FACULTY OF LAW
University of Lund

Moa Dahlbeck

The development of principles of law: a review of the status of the precautionary principle

Master thesis
30 credits

Ulf Linderfalk

International law

Fall 2007

Contents

Summary

This paper is an attempt to study and distinguish the necessary general features of those principles that have developed, or, are under the development into legal principles of international law. It is, in essence, an attempt to establish whether principles of law come from a common origin, have characteristics in scope in common, and share other features alike.

The manner, in which this study is carried out, is through the comparison of a principle of uncertain status, within the environmental sphere of international law, with the settled requirements of legal principles according to the prevailing theory of law. The chosen principle for this study is the principle of precaution when faced with certain kinds of risks, of certain degree of harm, to the environment (in short, the precautionary principle).

The purpose for the choice of object of examination is twofold. First, it is believed that the status of this particular principle might become clarified, in itself, during an examination such as the following. This is furthermore conceived as a welcomed side effect to the main investigation of the necessary features for development of legal principles in general, since a clarification of the precautionary principle might lead, in turn, to a further understanding of the components of environmental law.

Second, it is believed that the precautionary principle has been – due to the reliance on it in international disputes (concerning the legal obligation of environmental protection) as well as, the references to it, or to its effect, in a number of contemporary international instruments – elaborated thoroughly enough to function as a test mechanism for the propositions of necessary features of legal principles.

The practical method relied on in this paper's study is first, a rather thorough review of the legal history, origin and contexts of enumeration of the principle (through direct or indirect use of the concept) within international law, followed by a survey of the cases at the International court of justice, in which one party relied on, and argued for, an interpretation of international law that includes the precautionary principle into the sphere of generally binding norms.

The practical implications following upon the determination of the legal status of the precautionary principle then will be demonstrated, through the presentation of a currently pending case at the same adjudicating international body, as in the two already settled cases referred to above. This is included in order to show that the value of principles of law ought not to be underestimated in the context of practical issues of international relations.

Furthermore, the example of the precautionary principle stands to display, that sometimes, the very concrete queries of whether actions are in conformity or in opposition to obligations and rights of international law, can only be dealt with through the reliance on principles of law. This is an aspect of the use of principles that is perhaps somewhat surprising considering the fact that it is being established in this paper that principles of law require, in opposition to rules of law, vagueness and generality in

their scope and effects. To this end, it is asserted that the examination of the role of principles within the system of international law will help facilitate the understanding of some of the mechanisms governing this system in general.

By this last contention, I mean, in brief, that I believe that if we highlight the purpose with principles, as a particular type of norm, we will both understand each of their individual meaning in the system of law better, as well as, discern their importance as a group in practical issues. I believe this because I take the position that when we have established the role played by principles within international law, we also have before us a tool for making the understanding of the system more holistic. The reason for this is that there is no settled notion within international law of how, or by whom, the law should be construed, constructed or developed.

Sammanfattning

När Argentina vände sig till den internationella domstolen 2006 med sin begäran att domstolen skulle finna Uruguays handlande i strid med gällande folkrätt så argumenterade man främst utifrån Uruguays bilaterala förpliktelser gentemot sitt grannland men också utifrån den generella folkrätten. Man hänvisade till en bestämmelse i den bilaterala traktatet till grund för tvisten som i sin tur hanvisade till andra delar av folkrätten. Båda stater skulle, enligt artikel 41 i Rio Uruguay traktatet, beakta gällande internationella bestämmelser på miljöskyddsområdet när man utförde arbete, eller ändrade sin användning av den del av floden som föll under statens överhöghet. Det är utifrån detta argument som jag har hänfört den tvistiga frågan under bearbetning hos internationella domstolen i detta, så kallade, pappersmassefallet mellan Argentina och Uruguay, till ett resonemang kring betydelsen av och innebörden av försiktighetsprincipen i den moderna folkrätten. Jag har varit intresserad av att se om denna princip i dagsläget kan hänföras till den grupp av regler som parterna till tvisten är traktatsrättsligt skyldiga att iaktta.

Frågan om försiktighetsprincipens bindande verkan ledde sedermera in mig på frågan om principers generella betydelse inom folkrätten. Vad innebär det för skillnader, för effekten av en prinicip, om den är bindande eller ej?

I studerandet av den frågan insåg jag snabbt att för att svara på det måste jag först ta itu med frågorna om hur en princip alls blir bindande samt om man överhuvudtaget kan tala om principer som bindande rätt, kontra ickebindande, på samma vis som man kategoriserar rättsregler.

Dessa frägeställningar, ledde i sin tur till ett försök att reda ut betydelsen av begreppet princip i en rättsteoretisk kontext. Detta genomfördes praktiskt genom att titta på just försiktighetsprincipen, i ljuset av de yttringar den förekommit i, för att jämföra slutsatserna från denna översikt med en utvald rättsteoretisk förklaring till begreppet princip.

Syftet med detta grepp har varit att se om en sådan jämförelse kan läggas till grund för en bekräftelse av den valda rättsteorin eller om exemplet i form av försiktighetsprincipen och den presenterade rättsteorin istället talar emot varandra i sina respektive förklaringar till syftet och innebördern av begreppet princip.

De yttringar av försiktighetsprincipen som ligger tll grund för jämförelsen är dels, en översikt av de instrument som hänvisar till, eller på annat sätt låter sig påverkas av principen och dels, två äldre avgöranden från den internationella domstolen.

När det gäller de instrument som inkluderats i översikten har både icke direkt bindande överenskommelser så väl som vanliga konventioner som fastställer gällande rätt mellan traktatspraterna, i ett visst hänseende, använts. Anledningen till att även icke-bindande instrument, av mer så kallad policy-bildande karaktär, utnyttjats har att göra med att dessa, i visst hänseende, kan ses som uttryck för staters vilja att förändra rätten i en viss riktning samt att de tydligare än många konventionella traktat definierat

innebörden av försiktighetsprincipen. Detta framgår till exempel av att formuleringen av försiktighetsprincipen i Rio deklarationens princip 15 flitigt hänvisas till i traktat tillkomna senare än konferensen som fastslog principdeklarationen.

Abbreviations

AJIL	American Journal of International law
BAT	Best Available Technique
CARU	Comisión Adminstradora del Rio Uruguay
CBD	Convention on Biological Diversity
EC	European Community
EIA	Environmental Impact Assessment
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
EU	European Union
FAO	Food and Agriculture Organisation
FOE	Friends of Earth
GMO	Genetically Modified Organisms
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
Lortrap	Long-range transboundary air pollution
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OSPAR	Oslo Paris Convention
POP	Persistent Organic Pollutant
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
VCPOL	Vienna Convention for the Protection of the Ozone Layer
WCED	World Commission on Environment and Development
WWF	World Wildlife Fund

1 Introduction

1.1 Introduction

This paper is, in one sense, focused on an issue topical of international environmental law. However, while examining the particular development of the precautionary principle, set in the context of environmental management regulation, it is suggested that the features of the development of legal principles in general international law can be discerned.

The purpose of this paper is therefore essentially a question about finding the mechanisms that turn non-binding principles into generally binding principles of law. As I am stating below (section 1.3), the importance of identifying these mechanisms has to do with their practical importance in the context of contemporary international law. Perhaps, some would say, this importance is limited to the particular segment of environmental international law, where arguments of principles are often being used[1]. However, it is argued, that the understanding of arguments based on principle services also the understanding of international law in general. As I emphasize in section 2.2.2, this is because, in order for the system of international law, regarded as one entity, to create sustainable solutions to the very different problems pervading its distinct subject areas – given that it does not have a unifying legislative body or separation of powers between legislator or users – arguments of principles becomes inevitable in many circumstances. To this end, as also will be apparent below, arguments of principles can be offered as a method of bridging the gaps in international law making the system more coherent and uniform[2].

This is the main reason why it is believed that the conclusion reached in this paper concerning the generic evolution of principles of law can be said to affect also the understanding of the structures of international law in its entirety.

To start the discussion of this paper of, on an equal standing, it is emphasized that it is presupposed that there is a difference in rules of international law and principles of international law. The problem, therefore, becomes to identify these differences and to explain how principles – as a specific type of norm – become legally binding on the subjects of international law.

The main question at hand thus concerns the process of developing new principles of law, and this will be investigated through the environmental concept of the precautionary principle as it has been adopted in the 1992 Rio Declaration, a number of post Rio conventions, and in the reasoning of the parties to environmental disputes in the past as well as one particular present ditto.

---

[1] P. Birnie and A. Boyle, International law and the environment, 2nd edition, Oxford, 2002, page 18 - 19

[2] G.Hafner, Risks ensuing from fragmentation of international law, Official Records of the General Assembly, Fifty-fifth Session, Supplement No 10 (A/5510), annex, page 321; Birnie and Boyle, page 9

1.2 Method

1.2.1 Establishment of a theory of law

In order to understand the line of reasoning presented in this paper, the concept of principle of law must be further clarified. Therefore, before initiating the actual review of the development of the precautionary principle, the use of this particular term will be settled in Chapter 2. The use, in this paper, of the term and concept of principle, is based on a theory of law formulated by Ronald Dworkin[3].
Born in 1931, he is the successor to H. L. A. Hart of the professorship of jurisprudence in Oxford, as well as, the founder of the strongest critique of Hart's and other legal positivist's perception of the concept of law[4].

The description,in Chapter 2, of Dworkin's theory of law will be limited to what it states concerning the general conception of principles within systems of law. In brief, Dworkin's theory emphasises that principles are important parts of all systems of law, despite their inherent vagueness, because of the fact that any system of law would be far too poor to create a full body of law without them[5].

This stands, as referred to above, in opposition to the perception of principles, as formulated by H. L. A. Hart. In contrast to the Dworkin theory, Hart's theory recognises formally (according to the formal procedure, settled by the system of law in question) adopted rules of law, as legally binding alone. As a direct consequence of this view, he subsequently, hands over all cases not covered by such rules to the discretion of the judges, or, other users. Dworkin describes this feature of Hart's conception of the law by the following terms:

> Legal positivism rejects the idea that legal rights can pre-exist any form of legislation; it rejects the idea, that is, that individuals or groups can have rights in adjudication other than the rights explicitly provided in the collection of explicit rules that compose the whole of a community's law.[6]

H. L. A. Hart's (1907-1992) main thesis was to promote the concept that under the rule of law moral considerations have no place[7]. Below, in Chapter 2, this conclusion will be questioned. Instead, the use of principles of law, as perceived by Dworkin, will be chosen as the theoretical basis of this paper.

---

[3] R. Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge, 1978

[4] http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/the_tls/article3003761.ece

[5] Dworkin, Taking Rights Seriously page 22 and 28 - 29

[6] See Introduction page 11 in Taking Rights Seriously. See also generally pages 17 – 22 on the view of the positivists

[7] Legal philosophy in Oxford, http://www.law.ox.ac.uk/jurisprudence/hart.shtml

1.2.2 Scope, context and empirics

As I touched upon in Section 1.1, the main reason for the choice of focal point of this paper is the fact that instruments of environmental law often deploy vague regulation techniques for the purpose of governing practical issues. In this field of international law, soft law documents and declarations of principles are more commonly adopted, in order to govern the behavior of the subjects of law, than in other fields of international law[8].

Practically, this is largely why states involved in disputes with environmental implications often must turn to arguments of general principles instead of rules of environmental law. Understanding the legal value of such arguments is important when the purpose is, as in this case, to shed light on the structure of international law.

A final matter must be pointed to in connection to the delimitation of scope. The fact that a principle, just as a rule, might be included in a treaty between states, brings the conclusion that a principle might very well be unconditionally legally binding upon the parties to such a treaty. This is an unquestionable fact, just as the fact that a treaty only binds its parties. Since the purpose of this paper however, is to find the mechanisms that turn non-binding principles into generally binding principles, the possibility of a principle to become legally binding through the inclusion in an international treaty will be left outside of the scope of discussion.

Having the scope of the paper settled I will now turn to the practical context, in which the issues discussed in this examination is set, and the reasons for the choice of empiric material.

There is an ongoing dispute between Uruguay and Argentina concerning the environmental implications of paper mills placed on the Uruguayan side of the River Uruguay (a river that is shared by the two countries)[9].

The main argument of Argentina, the complaining state, is based on the reasoning that Uruguay has not observed necessary precautionary measures, including a proper environmental impact assessment involving (among other things) the public participation of the affected inhabitants on the Argentinian side of the river, before authorizing the project on their side of the river[10].

Argentina claims that the precautionary measures in question are mandatory on Uruguay for two reasons. First, because they are included in a bilateral convention in force between the two countries and second, because they are now part of customary international law. The latter reason for the obligation of Uruguay to take further precautionary measures is, according to Argentina, among other norms, the precautionary principle, which should now be applied when interpreting the substantial duties of bilateral treaties of this kind[11].

In its request, Argentina claimed that:

---

[8] Birnie and Boyle, pages 11 – 12 as well as, page 221; P. Okowa, State responsibility for transboundary air pollution in international law, Oxford University Press, 2000, at page 7

[9] *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay)

[10] To this end Argentina claimed that the continued construction of the paper mills "would set the seal on Uruguay's unilateral effort to create a ´fait accompli` . . . thus, depriving Argentina of its right to have an overall objective assessment of the environmental impacts carried out, in order, to determine whether or not the mills can be built. . ." Courts Order of 13 July 2006 in the Pulp Mills Case, page 5

[11] ICJ Order of 13 July 2006 in the Pulp Mills Case, page 4 paragraph 14

> . . . Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
> . . .
> (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;[12].

The dispute is currently a pending case at the International Court of Justice (ICJ). The arguments offered in favour of a binding precautionary principle, by Argentina, are good examples of the type of arguments that is in focus in this paper.

In two previous cases settled by the ICJ, parties to the disputes have argued about the precautionary principle as a norm of generally binding character, i.e. a customary norm, binding upon all subjects of international law, regardless of their attitude towards the norm in question[13].

In neither of the two cases, *Gabcikovo – Nagymaros Case 1997* or *Nuclear Tests Case II 1995*, did the court explicitly state how it perceived the legal status of the precautionary principle. Instead, in both of these cases, the court based their judgements solely on other legal norms and reasoning[14]. Furthermore, the decisions reached by the court were, on both occasions, of a negative effect for the states who urged the court to restrict activities planned by the defendant states on grounds of environmental protection[15].

The fact that the court did not consider the precautionary principle explicitly in neither of these cases, has been interpreted as if it did not conceive the concept in question to have a legally binding effect on the subjects of international law, at least at the time[16]. This interpretation forms the background context and reason for the interest in the development of the precautionary principle in particular. It is from this starting point – the reluctance of the ICJ to state its opinion on the principle – that the three mentioned cases will be looked upon.

First, a theoretical model for principles of law will be outlined, as referred to above in Section 1.2.1.

Second, a review will be presented of the precautionary principle's history, legal basis, and a range of international instruments referring to it. This review is presented in order to, partly, form the basis for the extraction of a possible content of the precautionary principle, as well as, partly, to be applied as a structure for the testing of the propositions concluded in Chapter 2.

---

[12] Article 41 of the 1975 Statute refer to the obligation of the parties to act in accordance with other applicable international agreements see below in section 5.3; quote from the Oral proceedings in the Pulp Mills (Argentine v. Uruguay) Case, translation of public sitting held on Thursday 8/6 2006 at 10 a.m

[13] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995; *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Case*, Judgment, I. C. J. Report, 1997

[14] See sections 4.2.2 and 4.3

[15] See sections 4.2.1 and 4.3.1

[16] Birnie and Boyle page 118

Third, the argumentation by the state parties to the disputes, the merits of the cases and the opinions of the separate and dissenting judges will be compared with the theoretical model settled in Chapter 2. In this manner, the features of the precautionary principle will be investigated and measured.

As a final comment in connection to the issues of scope, context and empirics, it is emphasised that it should be understood as an entirely separate question whether the effects of the precautionary principle, if considered legally binding, would in fact have led the court to rule in a different manner in the two reviewed cases of the ICJ. This is a question essentially outside the scope of this paper. This issue will only briefly be touched upon as the effects and practical implications of a legally binding precautionary principle are outlined in Section 3.5.4.

2 Theory of law

2.1 Defining the concept of principle

Concepts which are used simultaneously in domestic and international practices, or, within the same practice by lawyers belonging to diverse legal traditions, rarely have uncontested definitions in international law. This is also the case of the concept of principle. The unsettled question of the ´true` definition of the concept of principle of law (legal principle) is evidenced, for example, by the many different interpretations given to Article 38.1(c) in the Statute of the International Court of Justice[17].

Therefore, we must redefine the concept of principle before applying the term on a particular legal norm each time we consider the concept in legal discussions. In order to clarify the argumentation in this paper, what follows is a settlement of how the concept of principle is construed in this particular discussion. Obviously, not all possible dimensions of the concept will be analysed but this should be understood as a deliberate choice since the purpose of the paper require a focus on those particular features that attempt to explain the differences between principles of law, other principles and rules of law.

2.2 Distinguishing principles of law from principles

Throughout the discussion of principles of law in this paper, the term legal norm refers to a generic term describing all legal standards, which are prescribing certain behaviour, state of affair, or, conduct, in addition to an established link to one of the legal sources of international law[18].

However, the term is furthermore limited to the description of those standards that are not of a constituting character. In the theory of the positivists there is a distinction made between the type of norm that grants rights or imposes obligations upon the members of a community and, the type that stipulates how norms of the first kind should be created, recognized, modified or extinguished[19]. For present purposes – the discussion of the origination and development of a certain type of norm (principles of law), which prescribe the behaviour of the subjects of law – the term legal norm will be used when the regulative type is being referred to only.

---

[17] Article 38.1 (c) reads as follows "The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . c. the general principles of law recognized by civilized nations;". For examples of the difficulties of interpreting the article see I. Brownlie, Principles of Public International Law, 6th edition, Oxford, 2003 at page 15 - 19

[18] A. Peczenik, Juridikens metodproblem: rättskällelära och lagtolkning, Almqvist och Wiksell Förlag AB, Stockholm 1974, at page 30

[19] The terms constitutive norms and regulative norms is used in order to make the distinction clear, see Peczenik page 34

Thus, the first criteria that is necessary for a legal norm, given this meaning, to attain is the regulative character i.e. it must be conceived as normative in the sense that it is prescribing the conditions necessary for a right or an obligation to be at hands. A regulative character refers furthermore to the fact that the norm needs to
a) prescribe a type of conduct or state of affair for the subjects of the law to behave according to and,
b) state every condition that the prescription in question is dependent on[20].

When it comes to the additional requirement (mentioned above) of a link to one of the valid sources of international law, it should be emphasised, that within the legal system of international law, the legal sources do not put up additional formal requirements on legal norms. By this statement it is meant that the sources of international law simply do not require the formulation of a norm to contain any other formal elements (besides the required regulative character), in order for it to be valid within the legal sphere[21]. This is an important quality to emphasise, especially concerning our discussion of principles of law, since this particular quality establishes the fact that it is not a valid reason to dismiss a principle from the category of norms giving legal effect simply because it is called a principle and not a rule of law.

So, if a rule or a principle, extracted, for example, from a community practice, attain the requisites of legal norms stated above, it develops into a rule or a principle of law. The distinguishing feature is thereby not to be looked for in the specific content of the principle, neither is it dependent on the form the norm is being uttered in[22]. On the contrary, it is argued that all arguments of rights based on principle, even those not based on legal principles, appeals to a right the individual subject has vis-à-vis the organisation of the majority[23].
Dworkin speaks of the individual's right against a particular state, but in our discussion the individual subject must be conceived as a state or, other subject of international law, and the majority must be conceived as the collective of states within the global community[24].

2.2.1 Distinguishing principles of law in international law

Now, turning to the specific context of principles of law within international law, a careful attempt to apply some general standards will be performed as I draw upon the constitutional requisites[25] for adoption of new legal norms within this particular system of law, presupposing of course that the requirement of regulative character is satisfied.

[20] Dworkin page 19 referring to the rule of law theory by Hart
[21] This is apparent from article 38 of the Statute of the International Court of Justice
[22] Ibid.
[23] Dworkin chapter 6
[24] Ibid. at page 147
[25] The term constitutional requisites is referring to what is described in previous section, by footnote 18, as "a link to one of the legal sources of international law"

What I conceive as the ruling conception of the theory of law governing the system of international law is a variation of Hart's ´rule of recognition`[26]. This is the conception that all norms, which form the constituents of this particular system, are derivable to evidences of an original social contract, or agreement, establishing how legal norms should developed. These evidences are the accepted legal sources in international law. The common denominator for these sources is that they all, in some way or another, gives the competence of law making to the subjects of international law. Thus, it is always a requirement that the subjects of international law directly, or indirectly, give their consent to a new legal norm[27].

Looking upon a norm in international law, uncertain of its legal status, it is evidences of the consent of the subjects to be bound by the norm, which in turn can be derived from the ´original agreement establishing the valid legal sources` between the subjects of law, that we are in search for. It is therefore necessary, in such a process, to derive all norms within the system of international law to one of the sources of that law, as these have been created by such a ´rule of recognition` agreement by the subjects of international law[28]. Necessary, in the sense that, without the origin in one of the sources of the law, norms cannot be considered legally binding upon the subjects of international law.

In terms of which particular sources that have originally been agreed upon to form acceptable sources of legal norms, by the subjects of international law, these are generally recognised as treaties, custom recognised as law and certain general municipal standards[29].

What just have been argued might be summarized in the following way: to be able to consider a principle a principle of law, it must, first, attain a regulative character (described as the prescription of behaviour or, state of affair, in previous section) and second, be derived from a source recognised by the system of international law. These prerequisites makes the norm obligatory for the subjects of international law to abide by due to its legal authority, in contrast to other possible reasons such as, political motives, practicality or, customs.

