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Conflict between International Treaties: Failing to mitigate the effects of introduced marine species

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Introduction

Humans have changed the face of the earth - we have intentionally altered the locations of species in order to achieve food and economic security (eg, aquaculture of the freshwater fish *Tilapia* and the marine algae *Kappaphycus*) while also appealing to our cultural and aesthetic values (eg, the introduction of gorse to New Zealand and Australia). We have accidentally spread pathogens and diseases beyond their natural ranges[1] and we have improved our technologies (such as shipping) to such an extent that we can transit our planet in shorter and shorter timeframes. [2] All of these activities have occurred over many hundreds of years[3] and have led in one way or another, to an increasing number of species being introduced beyond their natural ranges. Such introductions are now considered one of the top five threats to native biological diversity.[4,]

This paper examines how humans have impacted upon the marine environment through the introduction of species beyond their native ranges. Introduced species impact upon native biodiversity, spread diseases and pathogens, and have had economic and social impacts in their 'new' ecosystems. Because of the range and extent of introduced species impacts, numerous methods to mitigate the effects of introduced species have been developed and implemented. Within this paper we will examine how two international legal instruments, the *Convention on Biological Diversity*, *1992* (CBD) and the World Trade Organization's *General Agreement on Tariffs and Trade 1994* (GATT), in particular its associated *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS), deal with introduced species. In this context, the paper focuses on the potential for conflict that may arise with the application of these international legal instruments, thus causing a failure to effectively mitigate for the effects of introduced species.

… **Precaution: what does it mean?**

The precautionary principle has been applied in the interests of environmental protection since the 1970s.[27] Various explanations of the principle have been provided, including the commonly referred to statement of the principle found in Principle 15 of the Rio Declaration on Environment and Development. As an example, this statement provides that in situations presenting with the threat of 'serious or irreversible damage,

scientific uncertainty must not be used as a basis for 'postponing cost-effective measures to prevent environmental degradation'. [28]

Whilst international environmental principles, such as the Rio Declaration, assist in illustrating the precautionary principle, unless the precautionary principle is expressly incorporated into an international treaty, there can be difficulties in requiring its application ie, 'a precautionary approach'.[29] This is because of a number of factors, including the 'soft law' status of guiding principles within the international legal framework, and in the particular case of the precautionary principle, the ongoing debate as to whether or not it has achieved the status of customary international law and can therefore be automatically applied.[30]

In response to this, a number of international treaties and declarations have incorporated versions of the principle into their texts to help facilitate an approach.[31] Within discussions about the application of the precautionary principle, the terms 'precautionary principle' and 'precautionary approach' are often used. The distinction between use of these two terms generally lies with the term 'approach' being used to describe the principle's application.[32] The World Commission on the Ethics of Scientific Knowledge and Technology, comments on this by acknowledging that there is discussion on the meaning of the two expressions, but that in general the term 'principle' is associated with the philosophical basis of the precaution concept, and the term 'approach' is used in the context of 'its practical application'.[33] The wording of Principle 15 of the Rio Declaration provides a direct example of this distinction. Prior to the statement of the principle itself, the text also requires that the precautionary approach must be taken by a State in a manner commensurate with their ability to do so.[34] In furthering the understanding of the distinction between 'principle' and 'approach', it could be suggested that the wording in Principle 15, in allowing an approach that varies with the ability of a State to apply the principle, intentionally

provides an inherently extensive level of flexibility associated with the principle's application.

Moving away from the flexible approach associated with the 'soft law' version of the principle, it could also be argued that the manner in which the various versions of the principle have been expressed in a treaty, when read with the objectives of that treaty, can assist in indicating the degree of the approach to be taken in applying the principle.[35]

It should also be noted that the precautionary principle philosophy and precautionary approach to be taken, as intended by an international treaty, is also strongly influenced by the domestic legislation and policy requirements of a particular country in its implementation of a treaty.[36] In addition to this, the wording of the precautionary principle in a treaty will often lack definitive direction,[37] and it could be said that this allows a considerable amount of leeway for the way in which countries formalise the principle and approach in legislative requirements.

An example of the variation in the 'precautionary approach' is illustrated below in a discussion of the comparison between the application of the CBD and SPS documents. In this context it could be said that the differing approaches form part of the basis for the potential conflict between international treaties that seek to manage similar issues eg, introduced marine species.

