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Abstract

The precautionary principle is certainly one of the most fundamental of international environmental law. Symbolic of a "technical democracy", this principle has been one of the cornerstones of the Rio Declaration. Its proclamation was then the starting point of a broad and rapid development of the principle –or the approach– of precaution which today underlies many legal systems.

Little by little, international courts have, by a constructive dialogue, gradually highlighted the precautionary principle, whether its authority or its contents and its implications. Its complex and composite nature continues to be a challenge. But in nowadays societies, characterized by a constant technical innovation, its introduction in positive law seems quite irresistible. Judges are expected to play an important role in the development of this "open textured" standard. In such a context, the dialogue –or at least the benevolence– between judges including between international, European and domestic judges, may still be helpful, and could contribute to feed and stabilize the case-law.

Key words

Precautionary principle – international law – international environmental law – case-law – International Court of Justice – International Tribunal for the Law of the Sea – precautionary approach – risks - responsibility

The Role of International Law in the Promotion of the Precautionary Principle

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The Stockholm Declaration (1972) principles, taken up and developed in the Rio Declaration on Environment and Development (1992), have played a major role in the development of international environmental law in the last forty years. Independently from their binding nature, unequally admitted, they have inspired negotiations of new conventional rules. They have also spread to most national laws and they have influenced, although sometimes only implicitly, decisions of courts and tribunals. The structuring role of these principles has been particularly important in the context of a rapid and continuous law-making process.

Among these principles, the precautionary principle is certainly one of the most fundamental. Enshrined in many international declaration and treaties, it is now recognised and to some extent promoted by international courts, with concrete consequences for States and –indirectly but surely– for non-states actors, particularly for corporations acting under their jurisdiction.

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I. The precautionary principle in texts

Symbol of what some have called the "technical democracy", this principle has been one of the cornerstones of the Rio Declaration. It is formulated in principle 15 as follows: "*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 not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*" This proclamation was the starting point of a broad and rapid development of the principle –or the approach– of precaution which today underpins many legal systems.

The precautionary principle is laid down, notably, in the United Nations Framework Convention on Climate Change as follows: *"The Parties should 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 full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. (...)"* (art. 3 para. 3). Without claiming to be exhaustive, the precautionary principle is also mentioned, for example, in the Convention on Biological Diversity (Preamble), in the 2000 Cartagena Protocol on Biosafety (art. 9 and 10) and in the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. It is contained in several conventions on the Marine Environment, in the 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (art. 5), in the 2000 Protocol on the Implementation of the Alpine Convention in the field of Transport (art. 1), or in the Convention on the Protection of the Rhine (art. 4). In short, it is largely enshrined in international environmental treaties.

However, despite of its reiteration in numerous treaties, the status of the precautionary principle has long been uncertain in international law. That was due to hesitations of international tribunals on the customary authority of the principle. These are becoming increasingly blurred in case-law (II). That was also due to the uncertainty of the content of the principle, which still remains, at least partially (III).

II. The precautionary principle in international case-law

The precautionary principle has, for a couple of years, been dealt with like a "hot potatoe" between international jurisdictions, having been passed on from one to another, each one refusing to decide on its authority, on the pretext that the others had not stated either.[1]

The phenomenon begun in 2009 with the European Court of Human Rights decision in the case of *Tatar vs. Romania*. Basing its reasoning on the Rio Declaration, the Court first stated that *"the precautionary principle recommends that States do not delay the adoption of effective and proportionate measures aimed at preventing the risk of serious and irreversible damage to the environment in the absence of scientific or technical certainty"*.[2] Referring to European Union law, it then recalled "*the importance of the precautionary principle (laid down for the first time by the Rio Declaration), which 'may be applicable in order to ensure a high level of protection of health, of the consumer safety and the environment, relating to the entire range of activities of the Community'*".[3] It highlighted that its introduction in the Rome Treaty at the time of the revision of the Maastricht Treaty (art. 130 R transformed into 191 TFEU) *"maps out, on the European level, the evolution of the principle from a philosophical concept to a legal norm"* whereas "*[t]he Court of Justice of the European Communities ("ECJ") considers this principle, at the light of article 17, paragraph 2, first subparagraph, EC, as one of the cornerstones of the policy aiming at a high level of protection by the Community in the field of the environment"*.[4]