The just referred to process might be depicted from the perspective of a subject of international law wishing to behave in accordance with the legal norms of that law. What oblige a state to act in accordance with a particular principle of law is the conviction that this principle prescribes a certain behaviour, in combination with, the conviction that the principle is stemming from one of the sources of international law. It is furthermore the latter requisite that is the decisive feature to states who are about to act in a manner contrary to the principle. If the content of the principle cannot be extracted from any of the sources recognised by the system

---

[26] The rule of recognition can be described as the proposition that a rule is validated, thus legal, through the derivation of that rule from a secondary rule, which stipulates how legal rules are founded: Dworkin page 21. The variation I refer to above is the inclusion of other norms than merely rules into that theory of law as proposed by Dworkin see page 22, 47 and 58 which makes the rule of recognition much harder to trace in practical reality within more complex systems of law such as the international

[27] See Brownlie page 3 and 4. Which norms, in this process, that have been chosen and which that have been rejected, might be explained by social theories of the international community. A community, like any other, which is supporting certain moral standards and have certain goals set for itself

[28] Dworkin page 21

[29] This is evidences by article 38 of the ICJ Statute which is normally referred to as the only formal listing of the sources of international law, see Brownlie page 5

of law then the (only) effect the state is facing, while acting, is moral rejection or political pressure[30].

According to Dworkin, the duty to perform a principle of law (in any system of law) is thus created by the principle's connection to the legal foundation of the community within which, the system of law is set to function in (in our case the international) and not from practical, political, moral or other conventions of that society. However, the connection is not as simple to find as to just point to an institutional support for the duty in question, as the rule of recognition asserts. In a complex system of law, such as the international system, the process of deriving particular norms (legal principles) to their sources has, in some instances, also to do with finding the soundest explanation to the norm in terms of political theory arguments explaining the international society's perception of moral rights[31].

2.2.2 Further considerations of principles of law

Two aspects of the definition of a principle of law, as opposed to other principles, deserve some extra attention. The first is that, as stated in previous section, moral principles and legal principles should not be seen as disparate in terms of their content and purpose. Instead, the connection between them can be emphasised, in order to make visible the origin of principles of law.

Principles of law are based on moral considerations in a stronger sense than rules and before continuing the discussion of distinguishing principles of law, this assertion perhaps requires some explanation.

Rules can be formulated either, to further individual or group rights (based in moral considerations) towards the majority or, political policies set to advance the utility of the community as an entity. However, a moral consideration cannot in itself be expressed by a rule since rules are inherently categorical and moral considerations are not. Principles of law, on the other hand, are always formulated so as to require "justice or fairness or some other dimension of morality". It is when a moral consideration expressed in a principle is recognized, by a source of the law as determined by the constitutive norms in a particular society, that they in fact turn legal. What has jus been stated is the reasoning behind the assertion that the content of a principle does not have to change in order to promote its recognition as a principle of law[32].

This reasoning is all the more important to keep in mind when considering the specific difficulties in international law in separating moral principles from legal once. It is only one of the sources of international law, which stipulates that the recognition of norms require agreements (formal or informal)[33]. Hence, there are great possibilities, within international law, for moral principles to develop into

[30] The rules of state responsibility are dependent on an internationally wrongful act in the sense that the act must constitute a breach against an international norm validated in accordance with ICJ Statute article 38
[31] Dworkin page 68
[32] Dworkin page 22, 24, 26 and 71 - 78
[33] The source of treaties, see article 38.1(a)

legal alike, through the practice of the subjects of law, without having to be linked to an agreement of some sort. The conditioning of the legal status of a norm, on the possibility to derive it from each of the accepted sources, creates the specific consequence for international law that a principle of law, just as moral considerations, might be deduced from the behaviour of states alone.

This consequence entails a measure of uncertainty, also specific for the context of international law, to our process of distinguishing principles of law from non-legal principles. The uncertainty, spoken of here, is always inherent in the process of identifying norms stemming from the source of customary law and not only apparent when dealing with principles of law. Customary law is identified by the evaluation of state actions, in the light of their respective opinio juris, in order to establish that the behaviour in question is complied with, by enough subjects of law, on the common conviction that international law oblige states to behave in this specific way. The evidences of their states of mind, opinio juris, are often the same as of state practice so; there can never be a complete certainty whether the behaviour taken into consideration is in fact not based only on moral (or other non-legal) considerations of the state[34].

The factual situation is furthermore that a great part of the substantial norms within international law still is being visible only in the customary behaviour of states. The investigation of the content, meaning, scope and effect of these norms requires, in each case, a comprehensive operation to discern[35].

With summarizing terms, when principles are originating from a coherent state of mind (or opinion) of a majority of the subjects of law, the operation of following them from moral considerations of the community to legal norms, is governed by the same criteria as the well known process of identifying customary rules. Thus, it is to this end necessary to confirm both examples of state practice, as well as, opinio juris manifesting a particular principle, in order to, establish its connection to the source of international law known as customary international law.

In this context, the attempted explanation of the constitutional prerequisite in international law (the link between the norm in question and one of the sources of international law), one last thing should be highlighted. This is the fact that the possibility of principles to be established as legal, in the manner just described (relying custom and state of opinions), does not exclude the alternative use of the source of treaties or more informal agreements (as described at footnote 33) for the establishment of the link between a source and a particular principle. Examples of the precautionary principle within such sources are being presented in section 3.5. However, since the focal point of this paper is generally binding principles, the source of agreements will not be further discussed due to the fact that an agreement binds its parties only, and not, the subjects of international law in general. However, the examples of treaties, which all contain references to the precautionary principle, will be used as evidences of state practices establishing opinions of the state parties to the respective treaty.

This brings us to the second aspect, which I consider worth extra attention. International law is a system of law that lacks certain mechanisms fundamental in other legal systems. There are, for example, neither legislative body nor separation of power between the legislator, adjudicators and the subjects of international

[34] M. N. Shaw, International Law, 5th edition, Cambridge 2006, at page 69 - 88
[35] Ibid. Also Brownlie pages 8-10

law[36]. This creates a uniquely organised system of law, which, because of its unregulated form, depends on arguments based on principles (not necessarily legal) in order to fill its frames with material content.

The lack of a legislative body furthermore gives the problem of separating principles of law from others, more than merely a theoretical aspect. Thus, when trying to make visible and extract the content of international law, it is essential to separate those principles that are directly affecting the behaviour of states – due to their legal character – and, those that are not. The utilization of the latter kind in the operation of filling out the unregulated parts of international law through argumentation of reason and logic, for example, makes this separation difficult.

Since there is no constitution or compiled set of laws, disputes often concern issues that has not, at the time of the dispute, yet been settled in custom or through treaty rules or principles. In such cases, it is often only very general principles that can settle the question of allocating the respective rights and obligations of the parties to the dispute[37]. The fact that a fundamental principle is favouring one of the rights in contradiction in the dispute, might lead to that particular right prevailing over the other, given of course, that there are no substantial norms of international law regulating the situation with more precision.

Additionally, another phenomenon can be pointed to, in order, to establish that the separation of legal principles from other principles is not just a theoretical query. This is the fact that the determination of when, or if, the development of a principle into a principle of law has in fact taken place, must often be performed by an adjudicating body of the international community as a side effect of its search for an answer to the legal question in conflict over. To this end, it has been maintained that behind all orders from an international court lies a central question of principle of law, which is allocating the rights in a certain direction[38].

The constant evaluation of principles of law is thus inherently important for understanding the governance of international relations. As has been shown in this section, the procedure of distinguishing principles of law from other principles is therefore an important procedure for practical reasons. This procedure must furthermore often be performed by adjudicating institutions, deciding a particular dispute, since disagreement about law seldom arises unless there is dispute between states.

[36] Brownlie page 3
[37] Dworkin chapter 3
[38] See dissenting opinion of judge Weeramantry in the Nuclear Tests Case, page 331

2.3 Distinguishing the differences between rules of law and principles of law

The position taken in this paper is that there exist differences between these two sets of norms in addition to their diverse denominations[39].

First, principles of law do not state the consequences following upon their applicability, in the same definitive manner as rules of law. A principle of law is constructed in such a way as to give guidance about the best way to act, in order to, promote a certain morally based interest but, does not do so in an unconditional way[40].

In comparison, a rule leaves no choice to the subjects of law. If a rule is valid, then the obligation or prohibition that the rule prescribes has to be performed[41]. A rule orders action or prohibits action for those cases where the conditions of the rule are fulfilled[42].

However, it should not be understood as though a state is less obliged – in order to behave in accordance with the law – to follow a particular principle when this is applicable. The difference should instead be understood as though the effects created by a principle are looser and more opentextured than the effects given by rules. Another way of putting this is to say that rules give decisions whereas principles give reason for decisions. Thus the main obligation might be set in a principle and the means by which the main obligation is to be reached is depicted in rules[43].

Thus, principles can state, which rules cannot, how subjects of law ought to act, not how they must act. If principles are recognised as principles of law then the subjects of the law are as bound to follow their guidance as if they were rules, in the sense that they cannot simply ignore them. However, what the principles state are still to be viewed as guidance only, and not as orders exactly stating the conditions for compliance.

This, just explained, specific feature of legal principles makes them attain, what I call, an inherent vagueness. The vagueness spoken of here, originates in the fundamental values that principles reflect, values that must be general in scope in order to be applicable in all branches of international law. The quality of vagueness is an additional prerequisite for general principles, which is independent of if they have attained the necessary features of being regulative in character and are stemming from a source of international law. Thus, the requirement of vagueness, or generality, is derived from the fact that a principle must be based in values and considerations of (originally moral) rights of the individual, conceived to be of utmost importance by the subjects of international law[44]. The assertion that

[39] Dworkin pages 24- 28 and 71 - 72
[40] Ibid. page 24
[41] Ibid.
[42] See for example the rule that forbids a host state to adjudicate actions performed by a diplomatic agent and compare with the principle of sustainability: Article 31 of the Vienna Convention on Diplomatic Relations and Principle 4 of The Rio Declaration on Environment and Development (the Rio declaration)
[43] Dworkin pages 24 -25
[44] Dworkin chapter 4

principles have a closer connection than rules, to the fundamental moral considerations of the society they are set to function in, can, in an alternative manner, be understood by the following explanation. Legal principles, in opposition to rules, should be understood, as wider reaching, and, as a ´higher-order` kind of legal norm, set to formulate the basic allocation of rights between the subjects of the law because they are intended to guide in situations where no rules are applicable or exists[45].

This distinguishing feature of the general legal principle creates not only the above stated difference to other norms but, yet another important feature for the conception of how principles of law develop. Due to their equal standing as basic rights allocators, principles of law can be weighed against each other when two or more are applicable in the same issue, rules of law cannot[46].

The difference to this end, between rules and principles, originates from the manner in which the two kinds of norms are stated, just like the above-explained difference in their legal effect.

Since rules are always stated in clear terms, giving concrete orders following upon concrete conditions, there can be exceptions to rules of law. In fact, a rule is not to be considered complete, theoretically at least, if all exceptions to it are not listed and taken into account[47]. An applicable exception can therefore hinder a rule from being applied; thus, make it invalid for a particular situation.

There can be no exceptions to a principle, in the same sense, because the principle is too indefinite in its original statement to, even theoretically, hold exceptions. Instead, there can be more than one principle of law, governing separate interests and promoting separate results, applicable on the same issue. These conflicting principles do not have connections to each other; they can very well derive from different moral considerations. Still, as touched upon just above, they present equally valid arguments in favour of a result in a certain direction. All principles of law argued around, in a particular case, must be given the same evaluation and they must all be measured against each other, in order to be able to, determine which of them is protecting the strongest right in the specific situation[48].

Thus, when considering one particular issue, more than one principle might be valid, and, to find out which one of them that is to decide the issue at hands, their distinct weighs have to be assessed.

Another way of putting this is to say that it is implicit, within a principle, that it shall be adhered to as long as it does not conflict with another principle which is deemed to weigh more.

These explained differences in effect of rules versus principles are, especially when dealing with practical issues of international law, such as, dispute settlement, important for the interpreter to keep in mind. If the conflicting norms are rules then the solution to the conflict consequently is another than if they were two legal principles. There exists no inherent hierarchy among rules (except for jus cogens), a rule simply is valid or is not. Therefore, the problem of two conflicting rules has to be resolved by finding out which of the two rules that is valid in the particular

[45] Steele. K, The precautionary principle: a new approach to public decision-making?, Law, Probability and Risk (2006) 5, 19 – 31, p.11
[46] Dworkin page 26 in fine - 27
[47] Ibid
[48] Ibid

situation at hands[49]. This issue is settled by other rules of law, rules of conflict. These determine which of the conflicting rules that is to be valid, in the particular situation at hands[50].

Principles of law can, in a way that rules cannot, compete with each other. To clarify this: the particular right one principle is governing might stand in contradiction to another moral right governed by another principle. The importance (in the specific situation) of the respective rights then has to be determined to settle which of the two principles that should have anteriority[51].

For example: the right to use the territory in such a manner a state finds appropriate can be said to be a right essentially based on the principle of state sovereignty[52]. This right might clash with the right of another state to have its territory free from external interference derived from a principle of equality of states[53]. These two principles might, during certain circumstances, stand in opposition to each other, causing a dispute between two states, since action within one state might cause effects on another. The conflict of the two principles then has to be solved by weighing the importance, in the specific situation, of the principles and furthermore finding a fair balance between the two equally valid rights. The result of the weighing will tell us which of the two states who has to tolerate to see some of its still valid right being under restraint. A procedure of weighing of principles, such as the one exemplified above, might also lead to both states in the dispute having to tolerate ´its principle` being mutilated, if the best solution is considered a compromise between the two.

In order to reconnect the reasoning about conflicting rules and principles, to the reasoning about why principles are inherently more ´vague` in what they orders than rules, a conclusion concerning the relationship between rules and principles of law is proposed. A possible explanation to the described structure of principles being vague and having different weighs contra, rules being clear and valid or not, is that rules are the outcome of the weighing of principles in conflict, in previous specific situations. That is, if we take the position that general principles are more open textured because they are meant to govern issues not before envisioned by the law-maker (which I am in this paper) then, what can come out of a repeated situation where the same two principles are in conflict, are rules clearly establishing the law on that particular matter. Following this line of thoughts, rules can be depicted as institutionalized weighing of principles.

[49] Ibid

[50] In the international context a codification of these rules might be found in the Vienna Convention on the Law of Treaties article 30

[51] Dworkin pages 24 - 28

[52] An expression of this principle right is depicted in the first sentence of Principle 2 of the Rio declaration

[53] An expression of this principle right is depicted in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

2.4 Why divide norms into rules and principles?

What is then gained by dividing norms into separate kinds?

A possible answer to this question involves referring to the inherent complexity of any legal system adopted to organise social life in whatever society or community. It is quite clear that no legal system, perhaps least of all the international, can anticipate all possible situations before they actually happens and, even less, prepare for them by rules established through the procedures proscribed by written or unwritten constitutions. As, mentioned earlier (sections 1.1 and 1.3), the need for flexibility is bigger in certain areas of international law than others. Ronald Dworkin presents an explanation to the question raised in the heading to present section, in his interpretation of a number of cases from US courts concerning individual claims of legal rights based on the American constitution[54].

The legal argumentation of principles, advocated in these cases is, according to him, caused by the fact that moral principles are enclosed in the American constitution. It is asserted here that it is possible to argue in the same direction when it comes to principles of international law. An explanation to the unsettled character which encompasses all principles of law within the international context is presenting itself through the placing of principles of law closer to the international 'constitution`, - the common moral denominators between the states of the global community – in the manner that is hopefully clarified through previous section[55].

In the examples given by Dworkin there existed no precise rules of law within the American system that regulated the allocation of the rights the individual's in these cases claimed that they had. Therefore, the findings of the national courts in these cases might be explained either, by reference to norms other than rules or, by reference to the discretion of the judges adjudicating the cases. The obvious and inconvenient consequences of an explanation in line with the latter suggestion would be that the legal system, in which the dispute appeared, is incomplete and that not all legal issues are in fact governed by the law[56]. He therefore turns to, in order to create a full body of law in these instances, reasoning based on principles of law[57].

It is argued here that whatever legal system we choose to examine, an answer in the opposing direction to the one reached by Dworkin, would be inconsistent with the requirement of foreseeability and legal security in a system of law. On the contrary, it is believed that it is only through the reliance on principles that it is possible to prevent arbitrariness and create foreseeability in a complex system of law.

Of course, the interpretation of the concept of principle, argued for in this paper, acknowledges that in unclear cases the discovering of the law is, in fact, in the

---

[54] Dworkin chapter 4

[55] See the dissenting opinion of Weeramantry in the Nuclear Tests Case, page 331. Also Dworkin, p. 22: ". . . a principle [is] a standard that is to be observed . . . because it is a requirement of justice and fairness or some other dimension of morality"

[56] Dworkin p. 29

[57] Ibid. chapter 4

hands of the interpreter. However, this is not the same thing as giving him authority to decide the case by full discretion, thus to create new law.

3 The precautionary principle

3.1 Narrowing down the scope of discussion

Before beginning the review of the evolution of the precautionary principle, set in an international context, it is in place to give the object of this review, some further considerations. In order to understand the reasoning presented in the following part of the paper – reasoning concerned with those general structures of international law that govern the origination of principles of law – a basic briefing of the actual content and context of the concept under investigation is considered necessary.

The purpose of this briefing is to give a more complete, as well as, a more concrete picture of the actual and practical effects created by the general construction of the international law. Because, even though it is, as stated in the introduction, the structures behind the development of legal principles in general that are the main concern of this paper, it is the specific context of every principle that can help explain its meaning and effects.

In section 3.2, I will try to describe the context specific for the precautionary principle. Thus, I will do this before dealing with the question of if, or how, the precautionary principle has evolved into a norm with the distinguished features described above in section 2.[58].

As stated above, the attempt to describe the substantial content of the precautionary principle is required, in order to, establish what practical effects the principle entails today (or, might come to entail in the future depending on its legal status).

It is perhaps also in place to emphasise that this briefing of the content and possible consequences of the precautionary principle is relevant regardless of the outcome of the inquiry of the concept's legal status. Thus, if it is established that the legal source of the principle is universal customary law the outlined effects of the principle are, as a direct consequence, binding upon all (in theory at least) subjects of international law[59].

However, even if this is not the case, the outlined effects of the principle, might very well, still be of interest to the interpreter of international law. The reason for this is connected to the fact that international law, with its layers of binding treaty, customary law (both regional and global) and non-binding policy documents and recommendations, is a highly dynamic system of law, in constant need of evaluation, since it constantly changes

[58] What is referred to above, as distinguished features, are the qualities in a principle, which makes it a norm possible to use as a basis of claim for binding obligations of states. Obligations conferred on states either through treaty law or general/regional customary law depending on the source of law behind the principle (See section 2.2.1)

[59] Shaw page 84

and develop[60]. Therefore, in a scenario where the precautionary principle is not deemed to be stemming from a source of generally binding law, the effects[61] of the precautionary principle, could still be important as general indicators of what direction decisions and policies should take, in order to be in conformity with the general idea of environmental concern.

3.2 Origin and rationale behind the principle

Even though the legal status of the concept of precaution still is debatable, the reasoning behind the concept is in no way a new phenomenon. As early as in the late sixties, academics and policy makers raised the issue of whether a more cautious way of handling human interference with the natural environment, ought to be introduced[62].

This discussion started following the realisation that the so called reactive approach[63] to environmental harm, which up till then had been the most commonly employed tool for handling environmental risks in almost all fields of environmental law, had in fact led to serious harm to nature in a number of cases[64].

The change in attitude towards threats to the environment was perhaps inevitable, since the appearance of a foresight based approach, to human activity which carries with it possible adverse effects on the natural environment, can also be viewed as a natural response to the discovery (in that same era) of the inherent complexity of most environmental damage. To this end, it was around then realised that we have to, when assessing how to mitigate environmental harm, contemplate the fact that environmental harm often never can be geographically limited[65].

The example of pollution caused by emissions in one country, which travels with the air and ends up damaging the territory of another country through acid rains, demonstrates the interconnection between states in this field of international law. It also shows the difficulty of creating satisfying and effective regulations, without the reliance on co-operation, within the global community. This difficulty becomes even more obvious when contemplating that it is very hard to calculate, estimate and, by scientific evidences, at all prove damage on the environment because of the, often occurring, time lag between the actual activity and the resulting damage. An explanation to this delay in when the damage is in fact visible is the buffering capacity of certain environmental components, as well as, the fact

[60] Birnie and Boyle, International Law and the Environment, 2nd edition, Oxford, 2002, page 10

[61] This is notwithstanding the fact that they already directly binds subjects of the world community through bilateral and regional conventional agreements, as is obvious from sections 3.3 and 3.5, for examples

[62] Trouwborst page 11 referring to Sir Robert Jennings

[63] A reaction from the world community was to be expected when calculations made on available science suggested it

[64] Trouwborst, page 8 and examples on page 9 - 10

[65] Trouwborts, page 9

that environmental problems more often than not, are the effects of a combination of different decisions and activities[66].

With the words of Arie Trouwborst[67] who have compiled most of the writings and views on the precautionary principle up to 2002:

> It will be apparent that these features of environmental problems [the spatial and temporal dimensions] – especially since they frequently interact – often hamper, if not render impossible, the accurate determination of whether, when, where and to what extent the environment will be adversely affected by a given activity.[68]

In order to make the attempted explanation of the reasons behind the origination of the concept of precaution, as holistic as possible, another discussion should be enlightened. This is the growth of the ecocentric arguments of the need for a systematical protection of the environment. We find such a view in some of the formulations of the concept in documents, which harbour the principle, such as, for example, the *Rio Declaration Principle 15*:

> 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.*[69]

This attitude, which emphasises the need to protect the environment because the environment is a valuable entity in itself – as is visible in the above-cited document – has attracted the support of many environmentalist organisations such as the World Wildlife Fund (WWF), Friends of the Earth (FOE) and Greenpeace[70].

