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THE STATUS OF PRECAUTIONARY PRINCIPLE: MOVING TOWARDS A RULE OF CUSTOMARY LAW

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***Annotation.** The main goal of this article is to analyse the current status of the precautionary principle in international law and outline the tendencies of its development into a rule of customary law. The methods of comparative and systematic analysis were used in this paper.*

The article concludes that there is sufficient state practice and opinio iuris to support the position of the European Communities that the precautionary principle has already crystallized into a general customary rule. Evidence may be found in international legally binding and non-binding documents, domestic law, and the jurisprudence of national and international courts and tribunals.

***Keywords:** the precautionary principle, rule of customary law, environmental law.*

Introduction

Scientific uncertainty regarding the evidence of a link between human activity (as a cause) and its impact on the environment (as a consequence) has been an enormous obstacle for lawmaking in the area of environmental protection. This scientific uncertainty has further increased in the recent decades, as society began using advanced technologies, including biotechnologies. Their long-term impact on the environment and human health is mostly unknown since they have not been studied in longitudinal research. Therefore, some countries have taken “a precautionary” approach in their domestic law, which allows for decision making in the area of environmental protection in case of scientific uncertainty regarding the evidence of cause and consequence. The Federal Republic of Germany has been a pioneer in the area of the “precautionary approach” towards the environment: they formulated the principle of precaution (*Vorsorgeprinzip*) in their domestic law in 1974.¹ A decade later, in 1984, for the first time in history, an indirect reference to the precautionary principle was made in a non-binding international document—the Bremen Ministerial Declaration of the International Conference on the Protection of the North Sea.² Consequently, the 1987 London Ministerial Declaration of the International Conference on the Protection of the North Sea already used the term “precautionary approach” explicitly.³ Although the precautionary principle has received wide international recognition, the status of this principle in law is still under debate. This suspends further application of the principle and allows for a discussion about the principle in the process of its development.

The main goal of this article is to analyse the current status of the precautionary principle in international law and its development into a rule of international customary law. This entails methods of comparative and systematic analysis.

1. The influence of Problems in the Definition of the Precautionary Principle on the Interpretation of its Status

The precautionary principle or “precautionary approach” is widely invoked in *soft law* (legally non-binding) documents and *hard law* instruments. According to D.Vanderzwaag, about 14 different definitions of the precautionary principle exist in

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- 1 Gesetz zum Schutz vor schaedlichen Umwelteinwirkungen durch Luftverunreinigungen, Geraeusche, Erschuetterungen und aehnliche Vorgaenge (Bundes-Immissionsschutzgesetz– BImSchG). Vom 15. Maerz 1974 (BGBl I S. 721, 1193). Art. 5, par. I.2. [interactive] [accessed 08-12-2008]. <http://www-penelope.drec.unilim.fr/Penelope/Library/Libs/DLib/BCHG/bchg_c.htm>.
 - 2 Ministerial Declaration, First International Conference on the Protection of the North Sea, Bremen, [interactive] (31 October – 1 November 1984) [accessed 10-12-2008]. <http://www.ospar.org/html_documents/ospar/html/1nsc-1984-bremen_declaration.pdf>.
 - 3 Ministerial Declaration, Second International Conference on the Protection of the North Sea, [interactive] London, 24-25 November 1987 [accessed 08-12-2008]. <http://www.ospar.org/html_documents/ospar/html/2nsc1987_london_declaration.pdf>.

international law.⁴ Such a variety of definitions has even prompted some researchers to assume that the lack of one unanimous definition is one of the properties of the precautionary principle.⁵ On the other hand, the variety of formulations is used by critics because it helps uncover problems in the application of the principle.⁶

The most widely known definition of the precautionary principle can be ascribed to the 1992 Rio Declaration. Principle 15 of the Declaration states that “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 or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁷ Similarly, the 1992 Framework Convention on Climate Change obliges participating parties “to take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing cost-effective measures”.⁸ The term “approach” instead of “principle” is used in the preamble of the Convention on Biological Diversity (1992): “where there is a threat of significant reduction or loss of biological diversity lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”.⁹ The UN Program for Further Implementation of Agenda 21 speaks of the progress made “in incorporating *principles* contained in the Rio Declaration <...> including <...> the precautionary principle”.¹⁰

The use of different terms and definitions is particularly problematic when interpreting the status of the precautionary principle. For example, in the case of *EC Biotech*, the United States (US) noted that it strongly disagrees that “precaution” has become a rule of international law and that the “precautionary principle” cannot be considered a general principle or norm of international law because it does not have a single, agreed formulation. According to the US, “quite the opposite is true: the concept of precaution has many permutations across a number of different factors. Thus, the United States considers precaution to be an ‘approach,’ rather than a ‘principle’ of international law.”¹¹ In another statement at the World Trade Organization (WTO), the US stressed that, even if the precautionary principle were considered a relevant rule of international law under Article 31(3) of the Vienna Convention, it would be useful only for the interpretation of particular treaty terms, and could not override any part of the SPS (Sanitary and

4 Vanderzwaag, D. The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces. *Journal of Environmental Law & Practice*. 1999, 8: 355–375.

