

## The United States' Application of Precaution in Managing Living Marine Resources

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26 *International Journal of Marine and Coastal Law* (Martinus Nijhoff Publ. 2011) at p. 643-666

Early international conventions rejected precaution as an overriding principle in addressing environmental issues, but as time passed countries began specifically acknowledging the principle in their own, domestic legislation...

...As late as 1982, the **United Nations Convention on the Law of the Sea (LOSC)** did not incorporate precaution specifically. (p. 645) The LOSC is the most comprehensive international agreement on marine and maritime matters. It was not intended solely as an environmental treaty. **However, commentators suggest that precaution is embedded in the general language found in the Convention.**<sup>13</sup> Articles 61 and 119 of the LOSC require that States use “the best available science” in managing living marine resources. Article 117 states that “All States have the duty to take...such measures...as may be necessary for the conservation of the living resources of the high seas.” Article 192 states that the “States have the obligation to protect and preserve the marine environment.” The US Senate has not ratified the LOSC.<sup>14</sup> **The Senate has not even held substantive discussions on many of the impacts the LOSC would have in the environmental area.**<sup>15</sup> **Some commentators believe that US lawmakers are aware of the growing use, especially within Europe, of precaution as an overriding principle in addressing environmental issues and are reluctant to incorporate it so broadly as ratification of the LOSC might require.**<sup>16</sup>

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**13** See generally Lawrence Kogan, ‘What Goes Around Comes Around: How UNCLOS Ratification will Herald Europe’s Precautionary Principle as U.S. Law’ (2009) 7 *Santa Clara Journal of International Law* 23. See also Richard Hildreth, ‘Achieving Fisheries Sustainability in the United States’ (2006) 36 *Environmental Law Reports* 10833.

**15** Kogan (*supra* note 13) at 31.

**16** *Ibid.* at 41.

(p. 646)

...The US has been particularly cautious in using the words ‘**precautionary principle**’, especially as Europe defines the concept. The word ‘principle’ suggests that precaution should be an overriding doctrine in making policy and drafting legislation and the US is not willing to adopt it so broadly...The US has reluctantly accepted the words ‘**precautionary approach**’ and has been willing to apply it on a case-by-case basis, especially as it applies to management of US fisheries.<sup>24</sup> **The remainder of this article discusses some of the precautionary approaches the US has taken.**

(p. 647)

*The Many Forms of Precaution*

The US has not broadly accepted the precautionary principle as its overriding policy doctrine, but it does incorporate precautionary approaches in managing living marine resources. **Like in the LOSC, the legislation itself can be “precautionary”, without specifically using the words. Regulations interpreting and applying legislation can incorporate, explicitly or implicitly, precautionary approaches. Federal agencies under the Secretaries of Commerce and Interior can apply them in considering permit applications. Parties can prevail in courts by using precautionary arguments. Most importantly, US states, through rights granted under the Magnuson-Stevens Fishery Conservation and Management Act and the Coastal Zone Management Act, can apply precautionary approaches in jointly managing living marine resources with the US federal government.**

**Furthermore, the application of precautionary approaches can take many legal forms...They can be embedded in the “spirit” of precaution in legislation like the Marine Mammals Protection Act, which places an almost total moratorium on the taking of marine animals. The “hazard-based” approach to environmental problems like those the European Union (EU) uses clearly incorporates precautionary approaches. The US “risk-based” approach also has overtones of precaution, although a “cost-benefit” analysis tempers its application.<sup>25</sup>**

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**25 See Kogan (*supra* note 13) at 7.** See also, in general, Rebecca M. Bratspies, ‘Rethinking Decision-making in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development’ (2007) 32 *Yale Journal of International Law* 363 at 381, where the author describes cost benefit as “an antidote and antonym” to precaution.  
(p. 648)

...The MSA requires that the RFMCs base their plans on “the best scientific data available”, but is silent on how scientific uncertainty should be resolved.<sup>44</sup> Nothing in the MSA specifically incorporates the precautionary approach. **Some commentators have suggested that the MSA incorporates the precautionary approach in spirit.<sup>45</sup>**...

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**45 Kogan (*supra* note 13) at 111.** The author cites the fact that “maximum sustainable yield became a ‘limit’ to be avoided rather than a target...to be achieved” suggests an implicit incorporation of the precautionary principle into the MSA.  
(p. 651)