The conclusion must therefore be that the principle has not solely developed through inter-governmental discussions, where state representatives have been acting in self-interest, for the preservation of their respective territory and resources, but, also through the work of non governmental organisations (NGO`s), advocating the interests of the environment in itself.

In order to summarise the different sources, from which the evolution of the concept of precaution within international law is stemming, the following condensed version of what has been stated above might help.

It has been a political and public awakening (perhaps more correctly described the other way around), concerning the fragility of the earth and its

---

[66] Trouwborst page 9
[67] Utrecht University School of Law Netherlands Institute for the Law of the Sea
[68] Trouwborst, page 10, footnote omitted
[69] 1992 Declaration of the UN Conference on Environment and Development, emphasise added
[70] Trouwborst, page 12

ecosystems, of which human life is utterly dependent, that has prepared the way for the formulation of a new management technique. This new approach to the management of the environment require us to set new standards for how to deal with conservation and exploitation of natural resources, pollution issues etc. It developed to guide politicians in their policy and decision-makings, as well as, the managers and owners of actual plants and industries with the common denominator that their respective activities pose possible threats of harm to the natural environment.

For the sake of repetition, what has been abandoned as the general approach to the handling of issues of environmental risks, is the obligation of taking abatement actions only when there is available scientific evidences establishing certainty of the damage caused by a particular activity. Furthermore, these actions had to be undertaken no further than that degree where the resource, species or environmental recipients in danger, had the possibility to assimilate to the new, scarcer, conditions and grow enough to be able to cope with further exploitation[71].

The precautionary thinking became a response to the effects of that approach and, came to stand for the position that science does not possess all the qualities needed for predicting what has to be predicted, in order to use this assimilative capacity technique correctly. As final words, trying to describe the core of the rationale behind this ´new` cautious attitude towards the vulnerability of the environment and the capacity to make scientific predictions of the future, I find a citation of Sir Geoffrey Palmer suitable:

> If we are not careful we will be doing scientific research which amounts to a post mortem of our planet. Why did it die? If it does die, I can tell you why now. It will be because the human race killed it. Certainty will not be attainable until it is too late.[72]

3.3 Legal history of the precautionary principle

As stated above, the spirit of the principle of precaution, being as it is, a general concept of concern for future risks and threats, is nothing new in itself in environmental regulation[73].

Indirect references to a cautious attitude towards environmental risks have been deployed for a long time, in many different domestic legislations,

[71] This is called the theory of assimilative capacity approach or permissive approach – activities are allowed within and up to the capacity of the ecosystem in question which require the correct prediction of this capacity, as described by McIntyre & Mosedale in their article "The Precautionary Principle as a Norm of Customary International Law" in 9 JEL, 1997, pp. 221-241 as well as by E. J. Molenaar, Coastal State Jurisdiction over Vessel-Source Pollution, Dordrecht 1998, both sources cited by Trouwborst on page 18

[72] G. Palmer, Environment: The International Challenge, Wellington 1995, p. 5. Cited by Trouwborst on page 14

[73] Previous section, third part

as well as, international conventions. Sectors concerned have been endangered animal species, forest management and air pollution, to name a few. These early tendencies of a more cautious attitude towards the capability of the environment in general are visible in many treaties regulating specific sectors of international environmental management or protection. They are detectable in, for example, treaties regulating the obligation of conservation of different living and non-living natural resources, treaties reversing the onus of proof of harm for certain kinds of activity, treaties requiring mandatory environmental impact assessments prior to certain types of activities and strict prohibitions of catches in certain areas or of certain species[74].

The first explicit mentioning of a precautionary approach was in a domestic legislation of the Federal Republic of Germany in 1976. It was included in a legal commandment, as a guiding principle to administrators in their dealings with polluters[75].

It seems to be a fairly recognised view that it is the German development of its administrative and environmental law, in combination with, its advocating of the inclusion of the principle in a declaration on protection of the North Sea that helped instigating the international acceptance of the Principle[76].

Thus, the introduction of some or all of the features of the principle (which I will turn to describe below) – albeit, without explicit reference to the term precautionary principle – as a response to environmental management problems, happened more or less simultaneously in different sections of international environmental law, as soon as, the inefficiency of the traditional assimilative model became apparent. The growing awareness of the vulnerability of the natural environment (see previous section) led to discussions, of the need of new regulation techniques, in areas as disparate as, on one hand, substantial environmental protection laws and, on the other hand, the norms concerning the enforcement of international law in general, i.e. the procedural rules of the law of state responsibility. The precautionary principle was in the last case a response to the growing dissatisfaction of the possibilities to claim state responsibility for having to put up with the exposure of risk of serious harm[77].

Then, in the late eighties and early nineties, a change in the way the global community perceived the notion of precaution, started to emerge. The precautionary principle was, for the first time, formulated as a conceptual solution to the issue of management of a geographical area in its entirety. The founders of the 1987 *Declaration of the Second International Conference on the Protection of the North Sea* explicitly referred to it as a general guiding policy[78].

In the Preamble to the declaration, it was thus stated:

---

[74] Trouwborst page 16, an early example of implicit precaution is the Indian Forestry Act of 1927

[75] Trouwborst page 17.

[76] Trouwborst page 17 and 24 where he refers to Haigh, Freestone & Hey and Lambers

[77] See Dissenting Opinion of Judge Weeramantry in Nuclear Tests Case ICJ Reports 1995, p. 348, Also Trouwborst page 19 footnote 85

[78] This view is held by at least Freestone & Hey, Kiss & Shelton, Cameron and Wade-Gery and Abouchar and Trouwborst all referred to by the Trouwborst on page 24 Footnote 124

> in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.[79]

This was furthermore restated in one of the operative provisions with the heading "the principle of precautionary action"[80].

In the years following this declaration, the principle was utilised as a governing principle of conduct, in a growing number of international – non-binding as well as binding – documents, mainly though in the area of prevention of contamination of the seas[81]. These tendencies culminated in the inclusion of the principle for the first time in a global instrument in 1991.

Through *Resolution LDC 44/14 on the Application of the Precautionary Approach to Environmental Protection within the Framework of the London Dumping Convention* of 1991, the precautionary principle was made mandatory to observe for the parties to the 1972 *London Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*. The first inclusion of an explicit reference to the precautionary approach (or principle) furthermore led other organs and international forums, of different fields of international law, to consider the concept. Thus, in the years following this first explicit mentioning of the principle within an instrument, which was regulating one particular environmental issue and having almost global support, the principle was included in other conventions and documents concerning the protection of other segments of international environmental law, which also attained a widespread participation from the states in the international community.

In 1992, it was included for the first time in instruments, which were both global and concerned with the protection of the environment in general[82]. The inclusion of the principle in the work of the UN-administered, inter-governmental and global conference of environment and development that took place in Rio de Janeiro in 1992 was the result of the accumulated tendencies of change in attitudes towards the environment, which I have tried to depict previously in this section. When the conference was held, the principle had been referred to, through explicit references, in management regulations in different areas of international environmental law (notwithstanding the earlier mentioned regulations of sea protection) ranging from, the protection of the ozone layer and management of

[79] Paragraph VII
[80] Trouwborst page 25
[81] For a more exhaustive listing of these different documents containing the early references to the precautionary principle in policy statements, other soft law documents concerning the seas and regional conventions of the seas see Trouwborst page 25-27
[82] See the Rio Declaration Principle 15, Climate Change Convention, the Convention on Biological Diversity. Also, Trouwborst page 27

hazardous wastes to, the protection and use of transboundary watercourses[83].

Furthermore, at this time the principle had also started to emerge as a principle governing the protection of the environment in general. This pattern is evidenced by the acceptance of the principle by international organisations such as the OECD[84] in its *Recommendation C(90)* in 1990, by the inclusion of the principle in the *Ministerial Declaration on Sustainable Development* in the ECE region in 1990, and in a similar ministerial declaration by the states of the ESCAP region in the same year[85].

Finally, the principle was included as a guiding principle for policy development in article 174 (2) of the 1992 *Maastricht Treaty*.

Even if these early explicit references to the precautionary principle, within instruments addressing environmental protection in general, is considered important for the overall evaluation of the status of the precautionary principle, most writers agree that it was the inclusion of the concept in the instruments concluded at the UN *Conference of Environment and Development in 1992* that was the true and final breakthrough for the principle in international law[86].

The principle was included in four of the five instruments of the conference. These, respectively affect the vast majority of states in the world because all participants to the conference signed the conventions and the conference attracted almost global participation. Moreover, they all have a general scope since they are either, regulating particular areas of concern in a general manner, such as, the *Convention of Biological Diversity* and the *Climate Change Convention*, or, the environment in general, such as, the *Rio Declaration* and the *Agenda 21*[87].

Apart from the endorsement of the principle in global documents, such as the ones concluded under the auspices of the UNCED Conference referred to above, the principle was furthermore rapidly employed in subsequent regional conventions concerning the environment in general, as well as, in sector-by-sector regulations of different problem areas of the global environment. Through this evolution, in the years following the UNCED Conference, the legal spheres of; air pollution, energy, forests, fisheries, cetaceans, trade in endangered species, migratory birds, genetically modified organisms (GMO`s), persistent organic pollutants (POP`s), and, of

---

[83] See 1990 amendments to 1987 Montreal Protocol of the 1985 Vienna Convention of the protection of the Ozone Layer; UNEP's Governing Council's 1990 Decision SS II/4 on a Comprehensive Approach to Hazardous Waste and the *Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa* of 1991, Article 3(f); *Helsinki Watercourses Convention on Protection and Use of Transboundary Watercourses and International Lakes*

[84] Organisation for Economic Co-operation and Development

[85] ECE stands for the United Nations Economic Commission for Europe and the ESCAP stands for the United Nations Economic and Social Commission for Asia and the Pacific

[86] Trouwborst page 28 referring to Cameron, 1994 pp. 267 and 279; Birnie and Boyle page 116

[87] See Principle 15 of the *Declaration on Environment and Development* (Rio declaration), Article 3(3) of the *Climate Change Convention*, Paragraph 9 of the Preamble to the *Convention on Biological Diversity* and in paragraphs 17.1, 17.5, 17.21, 17.22, 19.60, 20.32 and 22.5 of the action programme of the conference: *Agenda 21*

course, the area of marine pollution (where it had all started), continued to develop in accordance with the concept of precaution[88]. Thus, by 1996, it was being stated that, "the precautionary concept has been included in virtually every recent treaty and policy document related to the protection and preservation of the environment"[89].

To sum things up, what started as a conceptual development within separate sectors of environmental issues, which were more or less independent of each other, grew, through a regional phase where the concept started to be utilised as a general policy covering all activities in the regions, into a global trend of how to manage the environment in general.

Perhaps it is redundant, however, as a concluding remark to this section, I would still like to emphasise that the purpose of this brief review of the legal history of the precautionary principle within international law, is only to clarify to the reader that this development has been a rapid, and, in all aspects, overwhelming one. The entrance of the principle as such on the international arena occurred in the late 80s and already by 1996, learned writers stated what has been quoted above[90].

Finally, a few words will be given on the development of the principle in the time span following upon the UNCED conference up til today, in areas other than the purely international environmental context discussed above. As shown by Trouwborst in his general review of the status of the principle, the concept is referred to, through "express precautionary language", in much post-UNCED national legislation concerning the environment[91]. In the same manner, the precautionary concept has spilled over to the area of international regulations of human health issues[92].

3.4 Lack of definition

The inherent problematic issue of the concept under discussion in this paper, is the lack of agreement on how to define and understand the actual and material content of the precautionary principle. This matter needs to be addressed since it might have significance to the outcome of the question of legal status of the precautionary principle. There are in fact writers who

[88] see Trouwborst at p. 29 footnotes 162 – 177 for names and references to the different conventions and their articles

[89] This was stated by Freestone & Hey in: Origins and Development of the Precautionary Principle, Freestone, D. & Hey, E. (eds.), The precautionary principle and International Law, the Hague 1996, p 3, cited in Trouwborst at p. 30

[90] See last references in footnote 85

[91] Trouwborst page 30

[92] See for example United Nations Division on Sustainable Developmen, Agenda 21 Chapter 6 Article 1 Protecting and Promoting Human Health: "Particularly relevant is the inclusion of prevention programmes rather than relying solely on remediation and treatment."
http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter6.htm

argue that the question of the principle's legal status is dependent upon the principle being coherently defined[93].
However, the importance of the matter can also stem from – leaving the question of legal status aside – the fact that the vagueness of the concept is an important feature to keep in mind when investigating whether the concept is, in fact, a principle or a rule of law[94].

That there is a lack of a uniform definition of the precautionary principle does not mean that there are no suggestions of possible content of the principle (these will be dealt with below in the next section). However, it has, as of yet, not been precisely, or, coherently elaborated in one global instrument, exactly which duties that are conferred upon states by the precautionary principle in international law. Simply stated, the concept of a precautionary attitude towards environmental degradation has been expressed differently in many instruments with global scope[95].

Returning now, to what was referred to above, about the uncertainty of the principle's legal status and the claimed connection between this issue and the fact that the concept lacks a uniform definition. It is probably fair to say that the lack of one common way of interpreting the principle is, not only a valid argument, but also, indeed one of the strongest arguments in favour of a negative answer to the question of legal status of the concept. This being an issue that I will deal more closely with, in the analysis of this paper[96], it is sufficient here to mention the problem, in order to cast some light upon it. Birnie and Boyle stated in 1992, that:

> Despite its attractions, the great variety of interpretations given to the precautionary principle, and the novel and far-reaching effects of some of its applications suggest that it is not yet a principle of international law. Difficult questions concerning the point in time at which it becomes applicable to any given activity remain unanswered and seriously undermine its normative character and practical utility, although support for it does indicate a policy of greater prudence on the part of those states willing to accept it.[97]

Visible in the quote above is the fact that those international instruments and national legislations, which actually refers to an explicit or implicit precautionary principle, uses different definitions, or, simply leaves out the inclusion of a definition to the concept.

Considering this fact, it seams rather clear, that if the principle is to function as something more than a general guiding line to the subjects of

---

[93] See Birnie, P. & Boyle, A., International Law and the Environment, Oxford 2002, page 85, 96 and 119
[94] See section 2.3
[95] Section 3.5 in general
[96] Chapter 5, see specifically section 5.2.1
[97] Trouwborst page 51where he gives this quote from Birnie and Boyle

international law, it has to be drafted more thoroughly. For instance, in order to be applicable in a situation of claim of state responsibility, the actual obligations the principle confers upon states, must be more distinct and unambiguous than they are today[98]. Thus, if a goal within the international community is set to this – to make the law of state responsibility compatible with the precautionary principle – then many undefined components within the concept stands to be dealt with.

One of the particular issues, which have not yet been clearly established in any global instrument, is if there is and, supposing that there is, at what level the threshold of likeliness and gravity of harm lies. In short, how likely must it be for harm to occur and how grave harm must be at stake, for the principle to be applicable?

The issue of defining exactly which practical measures, in terms of management techniques, that are mandatory through the principle, is another of these queries still needed to be approached by either a convention or a conference enduring a global commitment[99].

Yet another example is the question of, whether or not, socio-economic considerations should play part in how to apply the principle. That is, the question of whether the precautionary principle should have different thresholds of application depending on the level of social and economical development of states[100].

In order to connect this discussion – the discussion of which features in the principle that are still undefined in a coherent manner – to the other discussion introduced in this section, of what this vagueness entails for the determination of the legal status of the principle, a last aspect will be addressed.

The fact that the principle is included into a rather large number of international treaties[101], thus, is in fact binding upon those states that are parties to respective treaty, does not alter the fact that the principle suffer from unsatisfying definition. However, it can provide us with a link between an inapplicable and applicable, general concept of precaution. As stated above, and as I will return to below, the lack of a clear definition might, or, might not, be an obstacle for the principle to be accepted as universal customary law[102]. It is in the scenario of the views of Birnie and Boyle prevailing, that the link is useful. In such a situation, some of the concept's vagueness ought to be able to adjust through the reliance on the definitions in the most commonly deployed treaty-formulations.

[98] See ILC Draft on the Law of state responsibility article 2 (b)
[99] See section 3.3 for examples of measures that are being employed by different instruments
[100] Trouwborst at p. 286
[101] See above section 3.3
[102] See above in footnote 92 referring to the views of Birnie and Boyle. Also discussion in section 5.2.1

3.5 Possible content of the principle

In order to clarify the possible practical effects on state activities a, in all circumstances, binding precautionary principle would have, some of the effects found in existing instruments of international law reviewed in this section.

As mentioned above[103], there is a variety of precautionary measures, respectively employed by numerous international instruments (binding as well as non-binding). The idea is that a review of some of these instruments, in the order they were created, will function as a basis for the comparison of instruments, in order to, determine where the precautionary principle stands, in terms of legal status as well as containment, in international law today. I will furthermore use the conclusions of this comparison when trying to expose a pattern, which the development of principles, from non-binding into legally binding norms of general applicability, follows[104].

3.5.1 The earliest international instruments

The 1972 *Convention of Marine Pollution by Dumping from Ships and Aircraft* (Oslo Convention) banned certain materials from being dumped into the sea and stated that there should be a restrictive approach against marine disposal[105].

The Convention itself can, in a sense, therefore be regarded as a precautionary response to the fear of finding the marine environment in great parts of the North Sea destroyed. The measures employed, such as, complete bans or restrictions in discharge permissions before scientific knowledge about the causal effect between the prohibited substances and the fear had been established, were, as a matter of fact, precautionary. In addition to this, the inclusion of an explicit reference to a precautionary approach against marine pollution makes this convention one of the earliest instruments in international law incorporating the idea of a cautious attitude towards human interference with nature.

The starting point to the creation of the Oslo convention was the realisation, by the affected states, that continuing unregulated dumping in the area would lead to disastrous consequences, if not some form of co-operation was instituted[106].

Further down, the OSPAR convention, which replaced the OSLO convention in 1992, and, which contains an even more pronounced version of the precautionary principle will be discussed.

Another early use of a generally outlined theory of precautionary thinking was the 1979 *Convention on Long-Range Transboundary Air Pollution*

---

[103] See sections 3.3 and 3.4

[104] For both examinations see Chapter 5

[105] C. Van der Burgt, Dealing with contaminated dredged materials with reference to the Oslo convention 1972 and the New Paris convention 1992, http://cat.inist.fr/?aModele=afficheN&cpsidt=3536607)

[106] Joint Nature Conservation Committee, http://www.jncc.gov.uk/page-1370

(Lortrap). This instrument, just as the one discussed above, can be seen as the recognition of a prevailing precautionary attitude towards environmental risks in a certain area of international regulation. It was also in this case the question of recognition of the need for interstate co-operation, in order to mitigate the problem a hands, which triggered the convention[107] .

The Lortrap convention does not explicitly requests precautionary action from the parties but, still is an instrument of interest to this review, at least if we look at the convention in itself as a response to uncertainties surrounding the effects of air pollution[108]. Therefore, where the convention is requiring co-operation among state parties, this could be seen as a consequence of applying a precautionary thinking to the problem at hands.

Even if the *United Nations Convention on the Law of the Sea* (UNCLOS) does not make use of the specific terminology of the precautionary principle, when discussing state responsibility for protecting the marine environment, it is nevertheless important to mention that convention here. Considering the fact that the UNCLOS was created before the breakthrough of the precautionary principle in the international arena, the authors of the convention were rather anticipative towards future changes of international law, when they formulated the articles governing protection of the marine environment. Anticipative in the sense that, in Section 5 of Part XII of the convention, it stands clear that most of the substantial duties conferred upon states, concerning environmental issues, entails an obligation to take into account internationally agreed rules. This kind of formulation of the substantial duty is used both when it comes to law making and law enforcement[109].

In practical terms this means that the precautionary principle can be incorporated within the provisions of UNCLOS if, and to the extent, that the concept has been used in such international agreements that the convention is referring to. An example of such a course of events is the *1972 London Dumping Convention*, in its revised shape in the 1992 protocol. The London convention is by most commentators thought to be one of those international agreements that UNCLOS incorporates[110].

In the same year as the UNCLOS was created, the General Assembly of the United Nations adopted Resolution 37/7: *The World Charter for Nature*. This document is of utmost importance in an inquiry such as this, since GA resolutions belong to the group of international documents (along with ILC Drafts, law-creating treaties and the conclusions of major conferences) that

[107] Birnie and Boyle page 505

[108] See preamble paragraph 6, 7 and 8 that reads respectively: "Recognizing the *existence of possible adverse effects*, in the short and long term, of air pollution including transboundary air pollution"; "Concerned that *a rise* in the level of *emissions* of air pollutants within the region as forecast *may increase such adverse effects"*; "Recognizing the *need to study the implications* of the long-range transport of air pollutants and the need to seek solutions for the problems identified". Emphasis added

[109] See for example articles 207, 208, 213 and 214

[110] See UNLOS article 210.6; Birnie and Boyle page 351, last section. Another example is the so-called 1995 Straddling Fish Stocks Agreement, created in order to develop the regulation of conservation and management of certain types of fish stocks within the UNCLOS. This convention is commented further upon below in section 3.5.3

can be seen as – given the right circumstances – directly evidential of customary law[111].

The impact of this particular GA resolution on international law is by, at least, Birnie and Boyle, estimated as enormous. They perceive that the charter is stated to have ”pretensions to laying down the law”, i.e. to be declaratory of customary law[112].

Trouwborsts considers the charter to depict the essence of the precautionary principle in its principle 11, though without explicit mentioning of the term precaution.

> The provision speaks of *potential* impacts – all gradations of possibility pass in review – and therefore of uncertainty, of threats, and of the course of action to be taken in the various situations described. The measures most typically associated with the precautionary principle are presented in the text: BAT, EIA, the reversed burden of proof and the moratorium.[113].

