Precautionary Principle in International Environmental Law: Rule of Customary International Law

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Abstract
Precautionary principle is one of the important approaches in international environmental law accepted by the international community. But, its consideration as a rule of customary international law is still dividing the actors of international community as well as scholars. The main goal of this article is to analyze 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 are used in this paper. The article concludes that although there are many state practices of this principle, it still lacks unity because its application remains subjective and differs from one State to another depending on their own interpretation of precautionary principle for this principle has many definitions. Also, the reluctance of some States and the doubt of international tribunals and court may show the lack of conviction (opiniojuris) of States and international community to accept this principle as rule of customary international law. However, reference to the precautionary principle as a rule of customary law and current developments in international law demonstrate that this international “approach” is moving toward an international “principle”, even looking forward to entering into the core principles of international law.

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

1. Introduction
The concept of Precautionary Principle finds its origins in the environmental debates since 1970s. But, in reality, this principle owes much to the German philosopher Hans Jonas³. Thus, since 1971, the term “vorsage” (precaution) appears in the program defining the environmental policy of the Federal Government. Previously, the measures that are generally barriers to trade should be based on clear scientific evidence. With the emergence of the precautionary principle, it is progressively possible to order measures even in the case of scientific uncertainty. The question arises how then take timely measures, just to avoid a risk to the environment, knowing that inaction could lead to irreversible damages to nature. Over the years that followed, this principle has been enshrined in many national legal environmental frameworks and nowadays, in the legal framework of some international organizations. Then, increasingly, it became an important element of international agreement (on the environment) and therefore plays a notable role in international relations and international law in general. The “Principle 15” of the Rio Declaration adopted in 1992 at the Earth Summit is generally recognized as the foundation of the precautionary principle in the field of

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³Hans Jonas stated an ethics for the technological civilization an imperative drawn from the imperative of Kant: “Act so that you may also want to let your maxim becomes a universal law”. He resumed this and stated it as follow: “Act so that the effects of your action are compatible with the permanence of an authentically human life on earth”. He added that “we have the right to risk our own lives, but not of mankind” and “we do not have the right to choose the non-being of future generations to be due to the present generation and we do not even have the right to risk”, adding the “unfinished dimension of our responsibility”, Jonas, H., Le Principe responsabilité :uneéthique pour la civilisation technologique, coll. Passages, Ed. du Cerf, Paris, 1995, pp. 30-32.
sustainable development. In recent years, it has been realized and developed differently in different sectors. Environmental principles can serve several functions. Their significance ranges from mere guiding policy incentives without any legal consequences as such to legally binding principles which can be invoked before the judiciary. But, the question on which we are going to focus is whether the realization and the development throughout the world by many nations as well as some international organizations may presume or consecrate one of them i.e precautionary principle as a principle of customary international law?

2. Precautionary Principle

First of all, we have to mention that there is no single definition, but a plurality of definitions of precautionary principle in international law. If not we can understand according to this principle that in case of scientific uncertainty, this uncertainty should not justify an absence or a delay of making a decision but rather the adoption of measures to protect environment against a or several potential damage(s). Although there is no common definition of this principle and considering the latter definition we can say that some of its components still remain constant: “the presence of a risk of serious and/or irreversible damage, lack of full scientific certainty as to the reality of damage and the obligation to take preventive measures”. However, it is necessary to differentiate the concept of precautionary prevention from precautionary principle. Thus, by opposition to the identified risks which will apply the concept of prevention, the precautionary principle will affect the potential or hypothetical cases where scientific knowledge hasn’t been able to establish whether the risks are proven or actual risks. Therefore, the precautionary principle obeys to both the common saying “when in doubt, leave it out” and also an imperative, “put every effort to act in the best way”. So, the implementations of this principle means “do not act” or respect the obligation of abstaining yourself of doing something you do not have its control” or renounce an uncontrolled action or take legal and other measures (technical…) to limit the future impact on the environment and health. Indeed, activities and substances that can seriously damage the environment must be regulated even if no evidence of risk exists a priori instead of placing the burden of proof on the agency or the State which undertakes the dangerous activity.

Nowadays, even if the application is somehow facing a resistance, we have to notice that many States have already accepted it either on their domestic environmental law or in the multilateral agreements in which they are parties. Is this sufficient enough to accept the precautionary principle as a principle of customary international law?