5 Taylor, P. *An Ecological Approach to International Law*. London: Routledge, 1998, p. 25.

6 Goklany, I. *The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment*. Washington DC: Cato Institute, 2001.

7 UN Rio Declaration on Environment and Development. A/CONF.151/26. Vol. I.

8 Framework Convention on Climate Change (May 9, 1992). 31 *ILM* 849. Art. 3 para. 3.

9 United Nations Convention on Biological Diversity. 31 *ILM* (1992). Preamble, 9.

10 UN Programme for Further Implementation of Agenda 21. Resolution S/19-2. para. 14.

11 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (“EC Biotech”)*. Doc WT/DS291-293/INTERIM. 29 September 2006. para. 4.541.

Phytosanitary) Agreement.¹² This position is consistent in other cases as well where the US questioned whether “precaution” is a “principle”.¹³ Consequently, the United States does not consider the “precautionary principle” to represent customary international law. Such an interpretation of the status of the precautionary principle has been used by the US as a counterargument to the European Communities (EC) position that the precautionary principle is, or has become, “a general customary rule of international law” or at least “a general principle of law”.¹⁴ Canada, in the *EC Hormones* case, took a middle position between the EC and the US. On the one hand, Canada declared that the “precautionary approach” is “an *emerging* principle of law” which may crystallize in the future into one of the “general principles of law recognized by civilized nations” within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. On the other hand, Canada agreed that the precautionary principle has not yet been incorporated into the corpus of public international law.¹⁵

These arguments from two classical cases reveal that “approach” is generally seen as a softer version of “principle” in international law. This conclusion may also be supported by a case of the International Tribunal for the Law of the Sea (ITLOS), where Judge Laing expressed a dissenting opinion. Judge Laing stated that “adopting an approach, rather than a principle imports a certain degree of flexibility and tends, though not dispositive, to underscore reticence about making premature pronouncements about desirable normative structures”.¹⁶ Another ITLOS Judge also associates the term “principle” with legally binding, customary status.¹⁷ Nevertheless, these separate opinions are only representative of the personal views of the judges participating in the said case. ITLOS as a tribunal has never made any statement explaining its position on the status of the precautionary principle. In a dispute between states, the World Trade Organization (WTO) Appellate Body also tried to avoid direct interpretation of the status of the precautionary principle and indicated that “it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question”.¹⁸ The WTO Appellate Body limited itself by saying that “at least outside the field of international environmental law, the precautionary principle still awaits authoritative formulation”.¹⁹ Thus, it was never acknowledged on the official WTO level that the precautionary principle is “a general customary rule of international law” or even

12 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (“EC Biotech”)*. Doc WT/DS291-293/INTERIM. 29 September 2006. para. 4.540.

13 *European Communities – Measures Concerning Meat and Meat Products (“EC Hormones”)*. Doc WT/DS26/AB/RWT/DS48/AB/R, AB-1997-4. 16 January 1998. (Report of the Appellate Body). para. 122.

14 EC’s appellant’s submission in case *EC hormones*, para. 91.

15 Canada’s appellee’s submission in case *EC hormones*, para. 34. Case *EC Hormones*. para. 122.

16 Separate Opinion of Judge Laing. The Order of the International Tribunal for the Law of the Sea Southern Bluefin Tuna case (*New Zealand v. Japan; Australia v. Japan*). [interactive] [accessed 19-11-2009]. <http://www.itlos.org/start2_en.html>.

17 Separate Opinion of Judge Trevis. The Order of the International Tribunal for the Law of the Sea Southern Bluefin Tuna case (*New Zealand v. Japan; Australia v. Japan*). [interactive] [accessed 19-11-2009]. <http://www.itlos.org/start2_en.html>.

18 Case *EC Hormones*, para. 123.

19 *Ibid.*

“a general principle of law”. However, the statement that “at least outside the field of international environmental law, the precautionary principle still awaits authoritative formulation” may be interpreted as recognition that the precautionary principle may have the status of the principle in international environmental law.

