/halcom/pubs/annmeet/1999/1999catchrecomendations.htm](http://www.iphc.washington.edu/halcom/pubs/annmeet/1999/1999catchrecomendations.htm) (visited 26 July 2000).

<sup>54</sup> International Baltic Sea Fisheries Commission. See [www.ibsc.org](http://www.ibsc.org) (visited 26 July 2000).

<sup>55</sup> General Fisheries Commission for the Mediterranean. See [www.fao.org/Waicent/FAOINFO/FISHERY/meetings/gfcm/gfcm22/reporte.asp#IMPLE](http://www.fao.org/Waicent/FAOINFO/FISHERY/meetings/gfcm/gfcm22/reporte.asp#IMPLE) (visited 26 July 2000).

<sup>56</sup> International Commission for the Conservation of Atlantic Tunas. COMSCRS/99/11; see [www.iccat.es](http://www.iccat.es) (visited 26 July 2000).

<sup>57</sup> North Atlantic Salmon Conservation Organization. Garcia, *supra* note 49, at 10.

<sup>58</sup> *Fisheries Jurisdiction Cases*, ICJ Reports (1974) 3, at 31.

the needs of conservation for the benefit of all. Consequently both Parties have the obligation to keep under review the fishery resources . . . in the light of scientific . . . information.

Judge Palmer, in his Dissenting Opinion in the *Request for an Examination in the Nuclear Tests* case,<sup>59</sup> provided some support for the development of the precautionary principle as a rule of customary international law relating to the environment when he concluded that both the precautionary principle and a more specific requirement for an environmental impact assessment were to be carried out 'where activities may have a significant effect on the environment'.

Judge Weeramantry, in his Dissenting Opinion in the *Request for an Examination in the Nuclear Tests* case,<sup>60</sup> expressed the view that the precautionary principle, which he noted was gaining increasing support as part of the international law of the environment, was a necessary response to an evidentiary problem clearly illustrated by the *Nuclear Tests* case.

In the European Court of Justice (ECJ) there has been no definitive ruling on the status of the precautionary approach. However, in a number of cases the ECJ has touched upon it. Rather, in the context of biodiversity, the ECJ in the *Danish Bees* case,<sup>61</sup> ruled in favour of the prohibition on the Danish Minister for Agriculture keeping, on the Danish island of Laeso, nectar-gathering bees other than those of the subspecies *Apis mellifera mellifera* (Leaso Brown Bee). In the absence of scientific evidence, the ECJ concluded that preservation measures for an indigenous animal population contribute to the maintenance of biodiversity. In a more recent decision, the ECJ ruled on the interpretation of Council Directive 90/220/EEC of 23 April 1990 on the placing of genetically modified products in the market. The ECJ held that the member states have the right to deny permission for the introduction of genetically modified food products provided they have new scientific evidence that these food products can cause harm to health or the environment.<sup>62</sup> In the *Mondiet* case,<sup>63</sup> the ECJ touched upon the issue of drift-nets when it affirmed the legality of European Council Regulation No. 345/92 enacted in application of the precautionary approach, thus conforming to Resolution 44/225 adopted by the General Assembly of the United Nations.<sup>64</sup>

The International Tribunal for the Law of the Sea in its Order of 27 August 1999,

<sup>59</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of December 1974 in Nuclear Tests (New Zealand v. France)*; Dissenting Opinion of Judge Palmer, ICJ Reports (1995) 412.

<sup>60</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of December 1974 in Nuclear Tests (New Zealand v. France)*; Dissenting Opinion of Judge Weeramantry, ICJ Reports (1995) 342.

<sup>61</sup> Case C-67/97, *Criminal Proceedings Against Ditlev Bluhme* [1998] ECR I-8033.

<sup>62</sup> Case C-6/99, *Association Greenpeace v. Ministère de l'Agriculture et de la Pêche*, judgment of 21 March 2000, European Court of Justice, not yet reported (as of 26 July 2000). For reference, see [www.curia.eu.int/de/act/0010de.htm#ToC2](http://www.curia.eu.int/de/act/0010de.htm#ToC2) (visited 26 July 2000) (German version).

<sup>63</sup> Case C-405/92, *Mondiet v. Armement Islais* [1993] ECR I-6133, at 6173–6176.