3. Precautionary Principle, Rule of Customary International Law?

Searching whether the precautionary principle can be consider as a rule of customary international law, it is to determine whether this principle can be applied even in the absence of international treaties. First, we all know that before any acceptance of a rule or a principle as a rule of customary international law, this new rule or principle must meet some conditions according to international law. Then, if the precautionary principle missed these conditions, the question arises whether the application of this principle in international environmental law can be precluded from these international law’s requirements and be included in the core of customary international law since international environmental law deals with facts, wild facts that reflect our growing global environmental problems? As long as this will remain our imagination, let’s move on the conditions under which this principle can be granted customary international law’s character. So, in this sense, two conditions must be met for that principle get the value of customary law. On one hand, the

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5 In the Rio Declaration, “prevention” appears in principle relating to the taking of effective legislation on the environment by States.
6 ICJ Statute, art. 38 (a) and (b):
   a- The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: […] b. international custom, as evidence of a general practice accepted as law; […]

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The International Application of this Principle should constitute a systematic and sustainable practice; on the other hand, this practice should be based on the belief that the binding principle is an integral part of the legal order. Or, the legal order should come from the consecration of this principle as well in domestic legal framework as international legal frameworks.

- **The International Application of This Principle by Some States**

Internationally, the precautionary principle has been directly or impliedly applied or referred to in judicial decisions in several countries. Justice Stein refers to cases decided in Britain, India, Pakistan and New Zealand and also refers to judgments of the International Court of Justice and the European Court of Justice.

In AP Pollution Control Board v. Nayudu the Indian Supreme Court applied the precautionary principle in considering a petition against the development of certain hazardous industries. The Court held that “... it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted state should not carry the burden or proof and the party who wants to alter it, must bear this burden”.

In Zia v. WAPDA the Supreme Court of Pakistan was called upon to consider a challenge by local residents to the construction of high voltage transmission lines in their locality. They argued that the electromagnetic radiation (EMR) emitted by the transmission lines constituted a serious health hazard. In deciding that the scientific evidence in relation to the effects of exposure to EMR was inconclusive, the Court applied the precautionary principle.

It is apparent that whether or not the precautionary principle is specifically referred to in relevant legislation such as pollution control Acts or environmental impact assessment legislation, courts throughout the world are increasingly inclined to accept the principle as a means of dealing with scientific uncertainty in environmental disputes. The principle may fairly be regarded as an evidentiary tool in resolving dispute over the risks presented to the environment and to human health by certain types of development.

Additionally, there is now a considerable body of judicial opinion placing the burden of proving the acceptability of a proposal in this respect on the proponent, not the person arguing that it is environmentally unacceptable.

The principle also acts as a guideline to administrators and the courts in making decisions involving competition between economic development and the maintenance of environmental quality where the potential impacts are unclear. In recent years the Indonesian courts have had regard to the precautionary principle (or considered the issue of adequacy of scientific evidence that could have attracted the principal),

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7 The “general practice” as an objective element: it includes aspects of duration, unity and diffusion.
8 “Accepted as law” as a subjective element: it is the conviction that is relevant in the sense of an establish position, namely that certain behavior is appropriate because it corresponds to what subjects of international law see as lawful.
10 R.v. Secretary of State for Trade and Industry Ex parte Duddridge and Others (Queens Bench Division, 4 October, 1994 (unreported)).
11 AP Pollution Control Board v. Nayudu. Supreme Court of India SOL Case No. 53, 27 January 1999 (unreported).
12 Zia v. WAPDA.PLD 1994 Supreme Court 693.
13 Greenpeace New Zealand Inc. v. Minister for Fisheries (High Court of New Zealand, CP 492/93, 27 November 1995, unreported).
16 See above, note 9: Rao, J.
17 See above, note 10
both in the contexts of exposure to electro-magnetic radiation from overhead power lines\textsuperscript{18} and death and destruction caused by landslides.\textsuperscript{19} Indonesian environmental legislation would appear to support the application of the precautionary principle in safeguarding the Indonesian environment.