The European Court of Human Rights also quoted the case law of the International Court of Justice when analyzing the applicable law. It refered more precisely to the excerpt of the decision of the International Court in the case of the Dam on the Danube, in which the ICJ "*recognizes (…) the need to take environmental concerns seriously and to take the required precautionary measures (…)*".[5] It should be noted, at this point, that the European Court of Human Rights has taken some liberties compared to precedents by using a shortened quotation. The ICJ has recognized that "*both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures*",[6] which constitutes an important detail when searching whether or not it has recognized a customary authority to the principle.

The year following the decision of the European Court of Human Rights, in 2010, in the case of the Pulp Mills on the River Uruguay, the International Court of Justice refered again to precaution, considering that a "*precautionary approach*" "*may be relevant in the interpretation and*

[1] S. Maljean-Dubois, « Le spectre de l'isolation clinique: quelle articulation entre les règles de l'OMC et les autres instruments et principes internationaux? », *Revue européenne de droit de l'environnement,* 2008/2.

[2] ECHR, *Tatar vc. Roumanie*, Request no 67021/01, Judgment of 27 January 2009, para. 109 (our translation, available only in French).

[3] *Ibid.*, para. 120.

[4] *Ibid.*

[5] *Ibid.*

[6] ICJ, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary vs. Slovakia)*, Judgment of 25 September 1997, para. 113.

application of the provisions of the Statute" of the River Uruguay.[7] The judgment of the Court did not, however, tell anything about the customary character of the principle. Discussion on this aspect was unnecessary, as parties had agreed to consider that the Court should interpret the statute according to a precautionary approach, even though they disagreed on the consequences which judges should draw from this.

On February 1st, 2011, a third, even more decisive step was taken with the adoption of the very bold advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.[8] The Chamber was called upon notably to determine whether States have the obligation to adopt a precautionary approach when they sponsor a company which is engaged in the exploration or exploitation of the Area, even if these activities fall outside the scope of the two Regulations on prospecting and exploration for polymetallic nodules and polymetallic sulphides which refer explicitly to it. The Chamber noted that "*it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations"*.[9] Due diligence being a customary obligation which was laid down in particular by the ICJ in its judgment on the Pulp Mills case and the precautionary approach forming part of due diligence, it **logically** follows that precaution is an obligation which takes its source in a customary rule. Which was to be demonstrated… The consequence is obvious: "*[t]he due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor"*, including in "*situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks"*.[10]

It appears however that the Chamber tried to circumscribe its reasoning to the marine environment, when adding afterwards that a "*a trend towards making this approach part of customary international law"* has been initiated by the incorporation of the precautionary principle "*into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration"*.[11] However, if we accept the premise, its reasoning could be extended and apply to the whole environment. The advisory opinion of the ITLOS could map out a new step; international jurisdictions which are called upon to state on the precautionary principle may build upon this recognition and continue the dialogue between judges, which has only started on this matter. Moreover, this change could be facilitated by the fact that the Chamber used the precautionary approach and principle as synonyms: "*the precautionary*

[7] ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentine vs. Uruguay)*, Judgment of 20 April 2010, para. 164.

[8] ITLOS, Advisory opinion of 1st February 2011, Case n° 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*.

[9] *Ibid.*, para. 131.

[10] *Ibid.*, para. 131.

[11] Ibid., para. 135.

approach (called "principle" in the French text of the standard clause just mentioned) is a contractual obligation of the sponsored contractors whose compliance the sponsoring State has the responsibility to ensure".[12] The Chamber itself used both expressions indistinctly. As a matter of fact, this distinction is to be relativized. In that regard, it should be noted that certain instruments, be they national or international, refer to the "precautionary principle", others to the "precautionary approach", the "precautionary method", or "precautionary measures". Some authors have regretted the semantic uncertainty.[13] The reality is that these expressions are generally chosen on purpose.[14] Those who refuse to recognize a customary and general character to the precautionary *principle* may accept that in certain cases, it is mandatory to follow a precautionary *approach* or to adopt precautionary *measures*… In practice, however, the distinction reveals to be essentially a symbolic one.

