



**International Seabed Authority 25th Session
25 February-1 March 2019**

Tuesday 26 February 2019

Agenda item 11: Draft Regulations for exploitation of mineral resources in the Area

REMPs (Regional Environmental Management Plans)

Precautionary Approach/Principle (*Tuesday afternoon/Wednesday afternoon*)

Thank you Madam President

We have been encouraged by the comments this afternoon on this issue, and just now by the observations of the Holy See with which we associate ourselves. His comments are a very helpful reminder of the linkages with the BBNJ negotiations.

We want to start with some specific issues which have not been touched on.

We were concerned to read in the Secretariat paper that *“The approach established under principle 15 of the Rio Declaration that the Authority has adopted does not prevent activities with effects unknown to science from proceeding, but rather requires that such activities only proceed with appropriate checks and risk-reduction measures in place, including robust science-based decision-making processes throughout the mining life cycle.”*

We cannot accept that. The precautionary principle certainly does require activities be prevented from proceeding, when required. It is not only a procedural mechanism.

The Secretariat states the correct formulation in Principle 15 of the Rio Declaration, which other delegations have read.

(“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious and or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”)

But, the first thing to note that the goal is clear: it is to protect the environment.

Secondly, the operational part is that *“lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”* In other words, the principle moves the decision-making point forward, again with the goal of preventing environmental degradation. It is not acceptable to cite lack of full scientific certainty as a reason to allow the project to go ahead. What it does not mean is that the project should go ahead

regardless, even if there are decision-making processes built in. The secretariat statement appears to reference adaptive management, but as the New Zealand Supreme Court said in a case called *Sustain Our Sounds* which specifically analysed this said:

"the overall question is whether any adaptive management regime can be considered consistent with a precautionary approach" and goes on to say that "The secondary question of whether the precautionary approach requires an activity **to be prohibited** until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors".

We believe that the paper misstates the precautionary principle as a merely procedural tool. For instance (para 19) it states that:

"For the Authority, establishing a framework that promotes participation and discussion in the decision-making processes is the primary goal for the successful implementation of the precautionary approach, and due consideration should be given to the cost-effectiveness of any measures under such framework. "

Madam President, Participation and discussion is not the primary goal in this context. Protection of the marine environment is the primary goal. And in any consideration of cost-effectiveness, consideration must be paid to the environmental costs.

The March 2017 ISA Discussion Paper makes it clear that the precautionary approach is implemented through substantive, procedural and institutional mechanisms. Illustrations of what the paper calls protective, which are substantive, measures to implement the precautionary principle are:

Ensure environmental management plans and marine protected areas are established before numerous exploration sites are allocated within a region

Ensure measures for the protection of vulnerable marine ecosystems are adopted before exploration work is authorized which may harm them

The [paper](#) on which it is based, states that "The third, and most crucial, element of precaution is that of remedial action at an early stage. Once the thresholds for gravity and probability of an environmental threat are crossed, the precautionary approach requires 'measures to prevent environmental degradation'. Without it, precaution would be meaningless.

We agree and commend the longer paper, as well as the shorter paper, to the Authority.

Madam President, to conclude on this important issue, the precautionary principle is not simply a procedural step. There are also substantive steps and institutional steps. Moreover, it requires proactive action to prevent environmental degradation.

Secondly, like the African Group, we also reject the characterisation of the call for the adoption of the precautionary principle, rather than approach, as that of "a handful of stakeholders" (paragraph 11). For one thing, some of those stakeholders include all African States; and for

another, there is a strong example for all 28 (to date) European member States in Article 191 of the European Treaty. (European Union policy ... shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.) We also associate ourselves with Jamaica's learned intervention.

As the ITLOS Seabed Disputes Chamber said, (131)

"the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations."

The Chamber also said that " A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach."

Madam President, this authoritative statement can be supplemented by numerous international precedents of the International Court and other international tribunals. It is also specifically incorporated in Article 6 of the Fish Stocks Agreement as Jamaica noted. (That reads that "States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.")

We note that there is no qualification of measures being cost effective.

Madam President, the simple point is this: the precautionary approach is legally binding and we believe is best stated as a legally binding principle which incorporates an approach.

We also have one specific observation: in DR 46, we suggest that the precautionary principle should not be restricted to the assessment and management of risk of harm to the marine environment from exploitation in the area. It should be applied to all aspects of the Regulation covering plans and activities.

Thank you Madam President.