The precautionary principle is widely used in the domestic environmental law of Germany\textsuperscript{20}, Belgium, and the Nordic countries (Denmark, Norway, Sweden, Finland and Island)\textsuperscript{21}. More interestingly, 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\textsuperscript{22}. 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. Moreover, in 1992 the principle became part of the National Strategy for Ecologically Sustainable Development in Australia\textsuperscript{23}. In 1993, the principle was incorporated into Australia’s Environmental Protection Act\textsuperscript{24}. In 1996, the precautionary principle was defined in the Oceans Act of Canada\textsuperscript{25} and in 1999, the Environmental Protection Act of Canada, which also regulates the activities of public administration institutions, was also supplemented with the precautionary principle\textsuperscript{26}. Even US law makes some indirect allusions to the precautionary principle (as measures) when dealing with questions of food safety\textsuperscript{27} and air pollution\textsuperscript{28}. Furthermore, as part of environmental impact assessment, the precautionary principle may be found in the local laws of about fifty countries\textsuperscript{29}. These examples illustrate the wide implementation of the precautionary principle in its procedural aspect. But its application remains subjective and differs from one State to another depending on their own interpretation of precautionary principle for this principle has many definitions. Indeed, precautionary principle involves a “serious and irreversible damage”. We must recognize that the determination of a more precise threshold of damage ultimately depends on the cultural context where the measure is to be implemented. Thus, what is precautionary in one society may not always be regarded as precautionary in another\textsuperscript{30}. Or customary international laws are peremptory norms subject to a general practice as an objective practice justifying a sustainable usage including aspects of duration, unity and diffusion. So, the diffusion of this principle is still going on whereas its unification seems to be difficult and still needs time.

\textsuperscript{18} The Singosari Case District Court, Gresik, East Java.
\textsuperscript{19} Mandalawangi Landslide Class Action Case (Civil Litigation). No. 49/PDT.G./2003/PN. District Court Bandung, 4 September, 2003.
\textsuperscript{22} La Constitution - Charte de l’environnement de 2004. Art. 5
**The Belief That the Binding Principle is an Integral Part of the Legal Order**

The international recognition of the precautionary principle has been a reality even before the 1992 Rio conference. Indeed, the World Charter for Nature (October 28, 1982) in its article 11(b) states: “When the potential harmful effects of these activities are only imperfectly known, these should not be undertaken”. This assertion is recommending States to refrain from implementing any development activity when they are aware of uncertainty (imperfectly known) in carrying this activity. So, although, this Charter has no binding force, it was a precursor text of the precautionary principle on many other texts. Then the Interm ministerial Declaration (2nd Conference on the Protection of the North Sea, 1987) says: “the signatory governments hereto shall apply the principle of precaution, that is to say, take steps to avoid potentially damaging impacts of substances even when there is no scientific evidence for the existence of causal link between emissions and effects”. This Declaration goes further in the sense that it recommends States to take measures to avoid potentially damages regardless of any scientific evidences of causal link between the activities and the effects. Therefore, the best way to avoid damages consists in issuing measures and including them in any development plan as soon as we find out any development activity. This idea has been made clear by a number of signatories States in a Declaration relating to the threats on climate in 1990. Thus, the principle appears for a third time, after the 2nd World Conference on Climate, in a declaration adopted by 137 States on November 7, 1990 on which it is stated: “We cannot wait for scientific certainty before taking actions to reduce greenhouse gas emissions”.

As we can notice here above, most of the texts showing the belief that the precautionary principle is an integral part of the international legal order remains “declarations” which have no binding force and therefore constitute a “soft law”. If not, when a declaration can be adopted by 137 States/154 at that time (certainly with the exception of industrialized States), why not keep step forward in transforming this declaration to a treaty? Perhaps, States have understood that the precautionary principle be binding and a posteriori rule of customary international law can curb their economics’ ambitions slowing down their scientific development. And, the position of these industrialized States can be understood for they are not ready to comply with this principle because of the competition that globalization implies on them. Hence, for them a high level of industrialization can help them keep their enviable position in world economy. Therefore, they have to produce in order to disinterest their local population, but more importantly they are exorbitantly producing in order to conquer all the markets regardless of the effects of their activities on climate, the local population health or provoked natural disaster. Anyway, in order to protect other States from some States’ wrong doing activities, most of the non industrialized States, particularly African, for the first time find a preventive way to protect themselves by enshrining a convention on precautionary principle, namely (the Bamako Convention of 29 January, 1991) which prohibits the import into Africa hazardous waste. This convention recommends the implementation of precautionary principle “Without waiting for scientific proof of incurred risks”31. It should be noted that the only main requirement is that Parties “strive to adopt” precaution, which lessens the normative power of the Convention. Interestingly, we can see the recognition of this principle in 1992 Rio Conference through its “famous” principle 15. At Rio Conference, both conventions enshrined this principle: biological diversity (paragraph 9 of its preamble) and climate change (article 4, paragraph 1f). Since that time, many conventions enshrined the precautionary principle. Among other we can mention: trans-boundary waterways and international lakes (Helsinki, 1992, Article 2); Baltic Sea (Helsinki, 1992, Article 3 (2)); Eastern North Atlantic (Paris, 1992, Article 2(3a)), Danube (Sofia, 1994, Article 2(4)); Special protected zones in Mediterranean (Barcelona Protocol, 1995, preamble); Sulfur emissions (Oslo protocol, 1994, preamble); UN Convention on Highly Migratory and Straddling Fish Stocks (New York, 1995, Article 5(c) and Article 6)and Article 10, paragraph 6 of the Protocol on Biodiversity (28 January, 2000)recognized recourse to the precautionary principle for Genetically Modified Organisms (GMO). Nowadays, many bilateral joint development agreements relating to shared resources management