<sup>64</sup> See *supra* note 19.

although it did not expressly refer to the precautionary approach, nevertheless more than hinted at it, particularly in paragraphs 77, 79 and 80. It stated that there existed scientific uncertainty regarding measures to be taken to conserve the stock of SBT and considered that the parties should ensure that effective conservation measures be taken to prevent serious harm to the stock of SBT and finally prescribed that the parties refrain from conducting an EFP. In fact for Japan, conducting an EFP at that time, the Order had the consequence of a moratorium as regards the carrying out of an EFP as long as the Annex VII arbitral tribunal had not decided on this matter. Thus the Order was historic because, for the first time in international environmental law, an international judicial body applied the precautionary approach directly, although it did not expressly say so.

This conclusion is confirmed by the Separate Opinion of Judge Laing<sup>65</sup> when he states that 'paragraphs 77 and 79 are pregnant with meaning'. Additional support can be obtained in the Separate Opinion of Judge *ad hoc* Shearer<sup>66</sup> when he notes that 'the Tribunal has not found it necessary to enter into a discussion of the precautionary principle/approach. However, I believe that the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach.'

But to conclude that the precautionary approach has become a rule of customary international law in the sector of marine living resources would require a thorough review of state practice and *opinio juris*,<sup>67</sup> which would go beyond the range of this article.<sup>68</sup> However, in view of recent state practice and *opinio juris*, there are in the author's opinion good grounds for arguing that the precautionary approach, in relation to marine living resources, has developed from an evolving norm to an established norm of customary international law. Nevertheless it still remains difficult to establish concrete thresholds in order to trigger environmental action. How serious does the harm to the environment have to be in order for states to evoke the precautionary approach and what are its consequences? The Tribunal's Order can provide some guidance to clarify this threshold for environmental action. First, it held that there was no disagreement between the parties that the stock of SBT was severely depleted and was at its 'historically lowest levels' and that this was a cause for 'serious biological concern'.<sup>69</sup> Secondly, in these circumstances, it held that the parties to the dispute should act with 'prudence and caution' to ensure that effective conservation measures were taken to prevent 'serious harm' to the stock of SBT.<sup>70</sup> Thirdly, as a consequence, the Tribunal provided for provisional measures and ordered that the parties should refrain from any EFP. Therefore, one can conclude that at least an 'undisputed historically low level of the parental biomass of a fish stock' satisfies the threshold of 'serious harm' to trigger environmental action.

<sup>65</sup> Order, Separate Opinion of Judge Laing, para. 12.

<sup>66</sup> Order, Separate Opinion of Judge *ad hoc* Shearer, 8.

<sup>67</sup> See *supra* note 38.

<sup>68</sup> For guidance with these questions, see Cameron and Abouchar, *supra* note 27, at 4; and McIntyre and Mosedale, *supra* note 42, at 223, who take a more holistic approach.

<sup>69</sup> Order, para. 71.

<sup>70</sup> Order, para. 77.

However, the Tribunal's finding is remarkable because, if there was a serious threat to the biomass of SBT stock, then why did the Tribunal not terminate the harvesting of SBT entirely for a period? The answer probably lies in the reading of Article 290(3) of the LOS Convention, which conditions the Rules of the Tribunal<sup>71</sup> and limits the Tribunal's power only to those measures requested by the parties.<sup>72</sup> Hence, the termination of the EFP was the best the Tribunal could offer, unless it acted *ultra vires*.

What then is the common denominator of the precautionary approach to fisheries and how does it work in practice? One good example to define the content of the precautionary approach to fisheries is provided by the ICES.<sup>73</sup> As a basis, ICES identifies limit and precautionary reference points — trigger levels — to take account of the uncertainty in managing fish stocks. The reference points act as an amber warning light (the precautionary point) and as a red danger light (limit point). They exist for an estimated spawning stock biomass and level of fishing mortality. The basic idea of the precautionary reference point is that the limit reference points — at which there is a serious risk of stock collapse — are never in practice reached. This is done by setting a higher level well above the limit reference points which gives reasonable certainty that, in spite of year-to-year fluctuations, the stock will stay above the limit level.

#### 4 Good Faith and the 1969 Vienna Convention on the Law of Treaties

In the present case it might not even have been necessary to hold the view that the precautionary approach is dictated by a rule of customary international law. It may well be argued, as the applicants did, that at least for the signatory powers to the 1995 UN Fish Stocks Agreement, although the Agreement has not entered into force yet, the signature to this Agreement had the consequence that Japan's conduct of an EFP was an act contrary to good faith. This principle is illustrated in Article 300 of the LOS Convention and Article 18(a) and (b) of the 1969 Vienna Convention on the Law of Treaties (VCLT), which codifies customary international law.<sup>74</sup> Pursuant to Article 18 VCLT, 'a State is obliged to refrain from acts which would defeat the object and purpose of a treaty' when it 'has signed the treaty, subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty'. The object and purpose of the 1995 UN Fish Stocks Agreement, as set out in Article 2, is to 'ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks', including SBT. As a means to provide this object and purpose, the precautionary approach was established in Article 6 of the Agreement and Annex II thereto.