It may also be acknowledged that certain formulations used in definitions of the precautionary principle also add to the discussions on the status of the principle. In some cases, definitions raise questions of whether they create obligatory rules. For example, some authors hesitate whether principles in the Convention on Climate Change, including the precautionary principle, create an obligation to the member states of the convention, because it is not clear what is meant by “the Parties shall be guided, *inter alia*”²⁰. In addition, the text of the Convention uses “should” instead of “must”: “the Parties should take precautionary measures to anticipate” (art. 3). The modal verb “must” expresses an obligation and implies that a verb used together with “must” definitely happens, while “should” implies that something may not happen.²¹ Another international instrument—the Convention on Biological Diversity—has a more abstract definition which may cause trouble for the implementation and interpretation of the principle. Article 6, General measures, in this legally binding document uses such formulas as “in accordance with its particular conditions and capabilities” and “as far as possible and as appropriate”.²² These and other similar expressions determine that separate norms of legally binding documents have a limited normative character. For them to become effective, corresponding domestic laws or new international agreements must come into effect. This characteristic of the precautionary principle leads some authors to conclude that the precautionary principle is a long way from having legally binding force and stands at the beginning of the so-called “procedural” principles, which may help states to meet their obligations.²³

Nevertheless, it seems that doubts about the precautionary principle being a “principle” are more common to Anglo-Saxon tradition.²⁴ The European Union (EU) law does not draw a clear difference between “principle”, “approach”, and “measures”; these terms are used in parallel to define the same principle and there is nothing to suggest that these three terms cannot be used interchangeably.²⁵ The European Commission in Communication On the Precautionary Principle also does not differentiate among these terms and recognizes the precautionary principle as a fully-fledged and general princi-

20 Paradell-Trius, L. Principles of International Environmental Law: an Overview. *Review of European Community & International Environmental Law*. 2000, 9(2): 93–95.

21 Leech, G. *An A-Z of English Grammar & Usage*. Walton-on-Thames: Nelson Ltd., 1989, p. 430.

22 The Kartachena Bio-Safety Protocol for Biological Diversity Convention. *OJ. L* 201/50. 2002-7-31.

23 Lang, W. UN principles and International Environmental Law. *United Nations Year Book*. 1999, 3: 167.

24 Širinskienė, A. Atsargumo principo taikymo teisinės prielaidos aplinkos ir žmogaus sveikatos apsaugos srityse. [Sirinskiene, A. Legal Prerequisites for the Application of the Precautionary Principle in Environmental Protection and Human Health Care]. *Jurisprudencija*. 2008, 12(114): 21.

25 *Ibid.*

ple of international law²⁶ or, as already discussed, even as a general customary rule of international law.²⁷

The status of the precautionary principle as a rule of customary law is significant because a rule of customary law creates obligations for all states, except those that have persistently objected to the practice and its legal consequences. Therefore, in cases where the precautionary principle is recognized as a rule of customary law, the application of the principle would acquire a broader scope on the international level. This possible change would be in accordance with EU policy, clearly defined in the articles 6 and 174 of the *Treaty Establishing the European Community*.²⁸ However, the EC has never explained its statements in the WTO and what reasoning lies behind them. The Communication on the Precautionary Principle and the jurisprudence of European Court of Justice also provide no answers. Bearing in mind this lack of legal certainty, the article will focus further analysis on the criteria for the development of a rule of customary law and how they may be applied to the precautionary principle.

2. Prerequisites for the Status of the Precautionary Principle as a Rule of Customary Law

The Statute of the International Court of Justice (art. 38, para. 1b) defines customary international law as “evidence of general practice accepted as law”.²⁹ The *Nicaragua* case³⁰ and the *North Sea Continental Shelf* case³¹ complement this article of the Statute and clarify two requirements of customary international law. According to the International Court of Justice (ICJ), customary international law arises when nations follow a practice in an extensive and virtually uniform manner and this practice is followed with the conviction that it is obligatory to do so under international law (*opinio iuris*). Virtually uniform manner is not interpreted in such a way that absolutely all states are supposed to have the same practice during a clearly defined period of time. Consequently, the opposition of some states does not interfere with the development of a customary rule.³² State practice is usually assessed with the help of defined criteria that indicate how states articulate their recognition of a rule of customary law. These non-exhaustive criteria that serve as evidence of customary international law are: treaties, declarations, decisions of international and national courts, domestic legislation, opinions and statements of states

26 Commission of the European Communities. Communication from the Commission on the precautionary principle. (COM/2000/0001 final). 11.