31 Bamako Convention, 29 January 1991, Article 4, Paragraph 3f
include environmental measures in their agreements. States, while negotiating those resources co-development, include elements like prevention, reporting of spill and follow up, environmental impact assessment, operational discharges, marine support, contingency plans, clean up strategy and so on. All these provisions can be seen as precautionary measures and therefore countable for precautionary principle. But, mostly, many of environmental instruments do not have any annexes specifying how the goals could be achieved, and if they have, the wordings of these undertakings are rather imprecise and doubtful.

Consequently, we can say that the “general practice” which is one of the criteria of recognizing a rule as customary law seems to be established through the omnipresence of the precautionary principle in a number of conventions. We may even presume its “sustainability” through its systematic enshrining from the Bamako convention since 1991 until nowadays. Therefore, one may assume that precautionary principle can be considered as customary international law when we consider that international law has allowed for a curious inroad into the maxim pacta sunt nec non contracta in that it is said that when a rule is repeated in a large number of treaties the rule “passes” into customary law, or that when an important multilateral convention has been inexistence for some time, its provisions become absorbed into the stream of customary international law. However, viewing that international environmental law is a new law, recent although innovatory, it is not custom like much of new laws. It involves topical political decisions, and it is often the focus of contention unlike to a rule of customary law. Thus, the finding of a uniform and continuous practice as far as it concerns the precautionary principle is not enough to establish the principle of international custom. It is still necessary that States consider these standards as required. This criterion of conviction is difficult to assess because highly subjective. Yet, the response of international tribunals in its invocation by some States in support of their claims provides a first element of assessment. However, in the few cases where the precautionary principle has been invoked, these courts have refused to accept this qualification claimed by the applicants. This refusal is implicit in both cases giving rise to decisions of the International Court of Justice. Indeed, New Zealand had obtained a decision by the International Court of Justice (ICJ) on French Nuclear test in the past: the Nuclear Tests case of 1974. This time however, the ICJ did not allow the case to be re-opened, so no substantive decisions were taken. However, from the dissenting opinions we can learn that the role of the precautionary principle in a case which would not stumble over procedural blockades might be important in the future. Again, in Gabčíkovo-Nagymaros Project’s judgment (Hungary v. Slovakia), the ICJ does affirm 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. In the same manner, in the Southern Bluefin Tuna case, the International Tribunal for the Law of the Sea 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. Also, an interesting example of the precautionary principle in practice is the dispute between the USA and Canada on the one hand and the EC on the other hand on the safety of beef raised using growth hormones. The EC claimed it was not safe for human health to eat such meat; the USA and Canada claimed the opposite and brought a case before a WTO panel. That panel concluded that the EC the import ban was violating WTO law. The appeal body came to a similar conclusion. The EC had brought forward that its import ban was justified in the light of the precautionary principle, which they presented as a binding rule of international customary law. The USA and Canada denied that the principle already had such a status. Canada did admit that it was an emerging principle. So, the line of reasoning followed by New Zealand in

33 Carlos Calvo, Le Droit International 136 (3d ed. 1880); LazareKopelmanas, Custom as a Means of the Creation of International Law, 18 BYIL 127, 136-38 (1937); Sørensen, Les Sources Du Droit International 95-98 (1946).
34 See ICJ Order, New Zealand c/ France, September 22, 1995 and also ICJ Report, September 25, 1997, Hungary c/ Slovakia, ECR, Paragraph 56 all available on (http://icjciij.org/cijwww/cases)
35 Southern Bluefin Tuna Case, Order, para. 77.