<sup>71</sup> Article 89(5) of the Rules of the Tribunal.

<sup>72</sup> Order, Separate Opinion of Judge *ad hoc* Shearer, 10.

<sup>73</sup> See Garcia, *supra* note 49, at 7.

<sup>74</sup> ILC Draft 1965, Article 15 Commentary, para. 1; reference in Dietrich Rauschnig (ed.), *The Vienna Convention on the Law of Treaties* (1978) 166.

To the contrary, Japan maintained that neither had the 1995 UN Fish Stocks Agreement been ratified by it nor had it entered into force yet. In its view, this had the consequence that it could not have been considered as being bound by the 1995 Agreement, for treaties in general are not binding from the time of signature. According to present practice, treaties are 'binding only by virtue of their ratification'.<sup>75</sup> But, as the counsel for the United States admitted before the British–United States Claims Arbitral Tribunal (1910), some questions may seem a little vexatious as to the effect of the signing of a treaty.<sup>76</sup> The vexatious question which is at issue deals with the well-known problem of the maintenance of the *status quo* between the signing of the treaty and the time of the exchange of ratifications. In the words of the International Court of Justice, it seems that the signing of a treaty 'establishes' at least a 'provisional status' between the signatories.<sup>77</sup> During the period in question, namely, between the signature and the ratification of a treaty, it seems that the parties must not act contrary to the obligations of the provisions of the treaty. This follows from the long-established principle of good faith,<sup>78</sup> which was only hinted at by the ICJ in the *Case Concerning Certain German Interests in Polish Upper Silesia*.<sup>79</sup> Only a few months later the Greco–Turkish Arbitral Tribunal was more explicit by finding that 'it is a principle of law that already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the Treaty by reducing the importance of its provisions . . . It is of interest to state that this principle — which really is only an expression of the principle of good faith which is the foundation of all law and all conventions — has received application in a number of treaties.'<sup>80</sup> The International Law Commission's Commentary on Article 18 VCLT noted that 'an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty [which] attaches to a State which has signed a treaty subject to ratification appears to be generally accepted'.<sup>81</sup> Contrary to the

<sup>75</sup> *International Commission of the River Oder Case (UK, Czechoslovakia, Denmark, France, Germany, Sweden and Poland)* 1929 PCIJ Series A, No. 23, 20; *Greece v. UK*, ICJ Reports (1952) 28.

<sup>76</sup> Fred. K. Nielsen, *American and British Claims Arbitrations, under the Special Agreement Concluded Between the United States and Great Britain, 18 August 1910* (1926), Report, at 398.

<sup>77</sup> *Advisory Opinion on the Reservations to the Convention of Genocide*, ICJ Reports (1951) 28.

<sup>78</sup> Bin Cheng, *General Principles of Law* (1987) 111–160, at 111; Ian Brownlie, *Principles of Public International Law*, vol. 5 (1999) 611.

<sup>79</sup> *Case Concerning Certain German Interests in Polish Upper Silesia*, 1926 PCIJ Series A, No. 7, at 39–40. Here, Poland complained of certain transactions of the German Government regarding the latter's property in Upper Silesia as being in violation of the signed, but not yet ratified, Treaty of Versailles (Article 256(I) and (II)). The Court noted that 'as, after its ratification, the Treaty did not, in the Court's opinion, impose on Germany such obligation to refrain from alienation, it is *a fortiori*, impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed. In these circumstances, the Court need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to refrain from any action likely to interfere with its execution when ratification has taken place.'

<sup>80</sup> *Megalidis Case*, (1926) 8 *Recueil des Decisions des Tribunaux arbitraux mixtes institués par les Traités de Paix* 390, at 395. See also 'Comment on Article 9 of the Draft Convention on the Law of the Treaties', 29 *AJIL* (1935) (Supplement) 778–787.

<sup>81</sup> See ILC Draft 1965, *supra* note 74, at 166.