27 EC's appellant's submission in *EC Hormones* case, para. 91.

28 The Treaty Establishing the European Community. OJ C. 325-33, 2002-12-24.

29 The Statute of the International Court of Justice [interactive] [accessed 19-11-2009]. <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>.

30 Case *Nicaragua*. ICJ Rep. (1986). para. 97-109.

31 Case *North Sea Continental Shelf*. ICJ Rep. (1969). para. 43-44.

32 *Ibid.*

during the preparation of treaties³³, correspondence between states, and even opinions of lawyers.³⁴

However, the best indicators of state practice remain the instruments of international law and state domestic law. As already discussed, there are about 14 different definitions of the precautionary principle in various legally binding and non-binding instruments of international law.³⁵ The precautionary principle is widely used in agreements and declarations addressing such global problems as climate change³⁶, atmospheric³⁷ and marine³⁸ pollution, environmental protection and biodiversity³⁹ and even in legal documents devoted to very specific regional problems such as tourism in Antarctica.⁴⁰ After the Maastricht Treaty in 1992, the precautionary principle has become a part of EU environmental law.⁴¹ Currently, the precautionary principle is used in more than 90 international declarations and agreements.⁴² In this context, the number of ratifications

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- 33 For instance, the statement of the representatives of Canada in a Bergen Conference, where they supported the inclusion of the precautionary principle in the preparatory documents. VaderZwaag, D. CEPA Issue Elaborating paper No.18. CEPA and the Precautionary Principle. *Approach*. 1995: 8.
- 34 Akehurst, M.; Malanczuk, P. *Šiuolaikinės tarptautinės teisės įvadas*. [Akehurst, M.; Malanczuk, P. Modern Introduction to International Law] Vilnius: Eugrimas, 2000, p. 68.
- 35 Vander Zwaagm, D. The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces. *Journal of Environmental Law & Practice*. 1999, 8: 355–75.
- 36 Ministerial Declaration of the Second World Climate Conference argued that lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (Ministerial Declaration of the Second World Climate Conference (1990). *Yearbook of International Environmental Law*. 1990: 473–475). The precautionary principle is also incorporated into the Framework Convention on Climate Change. (Framework Convention on Climate Change. 1992, 31 ILM 849.
- 37 The precautionary principle is used in Montreal Protocol on Substances that Deplete the Ozone Layer. OJ. L 297/31 (1988); Vienna Convention for the protection of the ozone layer. OJ. L297/10 (1988).
- 38 The London Ministerial Declaration of the Second International Conference on the Protection of the North Sea (1987); A 1989 recommendation by the Commission created under the 1974 Paris Convention for the Prevention of Marine Pollution from Land-based Sources. PARCOM Recommendation 89/1 (1989). Third International Conference on the Protection of North Sea in its declaration stated that “The participants <...>will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic, and liable to bioaccumulate even where there is no scientific evidence to prove a causal link between emissions and effects” (Final Declaration of the Third International Conference on Protection of the North Sea, Mar. 7-8, 1990. *Yearbook of International Environmental Law*. 1990, 658: 662–673). Convention for the Protection of the Marine Environment of the North-East Atlantic (1992): that preventive measures are to be taken when there are “reasonable grounds for concern <...> even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects”. (Convention for the Protection of the Marine Environment of the North-East Atlantic (1992). OJ. L104.2, art.2, para.2(a)). The precautionary principle appears and in UNCED Text on Protection of Oceans. (UNCED Text on Protection of Oceans. UN GAOR, 4th Sess., UN Doct A/CONF.151/PC/100 Add. 21 (1991)). Convention on the Protection of the Marine Environment of the Baltic Sea Area. OJ L73 20 (1994) Art 3. para. 2.
- 39 United Nations Convention on Biological Diversity. 31 ILM (1992); Rio Declaration on Environment and Development. Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972. Principle 15.
- 40 Resolution 3 (1997). Standard Form for Advance Notification and Post-Visit Reporting on Tourism and Non-Governmental Activities in Antarctica. [interactive] [accessed 22-07-2008]. <<http://www.state.gov/documents/organization/15279.pdf>>.
- 41 Treaty on the European Union (Maastricht Treaty). OJ. C 191-1, 1992-07-29.
- 42 Bonkourt, L. Principles of International Environmental Law: Precautionary Principle. *Review International Environmental Law*. 2007, 7: 3.

(majority of the treaties are multilateral) and the number of states signing declarations also reflect broad acceptance of the rule by states.⁴³ The abundance of treaties and declarations incorporating the precautionary principle provides at least an estimate of state practice and acceptance, which implies that the precautionary principle is crystallizing into a rule of customary environmental law.