III. What obligations for States?

The International Court of Justice has not specified the concrete consequences of the precautionary principle in the Pulp Mills case, even though it recognized that it could be useful for interpreting and applying the Convention concerned (a treaty adopted in 1975). Wouldn't it be, referring to the expression of Vaughan Lowe, a mere "*interstitial norm",* a meta-principle which participates in ensuring the coherence of other norms, that is, a principle which does not address rights-bearing subjects, but which might be used by the judge when interpreting primary rules?[15] This would amount to limiting the principle to "*a purely hermeneutic tool at the disposal of the interpreter and conferring the latter a large margin of appreciation when carrying out his or her task, but lacking normative independence and thus not being able to frame, as such, the behaviour of rights-bearing subjects*".[16] If the precautionary principle also aims at prescribing, the normative threshold (because of its general and abstract character) may only be reached through further implementation, notably through a judicial process or the adoption of implementing rules. This is what the European Court of Human Rights seems to highlight when it stated that the principle "*recommends that States do not delay the adoption of effective and proportionate measures aimed at preventing the risk of serious and irreversible damage to the environment in the absence of scientific or technical certainty"*.[17] The Court of Justice of the European Union also infers very

[12] *Ibid.*, para. 133.

[13] Conseil national de l'alimentation (National Food Council of France), *Rapport et avis sur le principe de précaution et la responsabilité dans le domaine alimentaire,* 20 /09/2001, Advisory opinion, n°30, p. 2.

[14] S. Maljean-Dubois, « Relations entre normes techniques et normes juridiques : illustrations à partir de l'exemple du commerce international des produits biotechnologiques », in *Les enjeux de la normalisation internationale. Entre environnement, santé et commerce international*, E. Brosset and Eve Truilhé-Marengo (dir.), La Documentation française, Paris, 2006, pp. 199-231.

15 V. Lowe, « Sustainable Development and Unstainable Agreements » *in International Law and Sustainable Development. Past, Achievements and Future Challenges,* A. Boyle and D. Freestone (dir.), OUP, Oxford, 1999, p. 31.

[16] Concerning the principle of sustainable development, V. Barral, *Le développement durable en droit international : essai sur les incidences juridiques d'un concept évolutif*, Doctoral thesis, European University Institute, May 2007, p. 234 (our translation).

[17] Case *Tatar c. Roumanie*, Request no 67021/01, Judgment of 27 January 2009, para. 109 (our translation).

concrete consequences from it when it states, for example, that the principle "*requires*" "*the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests*".[18] The principle thus brings with it positive obligations for Member States and European Union institutions.[19]

At the universal level, the path for implementing the precautionary principle has also recently been opened by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which, in its advisory opinion of 2011, focused in particular on clarifying several practical consequences. First of all, the Chamber considers that the Authority will be called upon to include or develop the provisions related to this approach in its regulation of exploitation activities or activities concerning minerals of different types, in order to complete the reference to the precautionary approach in the two Regulations, which concerns more particularly the activities envisaged therein, namely prospecting and exploration for polymetallic nodules and sulphides.[20] The Chamber notes that for States, the respect of a precautionary approach brings with it several positive obligations. First, the precautionary approach, as far as it forms part of the due diligence obligation, imposes, first of all, on each State to proceed to a potential impact assessment on the environment of the activities which are being carried out under its jurisdiction,[21] which supposes that it establishes adequate evaluation procedures and mechanisms. Secondly, it follows from the precautionary approach that States are required to anticipate even uncertain risks by establishing a legislative and regulatory framework which puts constrain not only on public authorities but also on private persons within their jurisdiction in order to comply with this approach. Thus, concerning the exploration and exploitation of the seabed, "*the sponsoring State has to take measures within the framework of its own legal system in order to oblige sponsored entities to adopt such an approach*".[22] Here lies a twofold obligation: the international obligation (of the State), in turn, has an impact on private persons through the national regulations of each State. Vertical in the beginning, the obligation in this way transforms into a horizontal obligation extending to the relationships between internal subjects.