The contracting parties to the above mentioned Oslo convention met in the first International North Sea Conference in 1984 in Bremen, Germany[114]. In the conclusions of that conference it was stated that the risk of irreversible damage made it necessary for states to sometimes act, before evidence clearly could establish the damage. This has been seen, at least by some commentators, as the first explicit reference to a precautionary principle in international law[115].

The second conference on the same subject took place in 1987 and elaborated the concept one step further by including the precautionary principle among the substantial provisions of its ministerial declaration[116]. Section 7 in the declaration reads:

> Accepting that, in order to protect the North Sea from possible damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.

---

[111] (Trouwborst page 150, see also Shaw, 1997, at page 75 ”the essential difference between law-making treaties and traité-contracts lies in the fact that the latter, being agreements between relatively few parties, can only create particular obligations between the signatories, whereas the former, being multipartite; may create law *per se*.”

[112] Birnie and Boyle, 1992, page 430

[113] Trouwborst page 151, Footnotes omitted

[114] Belgium, Denmark, the European Community, Finland, France, Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland. The OSPAR commission web page, http://www.ospar.org/eng/html/welcome.html

[115] Others mean that it was in the declaration of the second conference the principle for the first time was used explicitly in an international context, see Trouwborst page 24

[116] The declaration itself is a soft-law document, that is, a guide line document for states to adhere to, but, not legally binding in the sense that it constitutes a breach of international law not to follow the requests of the declaration

> (The participants) accept the principle of safeguarding the marine ecosystem of the North Sea by reducing pollution emissions of substances that are persistent, toxic and liable to bioaccumulate at source, by the use of best available technology and other appropriate measures. This applies especially when there is reason to assume that certain damage or harmful effects on the living resources of the sea are likely to be caused by such substances, even when there is no scientific evidence to prove the causal link between emissions and effects (´the principle of precautionary measures`)[117].

With reference to this field of international law (where these two ministerial declarations had been followed by other similar statements concerning the protection of the marine environment), the Secretary General of the United Nations in 1990 reported that the principle of precaution had been "endorsed by virtually all recent international forums"[118].

In the Preamble to the 1985 *Vienna Convention for the Protection of the Ozone Layer* (VCPOL) precautionary measures as such, are acknowledged[119].

In the operative part, the focus is more on an obligation to co-operate, in the process of finding scientific evidences of the relationship between substances or activities and damage to the environment, than to act in a precautionary manner[120].

The use of the word precaution in the preamble only, as an incitement for co-operation, can be explained by the need to compromise between parties with different agendas to reach a functioning agreement. This is also the reason behind the decision to make the convention a framework convention only, dependent on protocols for the introduction of substantial duties of states. The lack, at the time, of clear scientific evidences of the industrial society's effects on the ozone layer made some states reluctant to agree upon firm commitments that could result in slowing down their economical development. What was agreed upon therefore was only that the obvious problem of ozone depletion needed to be approached on a global level, through co-operation, rather than on a regional level. It was also apparent for the first time that some sort of joint action had to be taken, due to the wish of the negotiating parties, to prevent greater harm[121].

---

[117] Web page of Miljöstyrelsen, Miljöministeriet Denmark, http://www2.mst.dk/common/Udgivramme/Frame.asp?http://www2.mst.dk/udgiv/Publications/1999/87-7909-203-9/html/bil01_eng.htm

[118] UN Secretary General, Report on the Law of the Sea, 19 November 1990, 20, in paragraph 6, UN Doc. A/45/721. In 1988, a declaration by the parties to the 1974 *Convention on the Protection of the Marine Environment of the Baltic Sea Area* stated the principle. 1989 the principle was introduced through the work of the respective commissions to the above mentioned Oslo convention and 1*974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources* (OSCOM and PARCOM) to the hole area of North-East Atlantic, after considering UNEP recommendations in May the same year. Lastly, it was reiterated and re-emphasised by the 1990 Declaration of the Third International Conference on the Protection of the North Sea

[119] See Preamble paragraph 5

[120] See articles 3 and 4

[121] Birnie and Boyle page 504

It is my hope that it is clear to the reader, after the present review of early instruments, that the problem of finding, to all parties, acceptable conditions in the just discussed convention is a rather typical problem in the context of abating uncertain global environmental degradation through obligatory regulation. However, with the 1987 Montreal protocol to the convention in question, firm emission reduction targets, in fact, were introduced, though differentiating between the obligations of the developed and the developing countries. In the preamble to the protocol, a precautionary approach is referred to both explicitly, as well as, indirectly, as one of the incitements for the negotiations prevailing the protocol[122].

Parties to the Espoo convention must institute Environmental Impact Assessments (EIA`s) before giving permission to activities on the annexed list. The obligation to perform investigations, concerning the consequences on the environment, prior to projects, stems from the preamble where it is stated that the parties are:

> mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context,[123]

3.5.2 Instruments concluded 1992 during the Rio Conference

3.5.2.1 The background of the UNCED

The background to the meeting of state representatives of a vast majority of the states in the world community (as well as NGO representatives and lobbyists), in Rio de Janeiro, Brazil, in 1992, can be traced back as far as to the claims, in the 1960s, by decolonised states for a change in international economic relations. These claims were inherently affecting environmental issues in the sense that the newly independent states wanted to consider their natural resources as economical sovereign interests integrated in the concept of self-determination[124].

This view subsequently gained the support of the General Assembly of the United Nations, which began to treat sovereignty over natural resources as an economical aspect of the principle of self-determination[125].

However, these tendencies had no direct connected to the UN work on environmental protection, which, for example, gave rise to the *United Nations Conference on the Human Environment* held in Stockholm 1972.

---

[122] *Montreal Protocol on Substances that Deplete the Ozone Layer*, 7th edition, Preamble paragraphs 2 and 3 with indirect references and paragraph 6 with explicit mentioning of the need for precautionary measures to be taken

[123] *Convention on Environmental Impact Assessment in a Transboundary Context*, Espoo 1991 article 2 and 3 and Preamble paragraph 4)

[124] Birnie and Boyle page 40

[125] UNGA *Res. 1803 on Permanent Sovereignty over Natural Resources* (XVII) (1962)

On the contrary, the breakthrough of the idea that the two aspects were in fact connected, that economical development must incorporate environmental protection came as, late as, 1987[126].

Birnie and Boyle claims that

> it was not until the World Commission on Environment and Development (WCED) published a report (the ´Brundtland Report`) calling for a new approach, articulated as ´sustainable development`, that a turning point leading to the convening of the UNCED was reached.[127]

The authors of the Brundtland report urged the UN to create a Programme of Action on Sustainable Development, and, to host a conference with the aim to review implementation of this programme[128].

A conference was indeed initiated by the UN. However, due to major discrepancies between the negotiating states, the result of the conference did not reflect the original goal of the preparatory commission of the UN. Their goal had been to create an Earth Charter, defining the principles of conduct for environmental protection and sustainable development, an action programme for the implementation of these principle and three to four global conventions on the topics climate change, biological diversity, forestry and finally land-based pollution[129].

The evidenced difficulties of the conference to reach consensus on virtually all matters were, to a very considerable degree, connected to the clash between the ideas of economical development contra preservation of the natural environment. Even though it stood clear that the global threats to the environment needed to be combated in a global manner, those states fighting for and promoting their right to economical development did not want to be hampered by expensive obligations on environmental protection against dangers which, they did not feel they had the same responsibility in causing, as other states[130].

The outcomes of the conference were instead two global framework conventions, a non-binding *Declaration on environment and Development* and, in connection to the declaration, a programme of action called the *Agenda 21*.

3.5.2.2 The Rio Declaration of Environment and Development

Twenty-seven principles on matters, all some how touching upon and connected to the concept of sustainable development, was negotiated and agreed upon in Rio 1992. This has been said to be “at present the most

[126] Birnie and Boyle page 41
[127] Ibid, footnote omitted
[128] Ibid.
[129] Ibid)
[130] Ibid at page 42

significant universally endorsed statement of general rights and obligations of states affecting the environment."[131]

One way of understanding the meaning of the *Rio declaration* is to view it from a larger perspective than a ´preservation of the resources`-perspective. This other perspective makes it an attempt of unifying international environmental law into global sustainable developmental law.

If the standing point is taken that the concept of sustainable development means, and intends to create, a compromise between total protection of the environment and economical growth is necessary, then the principles within the *Rio declaration* can be viewed as the methods for how to distribute these compromises between different sections of the concept of state sovereignty[132].

The claim that the principles of the declaration affects the comprehensive picture of the concept of state sovereignty (in the sense that the declaration puts restrains on the freedom of states to do what they wishes) derives from the fact that many of the components of the concept of sustainable development, regulates state behaviour, not only in their external but also internal affairs. Directions are given, for example, on how to handle issues such as public participation, liability and compensation for pollution and who should bear the costs for pollution within a country[133]. This view helps explaining the fact that within this soft-law document, such as the Rio declaration, we find restatements of customary law next to principles that merely states the ideal development of policies[134].

Thus, all principles included in the instrument, promotes sustainable development as an over all concept in environmental regulation. Some of them happened to be firmly rooted in universal customary law, at the time of the conference, others had evolved to customary law within regions only, and, some had not at all gained the necessary support in state practice to be treated as customary law. They were all included within the declaration of principles because of their features as constituent elements of the concept of sustainable development. We find the next example of an expression of the precautionary principle (in the text of the declaration called approach) in this context[135].

Principle 15 states that when states faces a risk of (at least) serious environmental damage, they have to take some form of action, in order to prevent environmental degradation from occurring, even if there is no link established trough science between what is thought to be the cause of the future damage and the actual risk of damage. The obligation to act is meant to apply on all state activity; also domestic activities[136].

Birnie and Boyle view the precautionary principle in the Rio declaration as a component of the concept of sustainable utilization of natural resources,

---

[131] Birnie and Boyle page 82

[132] Birnie and Boyle emphasises this compromise-interpretation of sustainable development and rejects the view that sustainable development can mean zero growth, see page 44

[133] As visible in the Rio Declaration principles: 2, 3, 4, 8, 10, 11, 13, 15, 16, 17, 18, 19, 22, 24 the obligations conferred on states are in a majority of the cases intruding on the sphere of self-determination

[134] Birnie and Boyle page 82

[135] See quote of principle 15 above in chapter 3 section 3.2

[136] See *Rio declaration* principle 15

which, in turn, constitutes an element of the concept of sustainable development[137]. To this end, they consider the precautionary principle, as a possible means for turning the customary regulation on co-operation and sustainable use of natural resources more stringent and globally covering, something they obviously consider not have been achieved up until the Rio conference. They therefore place Principle 8 together with 15 in the sphere of soft law statements[138].

However, it is also possible to consider the precautionary principle, as it is formulated in Principle 15, as a component of another norm within the Rio declaration, namely the principle of obligation not to cause damage to areas outside the state's jurisdiction, enclosed in Principle 2.

Birnie and Boyle acknowledge this interpretation of the precautionary principle too. Considering their lengthy argumentation about the precautionary principle in this context, it is reasonable to conclude that it is within this subject matter they estimate the possible impact of the concept to be the greatest[139].

Principle 2 states:

> *States have*, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and *the responsibility to ensure that activities* within their jurisdiction or control *do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.[140].

According to, among others Birnie and Boyle, developmental tendencies in customary law have led to the inclusion, in some form at least, of considerations of caution into the assessment of, at what level a state has crossed the limit of diligent control, obligated by principle 2, for ensuring no harm to the environment of others and areas outside jurisdiction[141].

The connection between the expected behaviour of a state, in accordance with the principle of no harm, and the precautionary principle becomes obvious when considering the fact that the latter principle could, potentially, be used as a decisive factor in determining at what level of risk, the obligation to take action kicks in. With the words of Birnie and Boyle: "This is a question [at what point the obligation of diligent control arises] which can only be answered by reference to the forseeability or likelihood of harm and its potential gravity."[142]

---

[137] See principle 8
[138] See Birnie and Boyle page 88
[139] See section 4.2.e of chapter 3
[140] The Rio declaration, Principle 2. Emphasis added
[141] Birnie and Boyle page 115. see also Brownlie at page 276 and 283 in fine where he couples the principles of state responsibility to the principle of precaution through the principle of not causing harm)
[142] Birnie and Boyle, page 115: in the discussion on the fact that the precautionary principle at its core is concerned with the question of forseeability. Also Trouwborst Chapter 2 in general

What Birnie and Boyle appears to refer to, in this quote, is that the precautionary principle could be viewed as a development of the already established principle of no harm, giving states an obligation to act earlier than when risk of damage is deemed likely to occur[143].

From this standpoint, the precautionary principle becomes applicable, in the obligation not to cause harm to the environment, in two senses. First, as the means of lowering the threshold of likeliness of damage[144] and second, it becomes applicable, as the means to establish when such an objective risk actually is at hands[145].

In other words, the precautionary principle could answer the question of what states have to do actively, in terms of investigate potential risks and promote forseeability, in order to fulfil the requirement of due diligence within the no harm principle[146].

As final remark in this matter, it is pointed to the fact that when the precautionary principle, in the version it holds in the Rio declaration, is discussed in the context of the no-harm principle, it necessarily has to be coupled to the principle of prior assessments as well. The precautionary principle can readily be treated as the link which ties together the principle of prior assessments of environmental effects[147], before permitting certain types of activities, with the required notion of due diligence within the principle of no harm[148].

I will return to this lastly mentioned connection for a more thorough discussed in Chapter 5.

Read in the way proposed in this section, the precautionary principle has an overall reach in contemporary international environmental law, which is never seen before.

3.5.2.3 The Agenda 21

The Agenda 21 is the programme of action concluded at the global conference in Rio. The purpose of the programme was to accompany the declaration of guiding principles on issues of environment and development and to, furthermore, complement the declaration with concrete suggestions of actions[149].

The goal was, not only, to create an overall reaching instrument giving firm directions to the proposed concrete actions, in all matters involving environment and development, but to also, gather the amount of consensus

---

[143] which was the original interpretation of this customary rule in the Trial Smelter Case, see Birnie and Boyle page 115

[144] From a level where the obligation to act comes into effect when serious damage is likely, to a level where the obligation comes into effect when there is either an objective risk of damage or serious damage is probable

[145] Because the precautionary principle is most likely entailing the obligation to conduct prior EIA's

[146] Birnie and Boyle page 115-116. ILC draft Convention on Prevention Transboundary Harm. The Trail Smelter Arbitration, 33AJIL (1939), 182 & 35 AJIL (1941) 684

[147] Established as customary law, and, reflected by Rio declaration: Principle 17

[148] Birnie and Boyle page 131

[149] Birnie and Boyle page 41

required to make such an action programme strong and effective on the subjects of international law. However, during the debates of the conference, where huge discrepancies were unveiling, between the northern hemisphere and the southern (just as in the case of the connected declaration of principles), this turned out to be an unachievable goal. Instead, the authors of the conference had to settle for a compromise concerning this instrument and accept that many important issues had to be removed from the programme because of the controversies surrounding them[150].

According to the preamble to the programme, the chapters of the programme, as they were finally adopted, reflects the "global consensus and political commitment at the highest level on development and environment cooperation". Furthermore, it is also stated that the development of the programme "marks the beginning of a new global partnership for sustainable development[151].

Perhaps should these statements, most properly, be seen as merely the establishment of goodwill and loyalty among states, manifested in a uniform recognition of the interconnection between environmental problems and industrial developments, rather than a commitment to attack these problems through practical cooperation and sharing of knowledge and technologies. Nevertheless, they are important statements to add to the list of state practices, as evidences of a global opinion that sustainable development, as an over all concept, is indeed recognised as covering all decisions and policies with possible or likely environmental impacts. The fact is that governments view the Agenda 21 programme as a decisive instigation to act in order to stop the degradation of the environment, while using their sovereign right to develop.

The instigation of the Agenda 21 is obviously directed towards states foremost but also, unlike many other international instruments, towards all groups and individuals within a society. The programme is, in this manner, requesting all of these subjects to take part in the work concerning issues of environment and development during the remaining years of the twenties century and further into the twenty-first[152].

Concluding that the concept of sustainable development is the umbrella concept, covering all instruments concluded at the conference in Rio de Janeiro, the Agenda 21 is to be seen as the document setting concrete and partial goals for achieving this overall objective of a sustainable world. It furthermore tells the global community what measures that needs to be taken, in order to, reach the partial goals of the programme and finally, how these measures should be implemented. A division of the programme into 40 chapters concretely demonstrates these distinct levels of the programme, since each chapter is harbouring one or more problem area[153].

Given the interpretation referred to above (the described threefold way of viewing the commands of the programme; the goals, the measures and the implementation), the connection between the programme of action and the

[150] Birnie and Boyle page 42
[151] Agenda 21 Preambular paragraphs 3 and 6
[152] Agenda 21 – En sammanfattning, at page 5, http://www.regeringen.se/content/1/c6/01/86/84/6de2900f.pdf
[153] Ibid. page 43

declaration of principles becomes apparent. They are simply two means of the same ultimate goal of the conference, to transform societies into entities that cooperate in reaching a state of sustainable development. To this end, it is being presupposed that in striving to fulfil the objects of the Agenda 21, the principles of the declaration must be noted and observed[154], which is moreover clearly being emphasised in the preamble to the Agenda[155].

The relationship between sustainable development, on the one hand, and the principles established in the declaration of the conference, on the other, becomes even more crystallised when considering the Agenda 21 as the link between them. The agenda stands, in this context, for the unified voice of the global community, as it states that sustainable development is to be the lead word in environmental governance, and that certain principles, such as the precautionary principle, must be adhered to in this governance in order to comply with the will of states.

When all this is stated, it is essential to keep in mind that both the declaration and the programme of action are, as such, notwithstanding that both instruments in parts reflects international customary law, soft law documents[156].

Moving the scope now, from the Agenda 21's objects in general, to how the programme of action reflects and construes the concept of the precautionary principle in particular. For such an operation, it is necessary to look more deeply into the operative part of the instrument. Thus, it is not only by emphasising the relevance of the principles in the Rio declaration, in its preamble that the Agenda 21 is confirming the importance of the precautionary principle.

In chapter 9, for example, some of the measures that we have come to define as elements of the precautionary principle are reiterated as methods for achieving the objects of the programme areas of the chapter. To this end, EIA´s prior to activities, which might have an adverse effect on the climate or ozone layer, are being proposed. In addition, implementation policies and programmes, which promote sustainable utilization of natural resources, are being encouraged. Furthermore, chapter 9 is urging the parties to the VCPOL convention to implement the Montreal Protocol, as an activity to prevent stratospheric ozone depletion. Finally, in order to prevent transboundary air pollution, the establishing of national early warning systems, as well as, response mechanisms, are deemed necessary[157].

Recognising the spirit from chapter 9, chapter 10 is also using terms originating in precautionary discussions when it deals with an "[i]ntegrated approach to the planning and management of land resources". Governments should, to this end, "systematically apply techniques and procedures for assessing the environmental, social and economic" effects of specific actions in order to further the application of management tools and strategies that facilitates an integrated and sustainable approach to land and resources[158].

---

[154] Ibid.
[155] See paragraph 6 of preamble
[156] See Birnie and Boyle at page 82
[157] See Agenda 21 chapter 9 paragraphs 18, 21(b), 24 (a) and 28 (a)
[158] Chapter 10 paragraph 8 (b)

Chapter 15 then handles the issue of the goal to conserve the biological diversity of the world. The basis of this chapter is the recognition that a great loss of this diversity is under way and that "urgent and decisive action is needed to conserve and maintain genes, species and ecosystems"[159].

It seams clear, based on the formulation of the ´basis of action` and the ´objectives` of the programme areas of that chapter, that the need for decisive action is stemming from an uncertainty, as to what an impoverishment of the biological diversity actually will bring with it, in terms of adverse effects on societies[160]. It is set in this context, that the measures proposed by the ´activities` section of the chapter, can be viewed as measures promoting a precautionary approach.

Paragraphs 5 (a), (c), (f) and (k) are all measures aimed at preservation of the biological diversity through the focusing on the importance of further studies and assessments of the possible effects on the world's ecosystems caused by human interference of the biological diversity. The focus is put on assessments and studies in order to, first of all, get a bigger awareness in general, of possible risks towards the biological diversity, as early as possible and, second of all, to be able to put economical resources on prevention and preservation instead of restoration. The general theory behind this type of abatement method is the same as the reasoning behind the precautionary principle[161].

When it comes to explicit mentioning of a precautionary attitude, chapter 17, which deals with protection of the seas and their living resources, is the first chapter that does so. In its paragraph 1, it is established that the new approach – towards marine and coastal area management – that is required, because of the realisation that these areas are vitally important to, and integrated with the global life-support system, must be precautionary and anticipatory in scope. In addition, it is stated, that the application of the precautionary and preventive approaches is required, by states, in order for them to act in accordance with the objectives of two of the programme areas of the chapter[162].

In chapter 19 paragraph 60 (d), governments are urged to cooperate with international organisations to "monitor and control the generation, manufacturing, distribution, transportation and disposal activities relating to toxic chemicals, to foster preventive and precautionary approaches. . ."

In the ´basis of action` section of the third programme area of chapter 20, in paragraph 32, it is frankly stated that the precautionary approach – with all what it entails – should be applied "in order to promote and strengthen international cooperation in the management, including control and

---

[159] Quote from Chapter 15, Basis of action paragraph 3)

[160] Paragraph 3 of the ´basis of action` reads "Capacities for the *assessment, study and systematic observation and evaluation* of biological diversity need to be reinforced at national and international level." Paragraph 4 (i) of the ´objectives` states furthermore that governments, in cooperation with UN bodies, regional, intergovernmental and nongovernmental organisations, the private sector and finansial institutes, should "promote borader international and regional cooperation in *furthering scientific and economic understanding* of the importance of biological diversity and its functions in ecosystems" Emphasis added

[161] See above in section 3.2

[162] See paragraphs 1, 5, 21 and 22 of chapter 17

monitoring, of transboundary movements of hazardous wastes". The purpose of the usage of the principle in this context is to develop, as well as, to harmonize methods of identifying wastes dangerous to the environment.