Another primary indicator of state practice is domestic law. The precautionary principle is widely used in the domestic environmental law of Germany⁴⁴, Belgium, and the Nordic countries (Denmark, Norway, Sweden, Finland and Island).⁴⁵ In 2005, the principle was incorporated into the Preamble of the Constitution of France and is now part of the “Environmental charter” of the Constitution (another part of this preamble is the 1789 Declaration of the Rights of Man and the Citizen). Therefore, in French domestic law the precautionary principle is treated as a constitutional principle, which claims to be on the same level as the principles of the Declaration of the Rights of Man and the Citizen.⁴⁶ A systematic analysis of the French Constitution reveals that the relationship between articles 1 and 5 may be interpreted as giving broader application for the precautionary principle and that the principle may also be applied in certain areas of public health.

The precautionary principle is found not only in the domestic laws of European countries. For example, in 1992 the principle became part of the National Strategy for Ecologically Sustainable Development in Australia.⁴⁷ In 1993, the principle was incorporated into Australia’s Environmental Protection Act⁴⁸. In 1996, the precautionary principle was defined in the Oceans Act of Canada⁴⁹. In 1999, the Environmental Protection Act of Canada, which also regulates the activities of public administration institutions, was also supplemented with the precautionary principle.⁵⁰ Even US law makes some indirect allusions to the precautionary principle (as measures) when dealing with ques-

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- 43 Marr, S. *The Precautionary principle in the law of the sea – modern decision making in international law*. Kluwer Law International, 2003, p. 207.
- 44 Gesetz zum Schutz vor schaedlichen Umwelteinwirkungen durch Luftverunreinigungen, Geraeusche, Erschuetterungenund aehnliche Vorgaenge (Bundes-Immissionsschutzgesetz–BImSchG). Vom 15. Maerz 1974 (BGBl I S. 721, 1193). Art. 5, par. 1.2.
- 45 *Implementing the Precautionary Principle: Approaches from the Nordic Countries*. de Sadeleer, N. (ed.). Earthscan, 2007.
- 46 La Constitution - Charte de l’environnement de 2004. Art. 5 [interactive] [accessed 05-10-2008]. <<http://www.legifrance.gouv.fr/html/constitution/const03.htm>>.
- 47 *Council of Australian Governments*. National Strategy for Ecologically Sustainable Development. 1992 [interactive] [accessed 10-08-2008]. <<http://www.environment.gov.au/esd/national/nsesd/strategy/intro.html#Principles>>.
- 48 Environment Protection Act. 1993. Sec. 10, par 1b;iv. [interactive] [accessed 10-08-2008]. <http://www.austlii.edu.au/au/legis/sa/consol_act/epa1993284/s10.html>.
- 49 Oceans Act. Preamble. [interactive] [accessed 10-08-2008]. <http://laws.justice.gc.ca/en/ShowFullDoc/cs/O-2.4//20080811/en?command=home&caller=SI&fragment=Oceans%20Act&search_type=all&day=11&month=8&year=2008&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50>.
- 50 Environmental Protection Act. Para 2(1/a). [interactive] [accessed 10-08-2008]. <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-15.31//20080811/en?command=home&caller=SI&search_type=all&shorttitle=Environmental%20Protection%20Act&day=11&month=8&year=2008&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50>.

tions of food safety⁵¹ and air pollution.⁵² Furthermore, as part of environmental impact assessment, the precautionary principle may be found in the local laws of about fifty countries.⁵³ These examples illustrate the wide implementation of the procedural aspect of the precautionary principle.

In most of these legal acts, the application of the precautionary principle is directly related to the environment and indirectly to human health as under certain circumstances the environment creates risks to human health. The observation of this trend supports the theory that the precautionary principle is crossing the threshold of environmental law and entering new areas of regulations, such as public health.

State practice is further reflected in the applications and decisions of national and international courts where legal parties defend their legal interests based on the precautionary principle. Classical examples of such application of the precautionary principle are the *Gabčíkovo-Nagymaros Project (The Danube Dams)*⁵⁴ and *French underground nuclear tests* cases in the ICJ. The *Gabčíkovo-Nagymaros Project* was initiated by the 1977 Budapest Treaty between Czechoslovakia and Hungary. Its purpose was to prevent floods, to improve sailing routes, and produce electricity. Only part of the project had been completed by Slovakia alone. Hungary abandoned constructions unilaterally. A dispute between Slovakia and Hungary took place at the ICJ. Hungary argued that the subsequently imposed requirements of international law for the protection of the environment precluded performance of the Budapest Treaty. Hungary claimed that the previously existing obligation should not cause substantive damage to the territory of another State “evolved into an *erga omnes* obligation of prevention of damage pursuant to the ‘precautionary principle’”.⁵⁵ On this basis, termination was forced by the other party’s refusal to suspend work that was not compatible with standards of environmental protection. In reply, Slovakia stated “that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty.”⁵⁶ However, Slovakia did not object to the importance of the precautionary principle itself or to the duty to take precautionary measures. As the ICJ observed, both states agreed to take the required precautionary measures, but they fundamentally disagreed on the consequences this may have on their Project.⁵⁷ Nevertheless, the Court did not refer directly to the precautionary principle and only recognized that in the past decades “new norms and standards have been developed, set forth in a great number of instruments”. Such new norms, according to the ICJ, “have to be taken into consideration, not only when states plan new activities but also when they continue with activities begun in the