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the Nuclear Tests Case of 1995 before the ICJ as well as the opinions of the USA and Canada in the Beef Hormones cases and the reluctance of ICJ as well as ITLOS to evaluate the status of the precautionary principle in international law indicate that the principle is not yet a part of international customary law.

Therefore, the principle is to be codified into law systems so that discussions on its legal status are overcome and it will become easier for the judiciary to make use of the principle. The results of the Hague conference make this clear. Via such codifications, which have taken place at many levels already, the precautionary principle is developing from mere policy guidance ('soft law') into 'hard law'. Although this principle got a place in conventions, we may still presume that it is still soft law through the place where we can find them in the conventions and the way it is often written showing the obscure intention of the parties; because the character of soft law attributable to a standard not only depends on the binding nature of the instrument within which it is made, but also how it is written. And it is not rare to see this principle from the preamble to device or from the dispositions to general obligations of the conventions; a fact that may compromise its nature and its legal value attesting the hesitation of States on the binding character of this principle within those documents. As long as the precautionary principle remains non-binding, its application as customary international law may remain dubitative. This doubt of states and some international tribunal may show the lack of conviction of States and international community. This fact may justify the softness of this principle in particular and the international environmental law in general.

4. Conclusion

Although the first criterion under ICJ’s Statute article 38 is almost established, the second criterion of its binding or non-binding effect leaves us perplex on the application of precautionary principle as a rule of customary international law. However, we may welcome the application of this principle as a rule of customary international law, at least in the environmental issues to secure the future generation’s right to better life while enjoying ours. This sense does make change some international court and regional tribunal’s decisions while ruling on environmental disputes. Moreover States have repeatedly invoked the principle as a norm of general international law in international judicial proceedings. Better, reference to the precautionary principle as a rule of customary law and current developments in international law demonstrate that this international “approach” is moving toward an international “principle”, even looking forward to entering into the core principles of international law. In other words, the precautionary principle is rapidly shifting from its status of “soft law” to “hard law”. These considerations could indicate that the ICJ and other tribunals might express their attitude towards the changing status of this principle. Anyway, hopefully, this principle seems to be very active in the legal order of some international organizations such as European Union, World Trade Organization, World Health Organization… and some nations even if it does not yet acquire the character of customary international principle like Principle 21 of Stockholm Declaration reiterated in the Rio Declaration (Principle 2) which is generally considered to be a statement of customary international law because it is a corollary of sovereign State’s integrity. Seen the development of sciences and technology nowadays with their consequences in our health and the reluctance to qualify precautionary principle as part of customary international law, we are going to find a jeopardy in finding a balance between our economical needs and our right to health. So, increasingly, willy-nilly, this principle will impose itself to the international community because nowadays States are demonstrating their wish to accord significance to the environmental problems. Hopefully this wish can be transformed to a “will” very soon in order to make this principle binding. Although, this principle is still flexible, soft, it is a helpful technique to counter environmental problems we are facing to since States feel easily better to give their support to a soft laws than binding arrangements. It

36 “‘Soft law’ has two meanings. The first refers to the source, that is, to the fact that one is dealing with non-legal instrument, such as recommendations and guidelines of international organizations or declarations of head of states or ministers. The second refers to how authoritative the language used is, that is, to the fact that the principles or rules in a treaty in question are imprecise and do not really lay down a legally binding obligation”, F. Maes : "Environmental principles, their nature and the law of the sea : a challenge for legislator s " , in M. Sheridan, L. Lavrysen (dir.) : " Environmental Law Principles in Practice" , Bruylant, Bruxelles, 2002, page 65. 570
could overcome this technical stage and become a rule with binding force if States could act collectively, accepting to fetter their freedom of action. With this prayer, we should keep in mind as Professor Boyle that the role of soft laws is significant because they are the first step in a process eventually leading to a conclusion of a multilateral treaty.\footnote{A. Boyle, “Some Reflections on Relationship of Treaties and Soft Law”, In V. Gowland Debbas (ed.), Multilateral Treaty- Making. The Current Status of Challenges to and Reforms Needed in the International Legislative Process (2000), at 29}.

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