Finally, there is an explicit reference to the precautionary approach in chapter 22, paragraph 5, concerning the sound management of radioactive wastes. In sub paragraph b to that paragraph it is established that states should cooperate, in order to, achieve a ban on low-level radioactive wastes at sea, an action which would replace the voluntary moratorium of the London Dumping Convention. The precautionary approach is being referred to in this matter as one of the reasons behind the need for putting pressure on an expedite handling of the matter. According to the article, a in this direction decision – in accordance with the precautionary approach – would be preferable if it comes sooner, rather than when scientific certainty is established concerning the effects of low-level wastes.

3.5.2.4 The conventions of the conference

One of the conventions that were created under the auspices of the 1992 UN administered conference in Rio, the *Climate Change Convention*, repeats almost literally the words of Principle 15 in the Rio Declaration[163]. Since it is a framework convention, the measures that are required by article 3 are not further explained. Instead, the convention anticipates future protocols to set, for example, substantial limits on pollution reduction. Consequently, the only material obligation that is inflicted upon the state parties by the convention "is to achieve the goal of stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[164].

In addition, an important condition on how the self-elected measures are to be employed, by states in pursuit of the goals in article 2, is included in the operative part of the convention. The condition is formulated in the article where the convention enumerates principles which states are bound to follow in their work to achieve the object of the convention. The above quoted part, which repeats the words of principle 15 of the Rio declaration (see footnote?), is collected from just that article. Thus, through this technique, the precautionary principle has been made mandatory for the parties to observe[165].

The direct consequence of the regulation technique deployed in the Climate convention is that the precautionary principle, has to be considered, by the state parties of the convention, in all of their planning of policies and administration of environmental regulation in order to achieve the object of the convention[166].

---

[163] "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such [precautionary] measures. . ." Article 3.3 Climate Change Convention

[164] Article 2

[165] Article 3 Climate Change Convention

[166] Trouwborst as well as Birnie and Boyle concludes that this disparity in the use of terms between the, on the one hand, regional treaties of Europe and EC law and, on the other, the global treaties which deals with issues of precaution should be seen as a purely linguistic

The subject behind the *Convention on Biological Diversity* (completed and opened for signature in the last minutes of the UNCED) was a much more controversial topic, then the subject behind the Climate convention, causing more severe disagreement between the participating state representatives. This is evident in the result, which omitted several of the originally proposed substantive articles in order to create agreement[167].

One of the compromises referred to here was to leave out the precautionary principle from the operative part of the convention and only mention it in the preamble. There it is stated that the parties notes "that 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,"[168].

The debate, leading up to the conclusion of the treaty, evolved in large part around the argumentation by many developing states advocating their right to gain access to the knowledge derived from biodiversity resources (as well as their right to be compensated) when the resources were collected on their territory. These requests were not being accepted by the majority of the developed states, which argued instead for the protection of the intellectual property rights behind the ideas stemming from biodiversity resources, collected in developing states.

Even though compromises had to be accepted on both sides (affecting not least the promotion of the precautionary principle in a global contexts) the result of the discussions leading up to the conclusion of an agreement, was in the end, an acknowledgement of the political will to, by legal means, take control over this particular field of environmental protection. What was achieved through these compromises was a convention that attracted the majority of the world community, making it a comprehensive and a global treaty, regulating a subject that earlier only had been protected in a piecemeal manner[169].

The provisions of the convention are only expressing overall goals and the convention therefore functions, just like the Climate convention and VCPOL, as a framework convention. Still the Biodiversity convention should be considered as an instruments, which have promoted the development of a global principle of precaution. This is because the over all object of the convention is to conserve biological diversity, use its components sustainable and share, in a fair and equitable manner, the benefits from the utilization of genetic resources. These objects can all be linked to a precautionary thinking in themselves[170].

---

difference. The two terms should therefore be seen as reflecting the same concept. One reason for the use of the term approach in most global treaties is the advocating of this term of the United States. The US seems to think that approach is a softer term, which does not entail quite as firm responsibilities as the term principle. However, according to Trouwborst, this view can be rejected by references to state practice and the so called Tuna fish judgement by ITLOS. Birnie and Boyle at page 116 and Trouwborst at page four and five

[167] Birnie and Boyle at page 570

[168] Preamble, paragraph 9

[169] Birnie and Boyle at page 369 and 370

[170] See article 1

Thus, the objects are promoting the precautionary principle in that they are to be achieved through conservation measures covering all components of biodiversity (within the area of jurisdiction of a state) and all processes or activities which significantly impact the conservation and sustainable use of the sources of these components[171].

The acknowledgement of the need to protect the biological diversity as an entity of its own, is in itself, an expression of a precautionary attitude since it is not, as of yet, clearly established exactly what impacts that might follow upon the breakdowns of certain sources of biodiversity. Looking at the convention in the light of the origin of, and reasons behind, the precautionary principle, the convention itself can be seen as one of those actions of precaution that the principle requires in order to prevent or mitigate an uncertain, but possible, impact on the environment[172].

3.5.3 Post-Rio instruments

In 1992, shortly after the Rio conference was held, the parties to the 1972 Oslo Convention and the *1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources* met in Paris and decided to replace these instruments with an entirely new convention, which was to more widely cover all sorts of pollution in the North-East Atlantic area[173]. The precautionary tendencies in environmental policies, which had grown stronger through the completion of the Rio Conference, are the inspirations to this convention, the so-called OSPAR convention. In particular, this is clear in the parts of the convention, which explicitly requests state parties to apply the precautionary principle, and, in a more general manner, it is clear through the fact that the concept of sustainable development pervades the whole construction of the convention[174].

Within the general obligations, conferred upon states, the convention explicitly refers to the precautionary principle. More importantly, the drafters of the convention included an explanation, in connexion to the reference to the precautionary principle, of what this means in practical terms.

> The Contracting Parties shall apply:
> a. the precautionary principle, by virtue of which *preventive measures* are to be taken when there are *reasonable grounds for concern* that *substances or energy* introduced, directly or indirectly, into the marine environment *may bring about hazards* to human health, harm living resources and marine ecosystems, damage amenities or

[171] See article 4 – 12
[172] See section 3.2 and Trouwborst at page 8
[173] *The Convention for the Protection of the Marine Environment of the North-East Atlantic*, the OSPAR convention
[174] See preamble paragraph 3 for references to underlying thoughts of sustainable development, see preamble paragraph 6 for reference to the Rio conference and see article 2.2 for reference to the precautionary principle

> interfere with other legitimate uses of the sea, *even when there is no conclusive evidence of a causal relationship between the inputs and the effects*;"[175]

Turning now to another sector of international regulations, the 1996 protocol to the 1972 *London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter,* (London Dumping convention) is of interest to this review on two bases. First, the protocol replaced the original convention with a more restrictive standing in general to what substances that are permitted to dump at all, for the state parties, and under what circumstances[176].

Secondly, if a substance that has been dumped by a party to the convention is considered likely to cause harm to the marine environment, the protocol explicitly takes a cautious attitude towards what is to be the requested response to such a scenario. TO this end, the protocol obliges states to ensure that:

> appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.[177]

Just like the words of article 3.3 of the Climate Change Convention, this is another example of how the words of principle 15 of the Rio Declaration are visible in subsequent conventions on environmental protection.

In the so-called Straddling Stocks Agreement from 1995, the obligatory character of the precautionary principle is established through explicit terms in article 6. This article regulates issues of responses to risks, scientific uncertainties and the need for constant observation and review of the situation[178].

In the subsequent *Convention on the Law of Non-navigational Uses of International Watercourses* from 1997, there is no any explicit reference to the precautionary principle to be found in the text of the convention. Instead, the convention in its entirety is possible to view as a response to the, by 1997, prevailing general request for precaution, in environmental law. This becomes apparent by reading the object of the convention, which is to protect and prevent watercourses from dangers[179].

Both of these two last mentioned water management instruments utilize the precautionary approach for conservation purposes. The first, as well as the second document stand as models for regional developments following the same regulative pattern. It is furthermore important to point to the fact that technical guidelines, issued by the food and agriculture organisation

---

[175] Article 2.2, emphasis added
[176] http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681#7
[177] Ibid.
[178] Article 6 in the *Agreement for the implementation of the provisions of the United Nations Convention on the law of the sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*
[179] Article 1.1

(FAO), concern the implementation of the precautionary principle in the fisheries context in general. These require that the actors should apply the precautionary principle in all levels of fisheries systems. Furthermore, it places of the burden of proof on the party who wishes to exploit the natural resources in the region[180].

3.5.4 Towards extracting a possible content of a universally binding customary principle of precaution

It is argued here that the most frequently employed measures, from the international instruments containing references to a precautionary principle, could compose a core of substantive obligations which would follow upon a reference to a customary norm of precaution. Trouwborst argue in this way when he speaks of the material effects of the principle:

> Most commentators agree that in cases of uncertainty about the effects of a human-induced development, one of the *most consistent applications* of the precautionary principle would entail the placing of the burden of proving the activity in question will not cause unacceptable environmental damage on its proponent before allowing it to proceed, instead of requiring its opponents to show that it will before cancelling or adapting it.[181]

What he, in the quoted section, considers a consistent application of the principle is the reversing of the burden of proof in matters concerning environmental protection, albeit not entirely without restraints. Thus, admitting criticisms to this interpretation of the principle, he concludes that this particular effect of the principle contains conditions.

The criticism, concerning the interpretation of the precautionary principle as entailing a reversing of the burden of proof finds its base in the claim that such an application of the principle will lead to unrealistically heavy burdens of proof on the proponents of a particular activity. This claim directs itself both to activities in national contexts, as well as, in international contexts. Because he finds this criticism, at least partly, well-aimed, Trouwborst argues that the principle should, in general, be given the interpretation of containing a reversing of the burden of proof, however with some qualifications encapsulated within the norm.

The instruments deploying the principle, in the manner referred to here, manifests these qualifications through the inclusion of different types of limitations to the use of the precautionary principle. The requirement of a risk of irreversible harm, as opposed to, a risk of plain harm, as a threshold

[180] Birnie and Boyle at page 121

[181] Trouwborst page 14 in fine and 15, emphasis added. Also Trouwborst chapter 3 in general

for the obligation to act, is one pertinent example of such a limitation. Another is the reversing of the obligation to prove that the activity complained of causes no harm, to an obligation to demonstrate a high level of probability only that no serious or irreversible harm will occur[182].

A second possible consequence, of a consistent application of the precautionary principle, would be to reject the assertion of performance in accordance with the requirement of due diligence, by a state who failed to require a prior assessment (on possible effects on the environment) before green-lightning a project of certain character. The obligation of prior permits based on considerations of obligatory assessments and studies, which is included in many contemporary instruments, have made the requirement of conducting EIA's stand out as an component of the principle of precaution[183].

Trouwborst furthermore relies on the views of other writers when he reaches this conclusion about EIA's. He, for example turns to the views of McIntyre and Mosedale who has stated that "[EIA is] fundamental to the application of the precautionary principle"[184].

A third possible consequence of the principle – although applicable only on certain types of environmental problems – is possible to derive from the conservatory instruments which holds references to the need of precaution. In these instruments we find the unconditional moratoriums or the 'no harm option`. These regulations establish that certain protected areas should be completely clear of potentially harmful activities, in order to, "protect the area from present as well as future, not yet identified risks"[185].

Furthermore, the concept of a precautionary principle has also, in some instruments, as well as, by some writers, been referred to[186] as an ancillary concept to the concept (or principle) of sustainable development. Following that thought, parts of the containment of the precautionary principle should we be able to draw from reasoning about the purpose and object of the mother concept of sustainability[187].

To this end, it is possible to translate from the concept of sustainable development that the precautionary principle ought to be utilized in a manner that promotes equality between the living and future generations. As a subdivision of the principle of sustainable development, the precautionary principle should furthermore be used in issues concerning the preservation of the socio-economical interest within a state, blocking economical interests to prevail too easy in national decisions. Regulations aiming at establishing equality in the allocation of duties, between underdeveloped

---

[182] Ibid.

[183] See Espoo convention, Rio Declaration principle 17, ILC draft articles on the Prevention of Transboundary Harm from Hazardous Activities articles 3 and 7, and Trouwborst at page 67-68

[184] Trouwborst at page 43

[185] Trouwborst at page 69 where he states that "what most conventions on protected areas require approximates the implementation of such an approach very closely.....", for an example of this type of regulation see the 1959 Antarctic Treaty

[186] As I demonstrated above in section 3.5.2.2

[187] See Birnie and Boyle 40 – 47 about the World Commission on Environment and Development, known as the Brundtland Commission (WCED) and its principles "Legal Principles for Environmental Protection and Sustainable Development"

states and developed states, could possibly also rely on the precautionary principle, letting it promote the polluters pays principle to all developmental projects surrounded by uncertainties of their effects, which a state is operating on the territory of other states[188].

Even though the legal status of the concept of sustainable development in itself, is a highly controversial subject, writers who deny the legal status of the concept, such as, Birnie and Boyle, admits that international law – as a direct consequence of the concept – does require development decisions to be the outcome of processes which promotes sustainable development[189]. They further claim that decision processes, which leaves out EIA's, which does not encourage public participation, which does not integrate economical and environmental considerations, or, which does not take account of the needs of intra- and inter-generational equity, will have failed to implement such a decision process.

A specific component of the precautionary principle, the obligation of EIA's, are in this kind of description of the legal reality, given a standing on its own as a part of the binding procedural aspect of sustainable development.

In connection to the reasoning presented in this section, it is also worth mentioning that a likely side effect of the acceptance of the precautionary principle as a general norm (as it has been formulated in the general versions, such as, principle 15 of the Rio declaration) is a greater democratization of decision-making. This conclusion is collected from the argument that the principle moves the political decisions from scientists to policy-makers. It is furthermore another common denominator between the precautionary principle and the principle of sustainable development.

As a final remark to this chapter, I wish to remind of the fact that the instruments used above, as descriptions of diverse expressions of the precautionary principle, should be seen as just that, a collection of examples, and not, as an exhaustive list over all relevant documents. A complete review of all instruments containing implicit or explicit usage of the precautionary principle would be far too ambitious for the purposes of this paper. This is apparent from the conclusion made by Trouwborst that:

> [...] more than 1000 times a state (or the EC) has expressed its consent to be bound by the terms of a treaty or amendment containing express precautionary references, to which may be added the over 500 signatures that have not yet been reinforced by ratification.[190]

---

[188] See Birnie and Boyle page 88 where they classifies the precautionary principle as a sub principle to the principle of sustainable utilization which they in turn classifies as a sub principle within the broader concept of sustainable development. Also on page 84, "it [sustainable development] is central to the elaboration of global environmental responsibility by these [Rio Declaration, Conventions on Climate Change and Biodiversity] and other instruments. Also, WCED Principles, Our Common Future, Oxford 1997, articles 2, 7 and 9

[189] Birnie and Boyle at page 92

[190] Ibid. page 109

He, furthermore, sums up that there exist 14, more or less, truly global treaties containing one version or another of the principle. In addition to this, he believes that in practically all regions of the earth the principle is regulating environmental issues through one or more of the 39 regional instruments containing the principle.

I have included these final comments on the number of instruments that contains references to the principle, in order to show, that the discussion of what a customary principle of precaution would entail for the subjects of international law, is not purely a theoretical discussion, but highly relevant since quite a large amount of examples of state practices, approving of the principle, has or is about to take form.

4 The use of the principle in decisions by the International Court of Justice

4.1 Method of comparison

There have only been a very few number of decisions by the International Court of Justice that has touched upon the legal significance of the precautionary principle. In fact, there have not been many environmental disputes at all settled by the court[191].

It is of course possible to speculate what reasons lie behind the appearance of so few environmental disputes but, it is settled for here, to ascertain that the few examples we have are of great importance as tools for interpreting the role of the precautionary principle in general international law[192].

I have decided to look only at decisions settled after the 1992 Rio conference, based on the establishment in chapter 3 that the conference was the breakthrough for the assertion of a general principle of precaution. I have furthermore limited the scope of this comparative part to the only two cases in this period, where the main claim from the applicant was that environmental protective law requires the defendant to stop an activity lacking certainty concerning what the consequences would be if the activity would go on.

I will begin the study of these two cases, which thus both evolved around the interpretation of modern environmental obligations, by reviewing them in chronological order, starting with the earlier: Nuclear Tests Case II.

The reason for the comparison of the two cases is the hope to find evidences of a development of attitude towards the precautionary principle, within the single most important adjudicating body in international law, in the time span between the first and the last case.

Why decisions by the international court should be given any weight at all, in determining the legal status of a particular concept of law, is perhaps worth commenting on before starting the examination of the two chosen disputes. The decisions of international tribunals should not be equalized with any of the main sources of law, described by the ICJ Statute, thus, they are not by them selves directly determinative of the material norms of international law. However, it is generally accepted that these decisions are indicators of what the law states concerning particular issues under examination. Furthermore, given the fact that international law lacks any

[191] A noteworthy fact in this context is that the chamber for environmental disputes, founded in 1993, never has been in use Birnie and Boyle, page 224

[192] Trouwborst page 157. For speculations on why the environmental chamber of the I. C. J. never has been used see Birnie and Boyle, page 224

kind of compilation of material norms; this indicating feature should not be underestimated[193].

Finally, the fact that the memorials of the parties to a dispute should not be viewed as part of the interpretational guidance of the law, constituted by the judgment, is perhaps a redundant comment. Nevertheless, it is mentioned here in connection to a reminder of that, their value instead lie in that they can be used as evidences of their respective state's opinio juris, concerning particular matters discussed in the dispute. In general, the dissenting opinions and separate opinions of members of the court are being considered as doctrine, at least in the context of evaluating the law concerning a certain issue[194].

4.2 Review of the 1995 Nuclear Tests Case (New Zealand v. France)

In June 1995, France announced that it would conduct eight nuclear tests in the South Pacific in September that same year. The New Zealand reaction was immediate, stating for example, in several diplomatic notes that an application to the international court would follow upon a non-cancellation of the tests[195].

In August 21, 1995, New Zealand subsequently responded to the French non-cancellation with the filing of a request to the international court to re-open the case from 1974 (also concerned with nuclear tests albeit atmospheric ones).

This earlier dispute between the two states had been dismissed, without a judgement in the substantial question, from the court because of an undertaking of France to terminate its ongoing set of atmospheric tests immediately.

However, the situation had become further complicated through the French drawback of its approval of the general act, binding it to adjudication by the court, in case of a dispute with New Zealand. Thus, the new disagreement in 1995 forced New Zealand to find a way to derive the 1995 disagreement to the dispute of 1974 – of which the court, trough an unusual method, had kept jurisdiction over – in order to get it decided by the court[196].

---

[193] Trouwborst page 157 where he states that: "judgements of the World Court and other international tribunals that do arise are often of accorded great weight by states and academics alike as indicators of the state of the law at a given moment, the extent of their persuasive force depending, among other things, on their status in general and on the quality of their reasoning in specific instances"; Birnie and Boyle, page 108; Brownlie, page 19

[194] See Trouwborst, page 157 ; Brownlie page 6, 23 and 24

[195] New Zealand's application instituting proceedings, page 2

[196] (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgement of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) *Case, I.C.J. Reports 1995, 289*

The only method available to New Zealand, therefore, that was open to them, was to argue around Paragraph 63 of the 1974 judgement in which the court stated that:

> Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgement were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific settlement of International Disputes, which is relied on as a basis of jurisdiction in present case, cannot constitute by itself an obstacle to the presentation of such a request.[197]

4.2.1 The New Zealand request

Through its application in May 1973, New Zealand requested that the court should reopen the case and look at the resurrected dispute ones again, for a final settlement of the legal consequences of the French behaviour in the South Pacific. It argued that the case from 1974 was merely resting due to the formulation in paragraph 63[198].

The problem of referring the dispute to the sphere of paragraph 63 was to convince the court of the fact that the 'basis of the judgement` in 1974 – on which paragraph 63 revolved – was indeed, all forms of nuclear testing that could possibly cause severe consequences to the environment, and not only atmospheric ones, as was claimed by France.

The factual situation in 1974 was that France, by a number of official statements, undertook to seize with its atmospheric tests in the Pacific area. The court subsequently matched, in 1974, this undertaking with the claims of New Zealand and found that the dispute did no longer exist[199].

In 1995, New Zealand maintained that this match was a misconception of the situation by the court, since its claim in the original application "reflected New Zealand's concern of the risk of contamination of the environment outside of French territory by radioactive material arising from nuclear testing of any kind."[200] The court's misconception was understandable though, according to the New Zealand view in 1995, since all French testing leading up to the dispute in the 70s had been, in fact, atmospheric. In addition, the primary concern of the 1973 New Zealand application had furthermore been to stop the atmospheric tests[201].

However, in 1995, New Zealand asserted that the reason for its focus on atmospheric tests in 1973 was the fact that the prospect of underground

[197] Application to the ICJ by New Zealand, page 2, underlining in original
[198] Application page 3
[199] Ibid. page 10
[200] Ibid.
[201] Ibid. page 11

testing seamed, at the time, harmless. Had scientific evidence in the 70s been showing that underground testing posed a similar threat to the natural environment, as the atmospheric ones did, then New Zealand had not put its focus on only the latter type of tests in their arguments. Neither had the court matched the French undertaking to seize the atmospheric tests with the concerns of New Zealand in the manner that it did[202].

New Zealand did not contest that France had, from the decision of the court in December 1974 up till a moratorium signed in 1992, used the test-cites in question (current again in 1995 for a new set of tests thus, terminating the moratorium) several times for just underground testing of nuclear weapons[203].