Permanent Court of International Justice (PCIJ) in the *Case Concerning Certain German Interests in Polish Upper Silesia*, the International Law Commission was of the opinion that this obligation begins even ‘at an earlier stage when a State agrees to enter into negotiations for the conclusion of a treaty’.<sup>82</sup> As regards the performance of treaty obligations, the Permanent Court of Arbitration expressly affirmed that ‘every state has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations’.<sup>83</sup> Moreover, the PCIJ has developed a teleological approach of interpreting the intention of the parties so that it is the real and practical aim pursued by the contracting parties that is enforced.<sup>84</sup>

Against this backdrop it seems that there are good grounds for arguing that Japan violated the principle of good faith. For Japan, by undertaking what it called a unilateral EFP of an additional 1,400 tonnes, contravened the conservation objectives of the 1995 UN Fish Stocks Agreement and, as far as the author is aware, has not made it clear that it intended not to become a party to this Agreement. However, interestingly, Japan commented critically on the International Law Commission’s draft of Article 17 in 1962, when it considered that ‘the criterion for refraining from acts calculated to frustrate the objects of the treaty is too subjective and difficult of application. It would prefer to leave the matter entirely to the good faith of the parties and to omit the whole article.’<sup>85</sup>

## 5 Conclusion

The Order of 27 August 1999 of the International Tribunal for the Law of the Sea is remarkable in a number of aspects. First, as regards marine living resources, for the first time in international environmental law, an international court prescribed environmental action in the face of scientific uncertainties. Secondly, by doing this, it set an example for fishing nations to co-operate in the management and conservation of fish stocks by way of multilateral treaties as provided for in the LOS Convention. Thirdly, it can provide guidance for setting a threshold for environmental action on a procedural and substantive law level in relation to marine living resources. Fourthly, the Order interestingly shows the practice of international law. Although the Tribunal in the present case has given the applicants the benefit of the doubt, it remains unclear on what substantive legal basis its Order was founded. This follows from the fact that the Tribunal, although it terminated the EFP for SBT, did not expressly mention the precautionary approach, let alone clarify its standard or content. It simply applied it in a common sense way or as a principle required by morality. This raises the question of

<sup>82</sup> *Ibid.*

<sup>83</sup> *North Atlantic Fisheries Case*, (1910) 1 HCR, at 167.

<sup>84</sup> *Chorzów Factories Case* (Jurisdiction), 1927 PCIJ Series A, No. 9, 24, at 25.

<sup>85</sup> See ILC Draft 1965, *supra* note 74, at 165.

the very nature of international law as twisted between natural law<sup>86</sup> and positivism,<sup>87</sup> where in general two opposing viewpoints exist: the supporters of natural law argue 'that the international community is peculiarly dependent on its international tribunals for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from often divergent or uncertain practices of states'.<sup>88</sup> The opposing view claims 'that the absence of an international legislative organ and the uncertainties of the treaty process require more restraint by international tribunals since they are not subject to the review and corrective processes of legislative bodies'.<sup>89</sup> In addition, the fragile and precarious jurisdiction, which is dependent on the continued consent of states, would be jeopardized by a court which is too fast and creative in finding new law and obligations.<sup>90</sup> In the author's opinion, the Order contributes to the further development of international environmental law for the reasons stated above. However, one feels inclined to ask whether proof of a rule of customary international law matters, if courts apply the standards required by common sense and morality in any event?

<sup>86</sup> The core of this school of law is that principles of a law of nature exist necessarily, which form the basis for an orderly community life and that discovery and application of those principles is mandatory. For reference, see Verdross and Koeck, 'Natural Law: The Tradition of Universal Reason and Authority', in R.St.J. MacDonald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1986) 42.

<sup>87</sup> A 'positive' method requires that its foundation is built upon the extant and recognized rules of international law as set forth in the customary practice of states and in the formal conventions concluded between them; for reference, see Oppenheim, 'The Science of International Law: Its Task and Method', 2 *AJIL* (1908) 313–356, at 333. According to Anthony D'Amato, positivism 'regards laws as equivalent to a program installed on a computer: the computer literally follows the commands, whether or not they make sense'; for reference, see Anthony D'Amato, *International Law Anthology* (1994) 24.

<sup>88</sup> Lauterpacht, 'Codification and Development of International Law', 49 *AJIL* (1955) 16–43, at 16 and 17.

<sup>89</sup> Schachter, 'Creativity and Objectivity in International Tribunals', in *Festschrift für Hermann Mosler* (1983) 813–823, at 815.

<sup>90</sup> *Ibid.*