… As discussed by Riley, Article 1 of the CBD Guidelines provides further support for the use of the precautionary principle. In doing so, the guidelines state that the precautionary principle sets 'an appropriate standard' for managing invasive species. **Riley also discusses that the CBD, as an organisation, emphasises that the impetus for this relates to 'the unpredictability of the invasion process' as justification for prohibiting introductions, unless proven safe.**40

The precautionary principle when considered with the CBD's requirement that the onus for assessment, management and control of activities related to trade of introduced species rests with the State proposing to undertake the activity41, (known in trade circles as the exporter), indicates that the burden of proof lies with the proponent of an activity.42

This in itself, and alongside the intrinsic values of the CBD, could suggest that the precautionary approach to be taken by those implementing the CBD requires a strong emphasis within decision-making.

In addition, the essence of this is that it presents a 'guilty until proven innocent by science' approach to the transboundary movement of organisms by the importing and exporting country.43 Member countries of the CBD are obliged, under the Convention, to ensure that their trade activities adhere to the protection of biodiversity. Importers of introduced species need to heed Articles 8(h) and 14; while the weight of the onus is on exporters who need to observe all Articles 3, 8(h), and 14. (p.50)

… **The World Trade Organisation and introduced species**

… The World Trade Organisation (WTO) was established to facilitate and promote a global increase in trade through liberalisation of world markets.[44] As market liberalisation stimulates trade, thereby increasing trade volumes, the opening of the world to free markets facilitates and increases trade activity.[45] As a consequence of this increased global trade activity, there has been a concomitant global increase in frequency of introduced species via trade, increasing the risk of harmful introductions to plant, animal and human health.[46]

This concern is dealt with in the text of the WTO and operational measures are solidified under the *General Agreement on Tariffs and Trade 1994* (GATT). While allowing a country to block trade, GATT ensures bans and restrictions on trade are not protectionist measures by a Member State under the guise of environmental protection.[47] It is serviced by three standard setting bodies in formation under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). They include the International Plant Protection Convention (IPPC 1952, revised 1997), the World Animal Health Organisation (Office Internationale des Epizooites (OIE)) and Codex Alimentarius (food standards) (CA).

In particular, these mechanisms under the SPS prescribe the use of risk assessment methods in order to quantify possible negative effects of introduced species on these

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three domains.[48] The right of an importing nation to protect itself against introduced species by blocking trade of certain items is made possible under these mechanisms.

However, decisions based on these standardised risk assessments can be scrutinized and overruled by WTO organs, forcing a Member to comply with WTO rules and continue the trade of suspect introduced species. This approach could be said to represent the absence of the precautionary approach in the WTO,49 as well as promote the stance of

an 'innocent until proven guilty by scientific proof' approach to introduced species50 and the importer.

That said, it has been acknowledged that the SPS and even parts of GATT embed a variation of the precautionary principle through 'gateway' provisions. The evidence for this has been discussed by Cheyne as being present within Articles 5.1 and 5.7 of the SPS, as well as the potential for its application through the GATT in Articles XX(b), XX(g) and, although considered with ambivalence, the chapeau of Article XX.[51]

Article 5.7 of the SPS incorporates a form of precautionary approach, in relation to 'Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection' as follows:

> In cases where relevant scientific uncertainty is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

However, Cheyne points out there has been division amongst commentators as to the extent that this Article and the other Articles within the GATT and SPS allow for the application of the precautionary principle. Cheyne also appears to conclude that the question as to the strength of the precautionary approach appears to remain somewhat uncertain due to the WTO Appellate Body's acknowledgement of its existence yet failure to embrace it as a part of international law, and refusal to allow it to cancel out the intended meaning of provisions, such as Article 5.7 and 3.3 of the SPS.[52]

Another aspect of the WTO that should be examined in the context of introduced species is the recognition by the Trade Related Intellectual Property Rights (TRIPS) Council of traditional knowledge during the Doha Declaration. This area is usually examined in the context of the rights of traditional owners to traditional medicines and the lack of shared benefits. As more private interests are claiming intellectual property rights (IPR) incentives in trade of this 'intellectual property'53 further encourages the trade and dissemination of more exotic species, genetic materials, pathogens, disease and bacteria to other parts of the world, increasing the incidence of introduced species.

Ultimately the WTO, with SPS Agreement, has developed into an authority that attempts to liberalise trade, while attempting to reduce the risk that introduced species may harm human, animal and plant health, through trade blocking, while also administering an operational arm that removes impediments to trade restriction.54 This operation alone can result in managerial friction. (p.51)

53 NFTC (2003). ***Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science*****. National Foreign Trade Council, Inc. NW Washington, DC.**

<http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf> accessed on 20/03/09.

54 National Research Council (United States) (2002). *Predicting invasions of nonindigenous plants and plant pests*. Washington, DC: National Academy Press.