Thus, it was due to the evolution and change in the field of scientific knowledge, as well as, in the field of norms regulating protection of the environment that made the concerns of 1973 topical again in 1995, albeit set in a slightly different factual context. New Zealand argued that it was this kind of changes that paragraph 63 anticipated and that this scenario was what was described by the formulation of the phrase 'if the basis of the judgement has been altered`.

New Zealand tried to convince the court that the object of the concern of New Zealand in 1973 were, just as the basis of the 1974 judgement, the risk of environmental damage being caused by radioactive contamination, from whatever source.

Since it had been no more than a coincident (lack of scientific insight) that all that was complained of, in 1973, was atmospheric testing, the basis of the 1973 case (to protecting New Zealand from nuclear contamination) had, in 1995, been altered by the fact that scientific evidences, by then, directed attention to a much higher risk of contamination from underground testing. In addition, the fact that international environmental law by then demanded more of states in terms of conservation and harm prevention, also affected the object the 1973 case[204].

What New Zealand leaned on in its argumentation for a prohibition of the planned tests in 1995 was partly, the reluctance in the past of France to allow independent research, on the effects on the environment by underground testing at the same test-cites and, partly, the poor public insight into the project, afforded by France[205].

It continued, by referring to the only three studies of the area that had been conducted, and argued that the collected materials from these showed that incidents had in fact happened in the past and that the risk of:

a) the escape, through leakage, of radioactive material from the tests-cites into the sea, and

b) accidents, through collapses of the atolls holding the test chambers, with disastrous consequences on the marine environment, were high and not unlikely to occur[206].

---

[202] Ibid.
[203] Ibid. page 12
[204] Ibid. page 11
[205] Ibid. page 13
[206] Ibid. page 15-29

It went on to establish that these concerns about the marine environment had, also during the dispute in 1973-74, been raised by New Zealand, evidencing that the exact same type of effects were feared of in the two different contexts of the same dispute[207].

Coupled with the fact that there, in the opinion of New Zealand, existed a legal obligation, in 1995, to conduct EIA's prior to an activity of the size and scope of nuclear testing, New Zealand also referred to a string of rights that France would disrespect if it were allowed to continue with its testing without interference from the court. These rights were the same as in 1973, albeit this time the focus was being put on the parts, which safeguards the marine environment[208].

Testing in the South Pacific region would violate the right:

> of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the terrestrial, marine and aerial environment. . .;
> . . . of New Zealand that no radioactive material enter the territory of New Zealand,. . ., including the air space and the territorial waters, as a result of nuclear testing;
> . . . of New Zealand that no radioactive material, having entered the territory of New Zealand,. . ., including their air space and territorial waters, as a result of nuclear testing, causes harm, including apprehension, anxiety and concern, to the people and Government of New Zealand and....;
> . . . of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and seabed, without interference or detriment resulting from nuclear testing.[209]

As stated above, a part of the legal basis behind these claims from New Zealand, is to be found in an obligation to conduct an EIA. This obligation was stemming from both treaty and customary law according to New Zealand:

> It is France's consistent refusal to carry out a procedure which is now accepted virtually world-wide as absolutely essential in this class of activity that constitutes the first element of illegality in the position that France is now taking.[210]

In the interpretation given to the obligation of EIA's by New Zealand, the obligation to conduct assessments prior to an activity also means that the activity is only allowed to proceed if the project is determined as environmentally acceptable, following the considerations of the objections

[207] Ibid. page 13
[208] Ibid. page 57
[209] Ibid. page 6-7, underlining in original
[210] Ibid. page 48

to the activity. New Zealand argued that in the specific situation of nuclear testing, within the realm of the sea, the prerequisite of environmentally acceptable must mean that prior to the tests, it is established that no radioactive material "will be introduced into the marine environment as a result of the tests."[211]

This particular part of interpretation of the obligation to conduct EIA's, by New Zealand, is unfortunately lacking, in the application at hands, legal arguments to back it up. New Zealand referred to the so-called Nouma convention to establish the treaty based obligation on France, to adhere to the obligation of EIA, as well as, a number of international conventions such as the Espoo convention and the CBD, to show the existence of the same obligation in global customary law[212].

However, neither the examples given from the Nouma convention, nor the global instruments also referred to, states more than the fact that in certain circumstances – when a risk of significant adverse impact (the obligation is circumscribed in scope by the threshold-criteria of risk of – at the lowest – significant impact) upon the environment, is at hands, then an obligation to assess the possible consequences of the planned activity is triggered. Not one example given by New Zealand in support of the obligation to conduct EIA's can be said to also support the interpretation of the obligation, done by New Zealand in its application, whereby the obligation holds a prohibition of an activity if the EIA is not establishing environmentally acceptable impacts only[213].

Furthermore, the other legal basis behind the claim of breaches of international law caused by France's conduct, towards New Zealand, is the duty not to cause harm outside its own territory[214].
Principle 21 of the Stockholm declaration, principle 2 of the Rio declaration, article 3 of the CBD and article 4(6) of the Nouma convention is re-affirming this duty. In addition, New Zealand, asserted that special rules had developed in treaties, concerning, in particular, conduct which may lead to the introduction of radioactive material into the sea[215].

The treaties – of which the London dumping convention was referred to as one – New Zealand then referred to, all concern dumping (of some form) of nuclear wastes into the sea. The conclusion of the listing of the non-dumping conventions was that their total effect was an absolute prohibition of dumping of radioactive waste in the sea[216].

What is of importance for the purpose of present paper, concerning these arguments of New Zealand, is the subsequent reference to the precautionary principle as a principle that has "direct bearing on the application of these rules of international law"[217].

New Zealand viewed the precautionary principle as a principle giving directions on how to apply procedural rules in an environmental context.

---

[211] Ibid. page 38
[212] *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*: 26 ILM 38 (1987); Application page 36 and 46
[213] Ibid. page 36 – 48
[214] Ibid. page 49
[215] Ibid.
[216] Ibid. page 51
[217] Ibid. page 53

The starting point of its reasoning to this end was that the burden of proof normally rests on the complainant to establish that the other state is responsible for action in contradiction of international law. However, due to the specific problem of environmental law, which is that most of this law's substantial norms strive to prevent harm from occurring, this 'normal` burden of proof would – if applied in disputes with mainly environmental implications, often lead to irremediable harm having occurred before the complainant state had gathered the required proof. Therefore, a shift in the burden of proof had taken place, according to New Zealand. In environmental disputes, at least of the dimensions like the one facing the court in 1995, the evidentiary burden were instead placed on the respondent state to show that in situations that might possible be "significantly environmentally threatening" its conduct would not lead to such a result[218].

In this manner the precautionary principle obliged France, according to New Zealand, in this particular case to show, first, that there existed no need for the conduction of an EIA prior to the resumption of the underground testing in the South Pacific, and second, to prove that it had abundant evidences that these testing would not lead to adverse impacts on the environment[219].

The precautionary principle, as construed by New Zealand in its application, is thus an effective tool for making the substantial norm of preventing harm enforceable before the actual realisation of the harm is certain. This is created trough the principle's feature of reversing the burden of proof, so that, the state, which is planning an activity, must provide evidences of the harmlessness of said activity, in order to, liberate itself from the responsibility of having caused harm.

4.2.2 The position taken by the court

The court focused only at the preliminary discussion of whether or not it held jurisdiction over the matter. It started by analysing the wording of paragraph 63, of the 1974 judgement, and held that the formulation of this section implied that the court, in 1974, depicted the possibility for New Zealand to return to the court in a manner not already prescribed by the ICJ Statute. Thus, it disqualified the argument, which had been put forward by France that the only available manner in which a settled case could come under the re-examination of the court was through the outlined methods of the articles of the ICJ Statute. The court concluded to this end, that if it had been its intention to refer to only the methods that already existed in the statute, then the paragraph 63 had been unnecessary to include into the judgement since those other methods always lays free for a state to use[220].

It went on to examine and determine first, what the 'basis` (the word in the paragraph 63 opening up for re-examination of the case) of the

[218] Ibid. page 54
[219] Ibid. page 43 and 54
[220] (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgement of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) *Case), I.C.J. Reports 1995,* page 303 and 304

judgement in 1974 had been and second, whether this basis had, in fact, been affected, in the sense that New Zealand asserted, by the French actions in the 90s[221].

To this end, the court first, ascertained that it had established in the judgement of 1974 that the court is not only free but also, moreover bound to interpret the submissions of an applicant, to, establish the subject matter before it. When doing so in 1974 it had therefore taken account, not only of the New Zealand submissions (which were formulated in a broad manner opposing all types of contamination from all possible sources), but also of the argumentation in the application, together with, official statements delivered in support of the application. On all these grounds, it had reached the conclusion in 1974 that the New Zealand application exclusively concerned atmospheric tests and not contamination from any source[222].

Therefore, in determining that the court in 1974 had used its discretionary right to interpret an application of a party, in order to, settle the subject matter before it, the conclusion in 1995 had to be, according the court, that the case could only be re-opened if France would ones again turn to atmospheric testing.

The match, done by the court in 1974, of the French official undertakings to stop atmospheric tests and to replace these with underground tests, with the request of New Zealand to stop France from causing radioactive contamination on its environment, meant that the basis of the dispute (the reason behind the New Zealand action) was atmospheric tests only. New scientific evidences, or, the fact that a new policy prevailed in the environmental protection regulation in 1995 could not alter this. Thus, the legality of the planned French underground nuclear tests in the South Pacific area could not be examined by the court based on the re-opening of the Nuclear tests case from 1974 because the basis of the 1974 case had not been affected in the manner prescribed by paragraph 63[223].

4.2.3 The separate and dissenting opinions of members of the court

The rather abrupt way of dismissing the case, that the court managed to create by their formalistic[224] way of interpreting paragraph 63 of the 1974 judgement, left the main issues of the dispute unexamined. Among other things was the lengthy argumentation, which was presented by New Zealand, concerning the content, use and status of the precautionary principle left uncommented.

Not all members of the court approved of this. Three Dissenting opinions were subsequently attached to the judgement, of which one belonged to the

[221] Ibid.
[222] ICJ Reports 1995, page 304
[223] ICJ Report 1995, page 306
[224] Dissenting opinion of Judge ad hoc Sir Geoffrey Palmer, ICJ Reports, page 420 paragraph 117

ad hoc judge appointed by New Zealand. His view must naturally be treated more cautiously than the other two.

Perhaps (if one is to hard-draw matters a little), it ought to be seen more as an example of state practice evidencing the opinio juris of New Zealand, than as an independent interpretation of the law by a scholar. However, this kept in mind, his view can nevertheless be useful and indeed, important for the analysis presented below. The writings of scholars, which the dissenting and separate opinion of the members of the international court counts as, can be relied on as objective and learned interpretations of the legal status norms in international law. Public statements, on the other hand, of state officials are often relied on as examples of state practices, expressing a state's opinion on the legal status of a particular norm. To this end, an ad-hoc judge, such as the learned Sir Geoffrey Palmer, should of course not be seen as a state official speaking on behalf of its state, but an unofficial connection between his view and the position of his state is not to presuppose too much. This is the fact that needs to be kept in mind when using the view of an ad hoc judge in an analysis of the containment of the law in a particular matter[225].

Having said this, two of the three dissenting opinions will now be presented. I have limited this part of the review to those dissenting and separate opinions, which is touching upon and discussing the precautionary principle, hence, the leaving out of the dissenting opinion of Judge Abdul G. Koroma.

4.2.3.1 The opinion of Judge Weeramantry

Judge Weeramantry begins his review of the issues before the court by expressing his regret that the court dismissed the case already after examining what the basis of the 1974 case in fact was. He were of the opinion that the additional question of whether New Zealand had made out a prima facie case "on the facts that such basis has been affected" should also had been addressed, independently of the answer to the first question[226].

After a lengthy argumentation, concerning the interpretation of the basis of the 1974 judgement, he concluded that New Zealand indeed had the right to have their complaints, at least preliminary, heard in 1995.

This conclusion brought Weeramantry to the further discussion of whether New Zealand, in 1995, had managed to present enough evidences, as to its renewed risk of suffering the same harm as in 1974, to open up the old case. This, in turn, brought him to the discussion of the precautionary principle.

Before engaging on the review of his view on the precautionary principle, a short remark of the general position of Weeramantry (as this is apparent in his dissenting opinion), concerning principles of law, will be included.

---

[225] See Birnie and Boyle for the view that judgments and statements from the international court does not have a direct bearing on the content of the law but can function as a guide in interpreting the same, page 108; Brownlie, page 6 for a list of what actions amounts to state practice evidencing opinio juris where statements from state officials is included

[226] ICJ Reports, 1995, Dissenting Opinion of Weeramantry page 319

The note-worthy aspect concerning principles of law in general is that he referred to these as the determinative factors to use in the scale pan when faced with the situation of two logical interpretations of a notions leading to two contradictory endings. To this end, he admitted that the conclusion reached by the majority of the court also was, in logical and black lettered terms, just as correct as his own was. Therefore, he asserted, he had to turn to determining "the relative worth and importance of competing legislative grounds. . ."[227]

Since it was concluded in chapter 2 that no rules can be in competition in the sense that they have to be evaluated of their relative importance, what Weeramantry spoke of here must have been principles of law[228].

Thus, the conclusion this line of thought leads us to must subsequently be that it is principles of law that determines what interpretation is to prevail, when two or more, interpretations are found equally sound.

Turning now to the specific discussion Weeramantry presented in his opinion concerning the precautionary principle. He acknowledged, first, the interpretation, given by New Zealand, of the concept as a procedural principle changing the burden of proof in certain situations. Those situations were, according to him, the ones envisaged by the most common formulations of the concept, such as, for an example the Rio declaration, where the environment faces a risk of being significantly harmed without scientific proof accompanying the risk[229].

He, additionally, depicted yet another sector for application of the principle within the realm of judicial proceedings. From his reasoning on this matter, I draw the view that it is possible for an adjudicating body to rely on the principle in a dual manner[230].

First, it can be utilized when a party complains to the court of an environmental damage of irreversible nature, which another party is committing or threatening to commit, and the proof of the matter is in the hands of the party causing, or threatening to cause, the damage. In such a situation a judiciary institution can place, the evidential burden on the respondent state, in order to act and adjudicate in a timely manner, before the damage has actually occurred, using the precautionary principle. Second, it can also be used to give the tribunal or court in question the legal back up it needs to order provisional measures before the merits of the case has yet been discussed. The rationale behind this use of the principle is to make the substantial part of the principle, which calls upon states to act when there is a risk of harm to environment without the cause of that risk being certainly established by scientific evidences, applicable also by international bodies other than states[231].

He furthermore put across the argument that the concept and obligation on states to conduct EIA's is ancillary to the precautionary principle[232].

---

[227] Ibid. page 360 with quote from Justice Holmes in "The path of the Law", Harvard Law review, 1897, Vol. X, p. 466
[228] See section 2.3
[229] Dissenting opinion, ICJ Reports 1997, page 342 and 343
[230] Ibid.
[231] Ibid.
[232] Ibid. page 344

In other words, in order to fulfil the main duty of diligent prevention of harm, a state must – in certain situations – search for and see to, through active actions, that future potential dangers are being discovered.

Without explicitly pronouncing his view on the status of this principle, Weeramantry claims that the principle of EIA, just as the precautionary principle, has gained enough support in international law for the court to take notice of. If this means that, he considers it as customary international law, with a global scope, is thus left for the reader to decide. However, considering this statement in the light of ICJ Statute article 38 it is hard not to come to this conclusion[233].

4.2.3.2 The opinion of Judge ad hoc Sir Geoffrey Palmer

In brief, ad-hoc judge, Palmer interpreted the essential paragraph 63 in the same manner as New Zealand and judge Weeramantry[234].

What is more, also he gave a comment to the vast development of the environmental field of the international law, which had happened in the time span between the first and the second time New Zealand approached the court. To this end, he contended that:

> For present purposes the important point about the development of international environmental law is that its most important flowering and expansion spans the period of this case – it started in earnest about the time this case began and reached a crescendo at Rio in 1992[235].

In connection to this he asserted that some of the guiding principles of the Stockholm Declaration were being repeated in the Rio Declaration but, also that some new ones were added. He thus lifted out and pointed to, in particular, principle 15, stating the precautionary approach, and principle 17, stating the principle of EIA's[236]. He concluded on this subject matter, that the trend of the development – established through a review of treaty-law, agreements on policy documents, doctrine, and the scarce but important case law of international judiciary bodies – was towards a more powerful protectionistic and conservational environmental law. From this it can be inferred that he recognised, albeit implicitly, that the precautionary approach had prevailed, on a general level, as a standard setter for new international law concerning the environment. This is evidenced by citations such as the following:

---

[233] Ibid. Article 38 of the ICJ Stature states, in essence, what legal norms that should be considered by the ICJ when determining a dispute and refers therefore only to de lege lata in opposition to more resent evolutions of the law seen as de lege feranda)

[234] See in general I. C. J. Reports 1995, Dissenting opinion of Sir Geoffrey Palmer, page 396 – 400 and page 420 in fine

[235] Ibid. page 407

[236] Ibid.

> There is a widespread recognition now that there are risks that threaten our common survival. We cannot permit the onward march of technology and development without giving attention to the environmental limits that must govern these issues.[237]

When specifying his view of the content of the environmental law of 1995, Palmer (just as Weeramantry and New Zealand did in their contributions to the case) mentioned the principle of EIA together with the precautionary principle. He also explicitly referred the obligation of conducting EIA's as a means for accomplishing the main duty of seeing to that it is being established "before undertaking an activity that the activity does not involve any unacceptable risk to the environment."[238] With other words, what he argued was that the principle of EIA merely is one of the means for fulfilling the precautionary principle.

Since he asserted that the request, raised in 1995 by New Zealand, should have been answered through an interpretation of the law of 1995, i.e. by deciding the status of the new principles of precaution and EIA, he regretted that the court did not take the obvious opportunity before it, to settle these issues. However, having established that view he did not attempt to give his own view on the matter either[239].

However, without wishing to prejudice the question of the legal status of the two above mentioned principles, he concluded that there was a real possibility that these had developed into customary international law. He asserted that they possibly could, interpreted in accordance with the law of 1995, alter the legal basis of the 1974 judgement. The alteration would, in such a case, stem from the fact that they put higher demands on the behaviour of France, in order for it, to be in conformity with the due diligence required by international law of 1995.

Perhaps his conclusion to this end is better depicted through a quote from the opinion itself:

> Taken together, in application to present dispute, the legal developments are sufficient to meet a prima facie test that the legal circumstances have altered sufficiently to favour an examination of the 1974 case. Let me emphasize again, however, this is not to say what principles of law may apply here in the particular circumstances or indeed what their content might be. This is for the next stage.[240]

[237] Ibid. page 409
[238] Ibid. page 411
[239] Ibid, page 413
[240] Ibid. page 412

4.3 Review of the 1997 Gabcikovo-Nagymaros Project Case (Hungary/Slovakia)

In 1997, Hungary and Slovakia jointly filed a request to the court asking it to settle their disagreement concerning their cooperation, a joint investment, in a dam project on the Danube River, a watercourse shared by the two parties to the project. Trough a special agreement they gave the court competence to settle three issues;

1. Had Hungary in 1989 had the right to suspend and abandon the works of the project, which they were responsible of according to the treaty behind the project?
2. Was Slovakia in turn entitled to proceed in 1991 to a provisional solution where it took over parts of the work, from the area affected by the suspension of Hungary, and continued with these works on its own side?
3. What legal effects should a notification of termination of the treaty, sent by Hungary in 1992 to Slovakia, have?[241]

It was the first of the submitted questions, which raised issues concerned with the precautionary principle. Could the decision to suspend and subsequently abandon the project, on the Hungarian side, be considered as an action made out of concern for possible, not scientifically established, environmental consequences arising from the project?
Furthermore, could actions based on such concerns, in that case, be seen as in accordance with a precautionary principle and the obligation of every state to adhere to such a principle?
Could that principle and obligation, under certain circumstances, justify a unilateral suspension of a treaty based project?

By the terms of the 1977 bilateral treaty (establishing the project), the purposes of the project was threefold;

1. to produce hydroelectricity,
2. to improve navigation on the relevant section of the Danube and finally,
3. to protect the areas along the banks against flooding.

Alongside these objects, the parties also undertook to "ensure that the quality of water in the Danube was not impaired as a result of the Project,"[242]

The parties, when concluding the treaty, had not ignored the environmental aspect of the project, on the contrary, the treaty contained material obligations to promote the water quality and to negotiate the implementation of the treaty while taking into account environmental norms[243].

[241] Gabĉikovo-Nagymaros Project (Hungary/Slovakia), Judgement, I. C. J. Reports 1997, p. 20
[242] ICJ Reports 1997, p. 27
[243] This latter obligation is visible in article 19 in the Treaty see I. C. J. Reports 1997, p. 23

In 1989, in Hungary, the project was the object of increasing concern, both within sections of the public, as well as, in some scientific groups.

> The *uncertainties* not only about the economic viability of the project, but also, and more so, as to the guarantees it offered for prevention of the environment, engendered a climate of growing concern and opposition with regard to the project.[244]

What stands out, when looking at the cited phrase above, is the fact that the circumstances, prior to the suspension by Hungary of the works, are familiar from the typical thought scenario, in which, the precautionary principle is supposed to be applied. In this sense, the actions of Hungary are possible to explain by references to the precautionary principle.

It was scientific uncertainties, concerning the environmental consequences of the project, which made Hungary suspend their part of the project in order to behave (through carrying out further assessments and studies) in accordance with an obligation to act when there is a risk of damage to the environment. Thus, Hungary stressed that there existed a substantial obligation within international environmental law that gave it no choice but to act in contrast to the treaty from 1977.

However, the court did not find it necessary to settle whether there existed such an obligation, stemming from a principle of international law, or not. Instead, it found it possible to decide the question at hands by focusing on the treaty-related aspects of the issue only. In this way, the court established that whatever the status of the environmental obligation – referred to by Hungary – was, such an obligation could in any case never unmake the material breach of the 1977 treaty created by the non-performance by Hungary of its agreed part of the project.