51 Federal Food, Drug, and Cosmetic Act (1958). Sec. 402; 409. [interactive] [accessed 24-07-2008]. <<http://www.fda.gov/opacom/laws/fdcaact/fdcaact4.htm#sec402>>.

52 Goldstein, B. D.; Carruth, R. S. Implications of the Precautionary Principle for Environmental Regulation in the United States: Examples From The Control of Hazardous Air Pollutants in the 1990 Clean Air Act Amendments. *Law and Contemporary Problems*. 2003, 66: 250–252.

53 *The Precautionary Principle in International Law*. Freestone, D; Hey, E. (eds.). Kluwer, 1996, p. 71.

54 Case *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment. ICJ. Reports, 1997.

55 *Ibid.* para. 94.

56 *Ibid.*

57 *Ibid.*, para. 113.

past”.⁵⁸ The Court also recommended that “third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.”⁵⁹ As Philippe Sands has noted, such a judgment by the ICJ affirms the importance of environmental considerations in addressing the rights and obligations of states, but in assessing the implications of the judgment it must be borne in mind, that the Court was reluctant to recognize or apply the precautionary principle.⁶⁰

In the second—*French Underground Nuclear Test* case—New Zealand as the applicant emphasized that before France can carry out underground nuclear tests near a marine environment, it must provide enough evidence that the tests will not result in the introduction of radioactive material into that environment. According to New Zealand, a risk assessment must be carried out on account of the precautionary principle.⁶¹ In order to prove that the precautionary principle is a rule of customary law, the applicant used a broad range of arguments, such as citing international documents and legal doctrine published in the Sands book on environmental principles: “The legal status of the precautionary principle is evolving. <...> [H]owever, there is sufficient evidence of state practice to justify the conclusion that the principle, as elaborated in the Rio Declaration and the Climate Change and Biodiversity Conventions, has now received sufficiently broad support to allow a good argument to be made that it reflects a principle of customary law.”⁶² However, in this case the ICJ again did not see a necessity to evaluate the status of the precautionary principle in international law. This position of the court was criticized in a dissenting opinion by Judge Weeramantry. He regretted that the Court had not availed itself of the opportunity to consider the principles of environmental law (including the precautionary principle) and pointed out that “these principles of environmental law do not depend for their validity on treaty provisions. They are part of customary international law” and “they are part of the *sine qua non* for human survival”.⁶³ The latter statement raises the precautionary principle onto the level of newly developed principles which guarantee the survival of the human race; for example, the principle of human dignity has an analogous function in the area of biomedicine.⁶⁴ The importance of the principle was also emphasized by other ICJ judges. However, they did not see the precautionary principle as part of customary law and spoke of a different type of status:

58 Case *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment. ICJ. Reports, 1997. para. 140.

59 *Ibid.*, para. 113.

60 Sands, Ph. *Principles of international environmental law*. Cambridge University Press, 2003, p. 477.

61 Case *French Underground Nuclear Tests (New Zealand v. France)*. Application Of 9 May 1973). Request For An Examination Of The Situation. Para 105. [interactive] [accessed 10-08-2008]. <<http://www.icj-cij.org/Docket/Files/97/7187.Pdf>>.

62 Cf. Sands, Ph. *Principles of International environmental law*. p. 212–213 and Application. Para. 107.

63 Case *French Underground Nuclear Tests*. Dissenting opinion of judge Weeramantry. [interactive] [accessed 10-08-2008]. <<http://www.cornnet.nl/~akmalten/uweerama.html>>.

64 Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine. [interactive] [accessed 19-11-2009]. <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CM=8&DF=17/11/2009&CL=ENG>>.