The Chamber, in its exegesis of the precautionary principle, used directly Principle 15 of the Rio Declaration. This is implied by Seabed Regulations [article 31, paragraph 2 of the Regulation on the Nodules and article 33, paragraph 2 of the Regulation on the Sulphides both], which state

[18] Judgment of the Court of First Instance of the European Communities of 21st October 2003, *Pharmaceuticals BV vs. Council of the European Union*, Case T-392/02, para. 121.

[19] Council Resolution on the Precautionary Principle, Annex III to the Conclusions of the Presidency of the Council of the European Union of Nice, 7-10 December 2000.

[20] Abovementioned ITLOS Advisory opinion, para. 130.

[21] *Ibid*., para. 142 and 145.

[22] *Ibid*., para. 134.

that the Authority and the sponsoring State "*shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration*" in order "*to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area*". From this viewpoint it is interesting to see which normative authority[23] may arise from the Rio Declaration, even though the latter is not binding. It is a mandatory instrument which refers to it and via this explicit referral the normative suggestion contained in Principle 15 becomes mandatory.

With regard to the scope of the precautionary approach, the Chamber, by referring at several moments to Principle 15 of the Rio Declaration, classically limited its scope to the "*risk of serious and irreversible damage*". Additionally, it specified that the precautionary measures must be applied by States "*according to their capabilities*". For the Chamber, "*the first sentence of Principle 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each State*".[24] This criterion of the capability of States introduces a subjective factor in the assessment of the precautionary principle, related to the level of scientific knowledge and technical capabilities of each State. By so doing, the Tribunal accepted "*a dose of rationality and of reason*"[25] inherent to the idea of precaution and necessary in order to - implement the principle. However, the fact remains that each State is bound, albeit only according to its capability. This obligation applies to all States but its content may vary, depending on the level of development of each individual State. To summarize, the precautionary principle flirts with the albeit somewhat different principle of prevention, because of its common ground in due diligence, but also with the principle of common but differentiated responsibilities, from which it differs because of its binding character.

We can add that, on the procedural level, some authors consider that the precautionary principle calls for the burden of proof to be reversed. In practice, as of today, however, none of the international jurisdictions has ever inferred from the precautionary principle or approach such consequences on for the rules governing the burden of proof. As a matter of fact, the need for the evolution of procedural law towards the reversal of the burden of proof is felt less clearly nowadays because of the development of positive obligations which weigh at present on States when implementing the precautionary principle. Following the advisory opinion of the ITLOS, the precautionary attitude forms part of the due diligence obligations and consequently, as the principle of prevention, comes with positive obligations for States: the proof thus is eased. Not concerning the burden of proof, but concerning what has to be demonstrated by the plaintiff. The proof has to be made not of the existence of a risk, but that the State has not put in place the legislative and regulatory framework which would have enabled it to become aware of the risk, to measure its

[23] See C. Thibierge, *La force normative. Naissance d'un concept*, Paris, LGDJ, 2009.
[24] Abovementioned ITLOS Advisory Opinion, para. 129.
[25] L. Boisson de Chazournes, « Le principe de précaution : nature, contenu et limites », in *Le principe de précaution, aspects de droit international et européen*, Ch. Leben and J. Verhoeven (dir.), Paris, ed. Panthéon-Assas, 2002, p. 82.

probability and gravity, and to take the measures aimed at preventing it from realizing. The proof of such a failure does not reveal any particular difficulty.

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Step by step, international courts have, through a constructive dialogue, gradually highlighted the precautionary principle, by stating on its authority or its contents and its implications. The complex and composite nature of this principle continues to be a challenge. But in nowadays societies, characterized by constant technical innovation, its introduction in positive law seems quite irresistible. Judges are expected to play an important role in the development of this "open textured" standard. In such a context, the dialogue between judges including between international, European and domestic judges, may still be helpful, and could contribute to feed and stabilize the principle and its content.

As common and shared standards on the universal level, the principles of international environmental law are very often integrated in national laws, in legislative or even constitutional provisions. Sometimes, an existing formulation from the international level is used; in other circumstances, this formula is subject to debate, adaptation and modification. Through these phenomena of imitation or transplantation, the principles of international environmental law contribute in an important manner to the globalization of environmental law, and even to a certain extent, to some form of acculturation of national environmental laws. The phenomenon reflects the power of international norms as a new *common law*.