More importantly however, is that the court settled that the arguments concerning the need for further studies and general caution, not either fulfilled the requirements for achieving freedom of liability due to necessity, in accordance with the law of state responsibility. In essence, this established the view of the court where it accepts environmental concerns, as such, as protection-worthy in the sense that ecological interests should be seen as potential 'essential interests` of a state, making the claim of necessity open to argue around in order to escape liability for a wrongful act[245]. However, when the court on the other hand, disqualified the existence of environmental concerns as enough 'peril` as to trigger the rule of necessity it, in practice, set up a very high threshold for the possibility of escaping liability for treaty breach, on the basis of a treaty's clash with a new norm of environmental law. This difficulty is linked, at least, to all environmental norms that is establishing a duty to act early in order to anticipate the occurring of actual harm.

The court emphasised that the peril mentioned in article 25 of the ILC draft was meant to be – in cases of risk of long-term damage – with certainty established. If the case was of concerns about possible harm, backed up with the knowledge that there existed scarce scientific evidence

[244] ICJ Reports 1997, p. 40, emphasis added

[245] See article 25.1 *ILC drafts articles on state responsibility for international wrongful acts*

on the particular activity and its consequences only, the rule in question was not to be viewed as an option in order to argue in the direction of escape of liability for breach of international law[246].

It is, given the reasoning concerning the claim of necessity by the court, impossible not to contemplate that there indeed exists a rather large discrepancy between, certain of the substantial obligations and rights within modern international law and, the law of state responsibility, making the former norms in practice hard to enforce and maintain by international tribunals in interstate disputes.

However, this is an issue essentially outside of the scope of this paper. It is sufficient here to only point to this problem since it was in the particular context of claim of a state of necessity (thus within the sphere of the law of state responsibility) that the need of timely environmental protection was debated. Moreover, because thereof, the court did not find it necessary to further go into the content of, or the legal status of, the principle of precaution.

The court just high lightened its view that newer environmental norms, in general (without naming which of those that were at the time binding), should be adhered to by the parties to the disputes. The reason behind this conclusion was based on, first, the dynamic formulation of the 1977 treaty and, second, also due to the parties respective interests of being in conformity with international law, as it has developed since 1977[247].

Thus, a clear and convincing statement of the status of the precautionary principle and other norms manifested in the 1992 Rio declaration was not delivered by the court despite the obvious link between these norms and the claim by Hungary to lawfully suspend and terminate the project.

4.3.1 The Hungarian position and claim

Following the internal debate and, presumably public pressure, the Hungarian Deputy Prime Minister wrote to his Czechoslovak counterpart that a Hungarian scientific study had reached the conclusion that:

> we [Hungary] do not have adequate knowledge of the consequences of environmental risks. In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impact will ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary[248]

As will be demonstrated this statement is a clear, although not explicit, reference to the precautionary principle. There is in the above citation, first, an environmental risk established (risk of harm), followed by, secondly, a

[246] ICJ Reports 1997, p. 45
[247] Ibid. page 68
[248] Ibid. page 32

lack of certainty of the realisation of the risk as well as a connection between the project and the risk (uncertainty coupled with lack of causal link). Thirdly and lastly, some type of precautionary action are therefore proposed by the scientists (the obligation to act is triggered by uncertainties). In this particular case, the actions proposed were further studies.

Hungary, as described in the previous section, referred to a right to invoke the state of ecological necessity to preclude the wrongfulness of its act of suspending the works. It furthermore contested that this right was triggered by the risk of irreversible harm to the environment. Additionally, and more importantly for the purposes of present study, it was claimed that within this right to act wrongful in order to prevent a great and certain harm, lies a right to take earlier – less grave but still wrongful – measures, if there is fear for concerns to develop into such a risk[249].

In the view of Hungary, precautionary considerations had infiltrated and become inherent in the traditional state responsibility rule of necessity, which functions as an exculpating factor to an otherwise wrongful act.

In finalizing the examination of the this part of the Hungarian reasoning, one inevitable conclusion is that the precautionary principle, according to Hungary, can be activated, not only as a legal basis for state responsibility in its capacity as a primary norm of international law, but also, as a factor integrated in deciding whether the situation at hands reaches the threshold of the secondary norm of precluding wrongfulness[250].

Whether this interpretation is correct or not is naturally a question open for discussion. What is certain though (see previous section) is that the court did not want to give room for the inclusion of uncertainty as a factor to take into consideration, when deciding if a state of necessity was, or was not, at hands.

Apart from this example of implicit reliance (the creation of a slight alteration of the right within the rule of necessity) on the precautionary principle, there are other examples of more explicit references to that, at least the containment of, the principle was deemed important to both parties to the conflict. To this end, it was emphasised by Hungary that impact assessments were being instigated and encouraged by diverse groups of experts who had been called to evaluate the situation early on in the history of the project and dispute[251].

It was also accentuated by Hungary that the public engagement (both national as well as international) – which subsequently lead up to arguments being put forward, for public participation in general, within approval processes of these kinds of major developmental projects – was part of the reasons for the Hungarian government to renew the discussion of the justification of the project[252].

---

[249] Memorial of the republic of Hungary, Volume I, at page 267

[250] Hungarian Memorial at page 56: "I would like to emphasise that the Hungarian Government used international environmental law as its starting point, which requires that in the event that environmental dangers are perceived, states have the right and obligation to suspend work in the interest of avoiding undesirable ecological effects and to commence negotiations"

[251] Memorial of the republic of Hungary, Volume I, at page 36 and 37

[252] Ibid. page 41

The reasoning by Hungary, in this matter, resulted in the conclusion that the notions of EIA and public participation should be seen as integrated with one and other and, moreover, that they are both to be seen as components of the considerations a state is forced to take – in the light of scientific uncertainty concerning a project – due to the notion of precaution[253].

Hungary also relied on the precautionary principle in its claim that the action of Czechoslovakia, through the actuating of the provisional solution 'Variant C, ` - where it unilaterally constructed the joint project on their territory – was in violation of its obligations of international law[254].

In essence, the breach of Slovakia's duties under international law, was (at least partially) constituted by their failure, through its insistence on continuing the project and then its unilateral construction of the variant C despite the fact that the environmental effects of the project were still uncertain, to adhere to the customary norm of precaution.

This customary norm of caution was derived from another norm of environmental law which Hungary regarded as the main obligation of states in modern (post 1960) environmental regulation, namely the norm of prevention. Within this substantial duty to prevent harm from occurring lied, according to the Hungarian argumentation, furthermore the duty to act on suspicion – when there is lack of scientific evidence – to prevent harm, which is not yet with certainty established.

The applicability of the precautionary principle in this context is being drawn from its presence in some of the instruments enlisted in this paper (see chapter 3) which, according to Hungary was a sufficient evidence for the conclusion that the principle was a customary norm of international law with this content[255].

Hungary furthermore asserted that when adhering to the precautionary principle, a state is applying a concept that reverses the evidential burden. It, in effect to this, claimed that since Czechoslovakia had not put forward clear evidence of the harmlessness of variant C, it was prohibited in continuing the project[256].

In an attempt to summarize: Hungary claimed that when Slovakia did not institute any precautionary measures (in the form of studies and assessments of possible consequences) – in the connection to the major project that was under construction – it, not only, acted in contradiction with the precautionary principle but, also with the obligation of prevention of serious environmental harm. The breach of the latter norm was derived simply from

---

[253] For the view that public participation is a part of the obligation to perform EIA's see the Memorial of the republic of Hungary, Volume I, at page 39 were public participation is called a crucial element of an EIA

[254] The following facts referred to as arguments by Hungary in this section have been collected from part III of Hungarian memorial, Volume I, Section B. 1. from page 198 and onwards

[255] Ibid at page 201- 202, see for example paragraph 6.64 where Hungary states that " [t]he precautionary principle is the most developed form of the general rule imposing the obligation of prevention. Its proclamation at a universal level can be considered one of the most important results of the 1992 Rio de Janeiro Declaration on Environment and Development."

[256] Ibid at page 203, "the State whose activities are likely to damage the environment of another State must show that the proposed action will not have such effects. If this cannot be done, the proposed activity must be modified or even abandoned."

the fact that the precautionary principle should in fact be seen as a sub-norm to the norm of prevention[257].

4.3.2 The separate and dissenting opinions of members of the court

Not all of the judges, participating as members of the court in this case, agreed on the conclusions of the majority (as referred to above in section 4.2.2) concerning the claim and arguments put forward by Hungary on the protection of the natural environment.

Of the total 12 declarations, separate and dissenting opinions attached to the judgement, two stands out as containing more arguments of interest for the question under examination in this paper, than the others. These two, one separate and one dissenting opinion, touches (among other things) upon the issues of:
a) environmental concerns and their meaning for the outcome of this particular dispute and,
b) the position and role of these concerns within the corpus of general international law, in a manner that the majority of the court, for some unspoken reason, found unnecessary to do.

In these opinions, attached to the judgement, we find views that (albeit with somewhat differing force) gives the standing point of Hungary and its interpretation of the environmental regulations in question, at least, some support. In one particular opinion, this support is not, by the writing judge himself, estimated strong enough to make him reach a different final finding than the majority of the court. However, in the other opinion this is indeed the case.

4.3.2.1 The dissenting opinion of Judge Herczegh

The Hungarian (though not an ad hoc) judge Herczegh reached another answer to the question of whether Hungary, by the suspension of parts of its work – governed by the 1977 treaty – was responsible for its violation of the treaty and, as a direct consequence of this, was in contravention of international law.

Of course, some caution needs to be observed when evaluating this statement since the impartiality of Herczegh, in this particular case, could (and perhaps should) be questioned. Nevertheless, keeping the connection to one of the parties in the conflict in mind, his words ought to be given the same weight – as an example of the views in doctrine concerning these matters – as any other[258].

To begin with, he considered the court to take the arguments of ecological considerations into account in an insufficient manner. He claimed that these considerations are the decisive factors in the end, for the fair settlement of the dispute and not simply, as the majority considers, factors that are indeed important for the parties to consider in their respective performances of the

[257] Ibid.
[258] See footnote 182 in section 4.1 above

treaty however, not decisive in the legal questions asked to settle by the court[259].

To defend his standing point, he stressed, that the treaty itself opened up for the inclusion of modern environmental law into the treaty, through article 19. Thus, the arguments, put forward by Hungary, that the environmental obligations not fulfilled by Czechoslovakia did amount to a breach of the treaty which furthermore led up to a state of ecological necessity, should have made the court look at these accusations more closely, giving them more weight in the final outcome. To back this standing point up even further, he refers to the Advisory Opinion to the General Assembly on 8 July in 1996 *on the Legality of the Threat or Use of Nuclear Weapons.* In this case, the court stated that the environment should not be treated as a legal abstraction but as the concrete foundation of life and life quality, and, that it in general international law there indeed exists an obligation to respect this foundation set on the territories of other states when performing activities on ones own territory[260].

According to the reasoning followed by Herczegh, the court's conclusion should have been another concerning the adherence or non-adherence by Czechoslovakia of the obligation of article 19 of the 1977 treaty. This question should have been evaluated in the light of the international environmental regulations existing at the time of the Hungarian suspension, i.e. 1989, and not of the environmental law as it was at the time of the establishing of the treaty. He found support for this kind of dynamic and adaptable treaty interpretation in the decision by the court in the matter of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding the Security Council Resolution 276 (1970)*[261].

The court did acknowledge the importance of the adherence to new environmental protective regulations, in the prescriptive part of the judgement, where it stated that the parties should have incorporated these in their project from the start and, are furthermore, obliged to continue to do so during the future cooperation since the treaty is still in force between them[262].

However, Herczegh asserted that the determination by the court that there existed a legal obligation to incorporate the developed versions of international environmental law into the cooperation should logically also have led them to the conclusion that Czechoslovakia did not fulfil this obligation when it did not consider the project too risky to proceed with. He argues, to this end, that the uncontroversial and well-established principle, which confer upon states the obligation not to cause harm to other states was, in the light of the effects the development of international environmental law had had on this particular norm, in 1989 holding a duty,

---

[259] ICJ Reports 1997, dissenting opinion of Judge Herczegh, page 176

[260] ICJ Reports 1997, diss. op. page 177; Article 19 reads; "The Contracting Parties shall, through the means specified in the Joint Contractual Plan, ensure compliance with the obligations for the protection of nature arising in connection with construction and operations of the Systems of locks"

[261] Ibid. page 178

[262] Ibid. page 179

not only to, just prevent those harms that were with certainty established but also, through precautionary measures, to prevent uncertain harms and, more importantly, to look out for possible threats of harm[263].

In addition to this argumentation, he asserted that the establishment of the court that the suspension and abandoning of the works on the Hungarian side were not exculpable from state responsibility, due to a state of ecological necessity, was erroneous. In support of this view he argued that an essential interest of Hungary was indeed threatened, since the drinking water to Budapest was at stake, approximately 1/5 of the Hungarian population were facing the risk of being seriously effected by the Czechoslovak planned action. Herczegh stressed in connexion to this that, it must be considered enough, in order to invoke the exculpating rule of necessity, to demand that the certainty of such a great risk is conditional upon the fact that the planned action indeed is being realised (as in this case, according to him). It would have been unreasonable if to request that the planned action is also actually initiated. He concludes that the risk towards an essential interest must be concidered grave and imminent as soon as the state is aware of the planned activity and convinced of its consequences[264].

What is notable in this context is, that the interpretation, which Herczegh did of the rules limiting of state responsibility, opens up for the inclusion of modern environmental norms (just as asserted by Hungary), which aims at prevention and not redemption, into the sphere of the law of state responsibility. It is furthermore quite remarkable that he did not at all require an altering of the prerequisites for the use of the rule in question, in order for it, to become adjusted and more suited for the contemporary disputes, concerning issues of prevention. On the contrary, he seemed to have accepted that, the risk facing the environment of a state, must be with clear evidences established or, with another term, certain, in order for a long term risk to be viewed as imminent. It is the view that this criterion of certainty must necessarily mean that a realisation of the actions leading up to the risk being actualized has in fact begun, which he was in opposition to.

Thus, he simply gave, trough what I choose to call, a 'logical and consequence-based` interpretation of the prerequisites grave and imminent peril of the rule of necessity, room for the use of the material norms of precaution and prevention within international law (not only as primary norms of conduct but also) as legal bases for extraordinary means in contradiction with international obligations, acceptable in certain situations. His method of interpretation was logical in the sense that what was looked for was a reasonable version, which did not exclude situations based on terms, or, use of words.

He found, in this study, that since a right to act, when the risk of damage is certain and imminent (in the sense inevitable in that the actions leading up the risk being realised has in fact begun to occur) existed, then, a right to act before the risk has begun to become realised (given that the risk is equally certain), was reasonable to interpret into the rule.

The method was consequence-based because he focused on that the consequences, which Hungary was trying prevent through the invocation of

[263] Ibid.
[264] Ibid. page 184 and 185

the situation of ecological necessity on an early stage, were consequences, which would had been irrevocable if they had started to occur, which was what the interpretation of the rule required by the majority of the court.

He did perhaps widen the original scope of the norm of necessity, by this argumentation, but in that case, he did so indeed without weakening or hollowing the criteria of the norm. This is evidenced by the fact that he fully accepts the interpretation of these criteria, as put forward by the court, with the support of the ILC draft of the law of state responsibility[265].

4.3.2.2 The separate opinion of Judge Weeramantry

Judge Weeramantry saw three notions, actualized by the dispute in question, that he found necessary to elaborate further, in order, to explain the reasons behind his vote in conformity with the majority of the court. Two of these issues have a direct bearing on the questions under discussion in this paper.

These are first, the concept of sustainable development and second, the principle of (with his own choice of words) continuing environmental impact assessment. As will become apparent, I treat the principle of precaution as intrinsically dependent of these two concepts, for reasons that I hope will be clear on a later stage of this paper. Thus, I view the arguments in favour of conceiving these two concepts as parts of the corpus of general international law, as put forward by Weeramantry, as implicit arguments in favour of the equal treatment of the precautionary principle.

In explicit terms, he himself, tied the principle of continuing EIA to, what he called, the principle of caution:
"EIA . . ., embodies the obligation of continuing watchfulness and anticipation."[266].

The core of his reasoning, about the concept of sustainable development, evolved, in large part, around the long history of the concept within different ancient cultures and legal systems, in particular major irrigation civilizations of the pre-modern world. He drew from this review (coupled with a previous brief review of international instruments reiterating the modern version of the principle of sustainable development) the conclusion that the concept is well recognised in the historical roots of nearly all societies of today. What is more, he also traced, the source to the validity of the modern principle of sustainable development, back to the fact that this principle reflects the "ingrained values" of these civilizations[267].

He concluded in connection to this that there, in his opinion, existed no hesitation on that the principle of sustainable development was indeed, by 1997, a general principle of international law, thus binding upon the parties of the conflict partly through a variation of binding documents but more importantly, as a customary obligation. He rested this conclusion on a two-edged reasoning:

---

[265] Ibid.
[266] ICJ Reports 1997, separate opinion of Vice-President Weeramantry, page 113
[267] Ibid at page 108, the last remark deserves some further reflection sinse it seems to adhere rather well to the theory of law presented above in chapter 2, this statement will therefore be returned to in the analysis of chapter 5

a) the above mentioned review of historical evidences of the use of a similar, or the same, concept, in ancient cultures within disparate parts of the world and at different times (coupled with the existence of evidences of state acceptance of the principle in modern international relations)[268], and, b) the logical necessity of the existence of the principle, stemming from the presupposition that two principle cannot be placed side by side, operating in collision with each other, without a third principle of reconciliation[269].

Even if both parts of the reasoning – behind the conclusion concerning the legal status of the concept of sustainable development – are equally important, it is the second cornerstone of that reasoning that I will give some further elaboration here, in order to give a more fully understanding of Weeramantry's argumentation.

Weeramantry held that there undoubtedly existed a principle, of a right of states to each promote its peoples welfare and happiness as well as it can, this was the principle of right to development[270].

Equally certain was, according to Weeramantry, the existence of a principle allocating the obligation on states to each guarantee to its inhabitants a clean and healthy environment, thus an obligation of protection of the environment[271].

This is the background to the claim that there was an absolute, non-negotiable, necessity for the need of a principle with the purpose of mediating, when the two different objects of these principles clashed and demanded distinct and incompatible actions, in interstate affairs. The absolute necessity of a third principle came with the acceptance of the notion, presented in this paper as the Dworkin`s theory of law, which render impossible one principle – by a rule of hierarchy – to prevail over another.

This theory seemed to have been accepted by Weeramantry who, from his standing point, saw the principle of sustainable development as an inevitable compromise, which states had to abide by out of necessity, between the two principles colliding in the case; a right to develop and an obligation to protect the environment.

To accept that two principles could operate in collision with each other, without a method of reconciling, in the form of a third was impossible, asserted Weeramantry and dismissed this idea frankly:

> The unattainability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result. Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of

---

[268] Ibid.

[269] Ibid. page 90, this is another feature of the reasoning of judge Weeramantry that touches upon the theory of law presented in chapter 2 and relied on in this paper

[270] He refers to Article 1 of the Declaration on the Right to Development, 1986 and Article 3 of the Rio Declaration in support of this contention, see ICJ Reports 1997, dissenting opinion, page 91

[271] The basis and legal validity of this principle in international law is derived from the contemporary human rights doctrine, in which the former is a vital part, ibid. page 91 and 92

> reconciliation. That principle is the principle of sustainable development.[272]

Apart from giving support to the general utilisation of principles, in the manner advocated by Dworkin in the context of international law, judge Weeramantry also opened up for the inclusion of the precautionary principle within the sphere of generally binding norms through an object-based interpretation of the principle of sustainable development. The line of thoughts behind this last contention was as follows.

The traditional search of state practices, evidencing the legal status of a particular concept, can bring validity to that concept, based on (and only as far as), the limits of the state practice allows. An alternative search for legal validation of a particular concept, through studying the construction of the system of law in general (and the function played by the particular concept within this construction, in particular), in addition, provides us with the opportunity to determine the status of the concept at hands in accordance with the purpose of the concept. I derive this conclusion from the reasoning of Weeramantry, which entailed an aspect to it of promoting the inference of the legal status of a concept from the necessity of upholding a certain theory of law where the concepts had its role to play.

In order to clarify this reflection, I will rephrase it into terms that are more concrete. Thus, if we were not limited to looking at utterances of state opinions in order to approve of a 'new` binding norm, but were allowed to look at which role the norm plays within the international system of law, then further possibilities would exist to, determine that a norm had to be included within the binding sphere of international law.

In the light of the example of sustainable development, presented by the dispute between Hungary and Slovakia, this method of turning to an argument of logical need for a principle of compromise – due to the impossibility of a system of law accepting equally weighting principles – is an appealing one, since it allow the interpreter to establish also what components – within this principle of compromise – that are actually required, in order, for the concept to function as a mediator between the clashing rights.

Overall, the aspects relied on by Weeramantry in this context made him conclude that the principle of sustainable development was indeed a customary principle of international law. I furthermore draw from this the conclusion that this implicitly speaks in favour of a generally binding precautionary principle.

In order to balance the interests of development and protection of the environment, a cautious attitude in the planning, construction, and running phases of all projects is an indispensable feature of the compromise required by the principle of sustainable development. Thus, in theory it is enough to say that sustainable development afford the necessary compromise in order to solve the conflict situation at hands but in practical terms this notion tells us nothing of what is actually required. That can only be done by breaking

[272] IC J Reports 1997, separate opinion of Weeramantry, page 90

down the sustainable development concept into its components of which the precautionary principle most likely is one[273].