“the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today.”⁶⁵

This tendency of the ICJ to rely on the precautionary principle as a rule of customary law remains still. In 2008, the ICJ received an application from the state of Ecuador. Ecuador complained about the aerial spraying of coca and poppy crops with chemical herbicides carried out by Colombia at locations near, at and across its border with Ecuador. Ecuador claimed that toxic herbicides have caused damage to human health, property and the environment, and therefore Colombia has violated Ecuador’s rights under customary and conventional international law: “The harm that has occurred, and is further threatened, includes some with irreversible consequences, indicating that Colombia has failed to meet its obligations of prevention and precaution.”⁶⁶ Such a reference to the precautionary principle as a rule of customary law and current developments in international law could indicate that in this case the ICJ might express its attitude towards the status of this principle.

In an analysis of state practice, it is worth noting that states have repeatedly invoked the principle as a norm of general international law in international judicial proceedings before the International Tribunal for the Law of the Sea (ITLOS).⁶⁷ In the *MOX Plant* case, Ireland submitted that the precautionary principle is now recognized as a rule of customary international law.⁶⁸ In the *Southern Bluefin Tuna* case, the International Tribunal recognized the need for the parties to “act with prudence and caution” to ensure that effective conservation measures are taken to prevent serious harm to stocks of southern bluefin tuna; however, the ITLOS abstained from evaluating the status of the principle.⁶⁹

The principle is also used in the domestic courts of European countries⁷⁰, in the European Communities Court of Justice⁷¹ and outside Europe, even in countries with Islamic law systems, such as Pakistan,⁷² or in new democratic states in Latin America.

65 Case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Dissenting Opinion of Judge *ad hoc* Vinuesa, 13 July 2006. [interactive] [accessed 19-11-2009]. <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=5>>.

66 Case *Aerial Herbicide Spraying (Ecuador v. Colombia)*. Application of the Republic of Ecuador. para 37. [interactive] [accessed 19-11-2009]. <<http://www.icj-cij.org/docket/files/138/14474.pdf>>.

67 Case *Southern Bluefin Tuna (Requests for Provisional Measures) (Australia v. Japan, New Zealand v. Japan)*. 1999, 38 ILM 1624; case *MOX Plant (Request for Provisional Measures) (Ireland v. UK)*. 2002, 41 ILM 405. Case *Land Reclamation (Request for Provisional Measures) (Malaysia v. Singapore)*. ITLOS Case. 2003, 12.

68 Case *MOX Plant (Request for Provisional Measures) (Ireland v. UK)*. para 97.

69 Case *Southern Bluefin Tuna*. para. 77.

70 de Sadeleer, N. The Enforcement of the Precautionary Principle by German, French and Belgian Courts. *Review of European Community & International Environmental Law*. 2000, 9(2).

71 Case C-236/01 *Monsanto v. Italy* [2003] ECR I-8105; case C-252/05 *Thames Water Utilities* [2007]. ECR I-3883; case T-369/03 *Arizona Chemical BV* [2005] ECR II-5839; Case C-302/86 *Commission v. Denmark* [1998] ECR 649; Case T-70/99 *Alpharma v. Italy* [2002] ECR II- 3495; Case C-95/01 *Greenham ir Abel*. [2004] ECR I-1333; Case T-13/99 *Pfizer* [2002] ECR II-3305; Case T-132/00 *Commission v. Artogodan GmbH* [2002] ECR II-4965.

72 Ms. Shehla Zia and others v. WAPDA. *Compendium of summaries of judicial decisions in environment related cases*. [interactive] [accessed 08-10-2008]. <<http://www.unescap.org/drpad/vc/document/compendium/pk3.htm>>.

For example, in the *Caribbean Conservation Corporation and Others v. Costa Rica (Green Turtles)* case, Costa Rica's Constitutional Court upheld the constitutional right to an ecologically balanced environment and the precautionary principle was for the first time invoked by the Court as one of the means to grant such rights.⁷³ Other examples of application of the precautionary principle at the national level include rulings by the Supreme Courts of India and Canada.⁷⁴ Academic discussions are also paying close attention to various aspects of these changes of the principle in international law and interpret the state practice and/or *opinio iuris*.⁷⁵ Some academics, like Sands, have even had a direct influence on the practice of international courts and tribunals.⁷⁶ Academic support together with recent state practice appears to conclusively endorse the status of the principle as a norm of customary international law.

Based on the facts discussed in this section, we may conclude that the application of the principle by states has truly become widespread and consistent. This means that the discussion on the crystallization of the precautionary principle into a rule of international customary law in general, or at least a rule of international environmental customary law, is appropriate at this time. There is sufficient evidence that the precautionary principle is becoming or perhaps has already become a rule of customary law.

Conclusions

Although the precautionary principle was formulated just three and a half decades ago, state practice has since developed very rapidly. Therefore, there is sufficient state practice and *opinio iuris* to support the position of the EC that the precautionary principle has already crystallized into a general customary rule. Evidence may be found in international documents, national legislation, and judicial decisions of international courts, tribunals, and national courts. All of these legal documents (except a few sta-

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- 73 Castro, R. Protection of sea turtles: putting the precautionary principle into practice. p. 5. [interactive] [accessed 19-11-2009]. <<http://ccturtle.org/pdf/PrecautionaryPrincipleInCostaRicaTurtleBan.pdf>>.
- 74 Trouwborst, A. Prevention, Precaution, Logic and Law: The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions. *Erasmus Law Review*. 2009, 02(2): 109.
- 75 The most exhaustive research has been conducted by McIntyre, O.; Mosedale, Th. The Precautionary Principle as a Norm of Customary International Law. *Journal of Environmental Law*. 1997, 9(2); Cameron, J.; Abouchar, J. The Status of the Precautionary Principle in International Law. *The Precautionary Principle in International Law*. Freestone, D.; Hey, E. (ed.). Kluwer, 1996; Birnie, P.; Boyle, A. *International Law and the Environment*. Clarendon Press, 1992; de Sadeleer, N. *Environmental Principles – from Political Slogans to Legal Rules*. Oxford University Press, 2002; Sands, Ph. *Principles of International Environmental Law*.
- 76 Proff. Ph. Sands was engaged as Counsel or Adviser in the following international cases, where the precautionary principle was used: *Aerial Herbicide Spraying (Ecuador v. Colombia)* (Counsel for Ecuador); *Pulp Mills (Argentina v Uruguay)* (Counsel for Argentina); *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (Counsel, Hungary) (Judgment of 25 September 1997); *Request for an Examination of the Situation concerning paragraph 63 of its judgment of 20 December 1974 etc (New Zealand v. France)*, (Junior Counsel, Solomon Islands, Samoa, Federated States of Micronesia, Marshall Islands, “intervening” states) and *The MOX Plant Case, Ireland v United Kingdom*, (Lead Counsel, Ireland; provisional measures phase). Compare: *Philippe Sands’ CV* [interactive] [accessed 19-11-2009]. <<http://www.matrixlaw.co.uk/showDocument.aspx?documentId=903>>.

tements by the US and Canada) indicate strong approval of the obligation to apply the precautionary principle in environmental decision making. Furthermore, international practice in the area of application of the precautionary principle is developing rapidly.

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ATSARGUMO PRINCIPAS TARPTAUTINĖJE TEISĖJE: TARPTAUTINIO PAPROČIO LINK

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Santrauka. 1971 metais Vokietijos Federacinės Respublikos aplinkos apsaugos programoje, o 1974 m. – Vokietijos Federacinės Respublikos įstatymuose buvo suformuluotas „atsargaus veikimo principas“ arba „atsargumo principas“ (vok. *Vorsorgeprinzip*), kuris per nepilnus keturis dešimtmečius pradėtas naudoti tiek įvairiose nacionalinėse teisės sistemose, tiek ir tarptautinėje teisėje, o, Europos Bendrijų teigimu – tapo tarptautinės paprotinės teisės dalimi. Tačiau EB tarptautinei bendrijai niekada oficialiai nekonkretizavo, kokos aplinkybės pagrindžia tokią jos poziciją. Todėl straipsnyje analizuojama kiek ši EB pozicija yra pagrįsta ir aptariami tie atsargumo principo įtvirtinimo ir taikymo aspektai, kurie leistų kalbėti apie tam tikrą paplitusią visuotinę šalių praktiką bei opinio iuris atsargumo principo atžvilgiu. Nemažas dėmesys skiriamas ir pačiam principo formulavimui bei su ja susijusiai problematikai, kuri duoda pagrindo eilės valstybių abejonoms dėl atsargumo principo, kaip teisės principo, egzistavimo, taip paneigiant netgi patį principo statusą.

Straipsnyje, apibendrinus valstybių praktiką ir opinio iuris konstatuojama, kad galima pripažinti, kad bent jau aplinkos apsaugos srityje yra pakankamai įrodymų, kad galėtume atsargumo principą vadinti principu, kylančiu iš tarptautinio papročio. Taigi, darytina išvada, jog Europos Bendrijos pozicija, atsargumo principą laikanti principu kylančių iš tarptautinių papročių, turi realų pagrindą.

Reikšminiai žodžiai: atsargumo principas, tarptautinis paprotys, aplinkos apsaugos teisė.

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