As referred above as a two-edged reasoning, Weeramantry uses two methods in establishing sustainable development as part of general customary law. Of course, the search for legal status through the examination of state practices is the more important method of the two; indeed, it is the one method of such a process with the explicit support of the Statute of the ICJ[274].

However, seen as a complementary method, as adding strength to an already existing argument of customary law, the second method can be very important in giving us the reasons behind why states seems to accept a certain notion as law and also in helping us understand the content of a new customary concept[275].

I will now turn to the discussion on the concept of, what Weeramantry calls, continuing EIA. First of all, Weeramantry, by referring to domestic and international legislations, which recognizes the principle of EIA, concludes that he already had, in the above reviewed case (Nuclear Tests Case II), established that the principle of environmental impact assessment had gathered enough international acceptance in order to be seen as a generally binding norm, at least within certain types of conduct[276].

The purpose of the opinion at hands became therefore, in this matter, merely to clarify the scope and extent of the principle. He asserted that it followed from more recent application of this principle that by 1997, the duty to undertake environmental impacts assessment, was a continuing duty, lasting as long as the particular project was in operation.

The principle of EIA was furthermore to be viewed as an inherently dynamic one and its practical obligations therefore changed, depending on the stage and size of the project under consideration. This was apparent from most utterances concerning the principle in modern times, such as for example the wording by the court itself in this particular case:

> Owing to new scientific insights [. . .] new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate

---

[273] See above Section 3.5.4

[274] Article 38. 1(b) of the ICJ Statute reads: "international custom as, as evidence of a general practice accepted as law;"

[275] The sources of international law within article 38 of the ICJ Statute are not by all approved since they it in certain situations appears to be too rigid and categorical, see Brownlie at page 18

[276] ICJ Reports 1997, separate opinion page 111, see footnotes 77, referring to the previous case; *(Request for the Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (New Zeeland v. France) Case, I.C.J. Reports 1995, p 344).* Also footnote 78, enlisting instruments recognising the principle: the Rio Declaration; United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP draft Principles of Conduct; Agenda 21; the 1974 Nordic Environmental Protection Convention; the 1985 EC Environmental Assessment Directive; and the 1991 Espoo Convention

> new activities but also when continuing with activities begun in the past[277]

The main point therefore was, according to Weeramantry that the completion of pre-studies of a project's possible effects did not, under any circumstances, remove the further duty of a state to evaluate the risks of the project as it proceeded in time[278].

This development from, what we can call, the static version of the principle into, the dynamic or continuing version, was furthermore by 1997, settled in general customary environmental law, according to Weeramantry[279].

He traced the beginning of this development back to the Trail Smelter Arbitration in 1907, where the tribunal ordered the parties to monitor the future effects of their activities in an anticipatory manner. He listed a few more examples in favour of this interpretation of the duty to undertake impact assessments[280].

He completed his list of evidences on assertion that the principle was part of general international customary law by referring to examples of domestic use of the principle in a continuing manner, and more importantly, by reference to the principle being part of the larger principle of caution[281].

What is created by this last assertion – that the obligation to undertake continuing EIA's under the scope of the principle of EIA was a sub principle to the precautionary principle (by Weeramantry called the principle of precaution) – was a link between the three discussed principles of this part of the opinion. By the reasoning put forward by Weeramantry it was possible to view the precautionary principle as a sub principle to the principle of sustainable development, on the one hand, and the principle of EIA as a sub principle to the precautionary principle, on the other.

Such a link, if determined to be correct, would indeed provide us with a better understanding for the connection between three of the more important substantial norms of contemporary environmental law. It also, and much more importantly for the purpose of this paper, would give us a method for including the precautionary principle, into the sphere of customary norms, without having to turn to the harder task of evaluating examples of regular state practice since the other two concepts would presuppose a general precautionary principle.

---

[277] IC J Reports 1997, separate opinion Weeramantry, page. 78
[278] Ibid. page 111
[279] Ibid. page 112
[280] Co-operation Programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, under the ECE Convention; VCPOL, 1985; LorTrAP convention, 1979 are the enlisted examples on page 112
[281] An example of domestic use of the principle of EIA is collected from Indian law page 112, see also the quote above in this section for where he explicitly refer to the precautionary principle

4.4 The development of the view of the ICJ on the precautionary principle

In this section, the views of the court in the two reviewed cases will be examined and compared. Furthermore, the question of what similarities in the argumentation of the content of the precautionary principle – presented by New Zealand and Hungary respectively – is going to be examined. Therefore, the rather detailed review of the dissenting and separate opinions of the cases will be left without further comments for a while. I will instead return to these in the following chapter, where they will be treated as views of jurisprudence on how to interpret the law in this particular matter.

What seams clear after comparing the two environmental disputes just discussed is two main propositions. The first is that the interpretations, by New Zealand and Hungary respectively, concerning the precautionary principle appears, from the argumentation presented by New Zealand in 1995 and the argumentation by Hungary in 1997, indeed to be generally, similar and coherent. With this is meant that the scarce examples, which exist, of states referring to the precautionary principle in the context of international dispute settlement, within the realm of the International Court of Justice, thus show both a coherent and a uniform way of interpreting the principle.

For example, both states consider the principle to be triggered when there is uncertainty concerning the effects of a major project. Additionally, they share the interpretation that this uncertainty has to be coupled to a conviction that the state is facing a risk of somewhat concrete and severe damage (at least something more than merely a possible effect of whatever nature and degree). Thus, they both asserted that there is a threshold of acceptability of risks attached to the principle, which a state has to pass, in order, for the concept to become applicable. Evidence of this views can be found in the reasoning about when and what factors that triggers the obligation to conduct EIA's, in the application of New Zealand on page 36 – 48 and (see for example the last emphasised words of the quote below from the New Zealand application), in the Hungarian memorial from May 1994:

> the risk of constructing the Barrage System in accordance with the original plan cannot be considered *acceptable*. Of course, it c*annot be stated either that the adverse impact of will ensue for certain*, therefore, according to their recommendation, further thorough and time consuming studies are necessary[282]

Another interpretation of the principle, which the two states did in common, is the inference that there is a direct consequence of when the situation – proscribed by the principle – of uncertainty, is at hands. This consequence is the obligation of the state (who wishes to launch an activity with the potential environmental risk attached to it) to investigate and conduct thorough studies into the risk.

[282] ICJ Reports 1997, page 32, emphasis added

Clearer perhaps is to say that the precautionary principle needs and presupposes the principle of EIA as an operative tool in order for it to be effective. To this end, New Zealand stated that

> [i]t is France's consistent refusal to *carry out a procedure* [EIA] which is now accepted virtually world-wide as absolutely essential in this *class of activity* that constitutes the first element of illegality in the position that France is now taking.[283]

Hungary, took, as mentioned, the same position, which can be seen in its memorial, particularly on page 39.
Moreover, both states contended that the principle of precaution also entails a reversing, or at least, an easement, of the burden of the complaining state to prove that the risk threatening its environment is in fact stemming from a particular source outside of its control and insight. This is being stated by New Zealand in its application on pages 53- 54 and, in the Hungarian memorial on page 203.

In connection to this argument, Hungary furthermore brought forward a theory of the effect of the obligation of prior impact assessments, in turn to be seen as an outcome of the precautionary principle, which reflects the view of New Zealand in the same matter:

> the State whose activities are likely to damage the environment of another State must show that their proposed action will not have such effects. If this cannot be done, the proposed activity must be modified or even abandoned.[284]

The New Zealand argumentation to this end is presented in their application on page 38.

The second main proposition that is possible to derive from the comparison of the two cases has, as its starting point, the conclusion that it is difficult to come to any conclusions at all, as to the inquiry instigated in the heading to this section. This is so because the court, for different reasons in the respective cases, almost completely evaded the discussion of the status and establishment of content of the precautionary principle.

However, this conclusion of the giving of no-conclusions, on the matter of the precautionary principle, might in itself be used as the basis of the further proposition: that in 1997, the court still missed, in the principle of precaution, one or more of the essential elements required for a norm to constitute customary law.

Most likely, it was the prerequisites of a uniform application of the concept, coupled with the criterion of certain duration in time, which the court considered not to have been fulfilled in 1997.

Thus, the amount of non binding, as well as, binding declarations, treaties, resolutions and other instruments that had been created since the Rio Conference alone, up till the time for the instigation of the first dispute,

---

[283] (New Zealand application to the ICJ in Nuclear Tests Case, page 48, emphasis added
[284] Memorial by Hungary, Vol I in the Gabcikovo-Naymaros Case, page 203

ought to have been enough for the court to establish in 1995 (or at least in 1997 when the latest of the two findings were delivered) that the additional requirement of generality had been attained.

Importantly though, is it to remind of that in the latest of the two findings the court did at least open up for the inclusion of the precautionary principle into customary international law in the future.

In the Gabĉikovo-Nagymaros case, it thus referred to the growth of the concept of sustainable development as an important development within international environmental law, which was necessary for the parties to take into consideration[285].

Since it has also been suggested, by Weeramantry in his opinions, that the precautionary principle should be interpreted as a sub-principle to the principle of sustainable development[286]. Thus, if sustainability, as a legal concept, has reached the status of customary law naturally so have all of its components, including the element of precaution. However, the court did not state its opinion in this matter either.

Finally, it should be reminded of the fact that when the time comes for the settlement of the Argentine – Uruguay dispute, concerning paper mills in the river Uruguay, it has passed nearly a decade since the last statement from the ICJ were delivered about the content of the environmental context of international regulation. I therefore suggested that the court, by then, very well might find that the development within the environmental field of international regulation has been going on, in a coherent direction, for a long enough period of time, in order, to satisfy the prerequisite of duration. This, in turn, might very well lead to the situation in which the court finds it appropriate to approach and utilize the concept directly in the settling of the, as of yet, unsettled dispute between the two neighbouring states in South America.

[285] ICJ Reports page 78
[286] See Birnie and Boyle page 88

5 Analysis

5.1 The method of analysis

This analysis will be set out in two parts.

First, the particular question of how far the development of the precautionary principle in international law has come will be examined. This is going to be done by reviewing what has been described about the principle in chapters 3 and 4 in the light of the requirements of generally binding norms of law, as established by chapter 2.

Then, the focus will be turned to the main purpose of this paper, namely the examination of how principles of law develop in general. An attempt to draw some conclusions to this end will be proposed. The second part of this analysis, is therefore, in essence, a test to see if the attempted elucidation (in chapters 3 and 4) of the general development of principles, through the use of the particular example of the principle of precaution, add anything to the theory of law presented in chapter two. Thus, this is an effort to verify if, what the theory of law presented there tell us about the manner in which principles of law develop, matches with the answer to the same question derived from the findings in the example used in this paper.

The first part of the analysis, for the reason set out above[287], is dealt with in a somewhat more summary way than the second part[288].

5.2 The analysis of the particular matter: the legal status and effects of the precautionary principle

Before instigating the actual comparison of the findings on the precautionary principle with the requirements of chapter two, the main propositions from that chapter will be lifted and high lightened.

Subsequently, the weaker, or more doubtful (in the light of the just mentioned propositions from chapter two), parts of the principle will be dealt with in some depth, in order to see, if these parts do, or do not, fit the requirements of our established theory of law.

There are certain facts concerning the precautionary principle that has made some learned writers hesitating upon declaring it generally binding in the international context. I will, for the purpose just described, bring up those facts and discuss their impact on the over all conclusion of the principle[289]

---

[287] This is that the main purpose of present paper is to study a particular principle of law in order to derive from this some general conclusions on the development of principles of law in general

[288] See chapter 1. 1 second and fourth sentences

[289] See in section 3.4 the quote from the 1992 work of Birnie and Boyle

From the conclusions reached in the establishment of the theory of law used in this paper, I wish to lift out and emphasise the following:
To constitute a legal norm the precautionary principle must:

- Be established as regulative, i.e. have features prescribing a type of conduct or state of affairs, as well as, stating the conditions for the prescription[290];
- be stemming from one of the established (legitimized by the international community) sources of law, i.e. have a firm connection to the legal foundation of the international society[291].

To constitute a generally binding norm of international law, the precautionary principle must furthermore:

- have as its source either the informal agreement, known as, customary international law (and fulfil the specific requirements of this type of norm), or alternatively, general principles of law, derived from a majority of the world's societies[292].

To distinct itself from a rule of precaution, the precautionary principle must:

- attain the requirement of generality, with another term described as. It must have a guiding-type of effect, in opposition to the concrete effects that rules of law has as indicating marks[293] ;
- it furthermore needs to be completed in the stating of itself, in opposition to a rule, which is complete only when all exemptions from it is listed (at least in theory) and attached to it[294].

Now, the task of testing these main propositions on the known facts about the precautionary principle, as it is being depicted in treaties, instruments, statements of state opinions and by the international court of justice, will proceed.

An argument as to the lack of the first requirement of the enumerated conditions within the precautionary principle can easily be rejected. By stating one of the more resent formulations of the principle it should stand clear that (by now at least and in the quoted version) the principle is regulative enough as to be considered a legal norm. It is prescribing the state of affairs of general precaution towards developmental projects containing potential degradation effects on the environment, as well as the type of conduct that it is expecting:

The Contracting Parties shall apply:

b. the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no

[290] Chapter 2.2
[291] Chapter 2.2.1, first part
[292] Ibid, see article 38 of the ICJ Statute
[293] Chapter 2.3
[294] Chapter 2.3

conclusive evidence of a causal relationship between the inputs and the effects;[295]

Furthermore, it is equally easy to reject the proposition that the second requirement should not at hands. Chapter 3, in its entirety, can be presented as a basis for the argument that the precautionary principle, at least, is a principle firmly rooted in modern treaty law. Thus, at a minimum the principle is, in the form that it is defined in respective treaty which, of course can vary from instrument to instrument, obligatory to abide by for all the states bound by any of the different treaties. Hence, the precautionary principle is certainly in some form connected to the legal foundation of the international society.

Difficulty to verify of the precautionary principle, in the light of the above listed requirements on legal norms with general reach, arises thus first when the third requirement is to be dealt with. It is here the views differ in doctrine and, it was furthermore this proposition that the ICJ declined to formulate its opinion on when the chance appeared in the 1997 Gabĉikovo-Nagymaros case.

The reluctance to view the precautionary principle as generally binding, in one and the same manner, upon all subjects of international law, is probably connected to the fact that the operation of establishing norms of international customary law is rather complex in the first place.

In addition, the obvious attainment of the fourth main prerequisite for a principle of law, the quality of vagueness or generality[296], has also been put forward as an argument against the precautionary principle being established as a legal principle with general applicability. I will soon to this issue, however, the fifth prerequisite shall first be shortly addressed.

That the precautionary principle is unconditional, in the sense that it tolerates no exceptions but simply steps aside or prevails when faced with an opposing norm, can be drawn from the argumentation presented by the distinguished judge Weeramantry in his separate opinion to the Gabĉikovo-Nagymaros case[297].His reasoning to this end presents a scrupulous and practical example of the theoretical operation of weighing of principles.

This having been said, I will now turn to the propositions of prerequisites for the precautionary principle, just enlisted, which were not as easy to find an unequivocal answer to as the first, second and fifth.

5.2.1 The consequences of the principle being undefined and vague

I will deal with the fourth proposition first, prior to the issues of the conditions for attaining general applicability through the connection to one of the two sources of law giving such a capacity. The fourth proposition is the one concerning the unique feature of a principle, which separates it from a rule of law. I have chosen this disposition because it better – than the

[295] See section 3.5.3 where this quote from London Dumping Convention is collected
[296] See section 3.4
[297] See in particular section 4.3.2.2 by footnote 272

converted – accentuates the interdependence between the two propositions in question. The attainment of the fourth proposition have lead some to conclude that the third cannot be attained, at least, not through the use of the source of customary law. Furthermore, the chosen disposition follows a disposition, which appears to be more natural to use in examining what footprint a certain principle leaves within the international context. In such an examination, it would be a logical pattern to first, review the status, and subsequently, the effects of a norm of international law.

What will be dealt with in this section is thus the fact that a confirming answer to the pr concerning the unique feature of a principle that separates it from a rule of law,oposition that the principle of precaution has attained the necessary feature of vagueness, in order for it to be separated from rules of law, leads to the conclusion (by a few interpreters) that the principle cannot be viewed as generally binding since the proposition of vagueness in itself renders this impossible[298].

There is a string of arguments that in opposition to the interpretation of Birnie and Boyle though. First of all, if the contention, that the very feature which distinct principles of law from rules of law is the same as the fact which blocks a principle from being viewed as generally binding, is to be accepted then one must also accept the consequence that the whole theory of law, which this paper rests upon, must be rejected. This is so, since a contention of this sort is contradictory to the whole basis of that theory. That theory, namely, presupposes principles of law as something distinct as rules of law but with the equal possibility of being legally binding, and in addition, perceives principles as utterly important for the system of law to function.

Second, what is left in terms of theories for understanding the international system of law in general, as well as, of methods of understanding the interpretations of the law by international courts, is the reliance on the opposing explanation of the unregulated situations. The situations in which we, according to the theory of this paper, would have to lean on principles of law whereas, the opposing theory is explaining these situations by reference to the discretion of the individual judge[299].

Due to the fact that the other method, of resolving the problem of gaps in the material law, involves the acceptance of the judging power as being legislative, in the sense that it has the full discretion to determine – rather than interpreting – the law on a case to case-basis when faced with gaps or contradictions, this method must be rejected. For reasons set out above (section 2.4) this method of explaining the law is simply not acceptable if the law is to be regarded as founded on forseeability and predictability. Therefore, in conclusion, I do not find the contention arguable that the mere

---

[298] (See Trouwborst page 51, where he refers to writers with this view; An example of this view is presented by Birnie and Boyle who at page 119 in their work from 1992 states concerning the status of the principle that : "[m]ore fundamentally, the consequences of applying a precautionary approach also differ widely. As formulated in Principle 15 if the Rio Declaration, the precautionary approach helps us identify whether a legally significant risk exists by addressing the role of scientific uncertainty, but it says nothing about how to control that risk, or about what level of risk is socially acceptable. [...] [T]here is no general principle for determining what standards to adopt."

[299] Seee 2.4 last part

attainment of the prerequisite of vagueness and generality within the scope of the precautionary principle is ruling out the principle from becoming generally binding.

This conclusion is based partly, as just described, on the construction of the theory of law which I have chosen to adhere to but, furthermore, also on the fact that it can be successfully denied that the generality in the containment of a principle is not, by itself, ruling out the possibility of a norm from becoming legally binding on all subjects of international law.

Instead it is argued, in connection to this, that no matter how important, in terms of practicality, it is for the precautionary principle to become further elaborated, it cannot be seen as an unequivocal fact that such an elaboration would effect the determination of the status of the principle. The argument is put forward that vagueness does not, in itself, stop a norm from the possibility of being derived from customary international law or general principles of law. Without jumping ahead of my assumptions, the point I am trying to make here is that, although the vagueness about the precautionary principle might affect the perception of the principle in some senses it cannot be used as a successful argument to the contention that it, because of this, is not enough regulative in its statement to be generally binding. This is asserted because, as has been showed, the prerequisite of regulative character is performed on entirely different criteria[300].

In terms of what effects this unsettled problem actually brings with it to the determination of the status of the principle, I suggest a comparison to a firmly established norm within international law. The rule that prohibits states to use threat of, or, armed force against other territories, which we find in one version in the United Nations Charter and another, probably almost identical, in customary international law, is a uncontroversial example of a firmly established norm of international law with general legal binding effects[301]. The legal effect is even firmer established through the fact that it is a well-recognised view that this rule is considered as a norm with jus cogens character[302]. Nevertheless, this norm is still the object of rigorous investigations concerning the determination of the correct understanding of its content, effects and exact distribution of duties and rights among states[303].

This example is given, in order to show, the fact that a vagueness concerning the exact material (substantial) effects of a norm, or, its exact implications to the subjects of international law, never alone can exclude it from the circuit of legally binding norms.

Furthermore and lastly, there is absolutely no lack of substantive obligations and rights conferred on states containing a reference to the precautionary principle – within the different versions of the principle

---

[300] See above in section 2.2

[301] See ICJ 1986 Nicaragua case where it was established that the rule also exist in customary international law and is binding upon all states

[302] See Brownlie Ian, Principles of Public International Law, 6th edition, Oxford 2003, at page 488 in fine. Cassese Antonio, International Law, Oxford 2991, at page 139. Shaw Malcolm N., International Law,5th edition, Cambridge 2003, at page 117 in fine. Dixon Martin, Textbook on International Law, 5th edition, Oxford, 2005, at page 37

[303] See Trouwborst at p. 53

formulated in the different contexts where it is being utilized – from which a firm definition in the future might not be drawn.

5.2.2 Has the precautionary principle attained what is required for it to be generally binding?

Concerning the other proposition, which, together with the proposition discussed in previous section, is harder to confirm than the others presented in section 5.2, it is necessary to emphasise that it, in turn, needs to be divided into two separate examinations. Since a norm might bind all subjects of international law in a general manner if it is derived from one of two sources generally binding sources of international law, the criteria of both sources must consequently be addressed in this section[304].

5.2.2.1 The source of general principles of law

It has not been argued in any of the material used for the completion of this paper that the precautionary principle should be seen as being derived from a majority of national systems of law where it, to this end, would have to have been as one of their fundamental principles upholding and giving support to its system[305].

On the contrary, as is evident by sections 3.2 and 3.3 in this paper, the conception of a notion of precaution in the environmental context is something that has evolved largely within the international arena even though the first reference to a precautionary principle was in a domestic regulation[306].

Judge Weeramantry, however, argued in the direction of general principle of law concerning the principle of sustainable development in his separate opinion to the Gabĉikovo-Nagymaros case. However, notwithstanding the fact that his reasoning did not concern the precautionary principle directly, it also was limited to a very narrow usage of the principle of sustainable development. So, even if it could be argued that his reasoning is affecting the precautionary principle (due to the acceptance of the derivation of that principle from the main principle of sustainable development) support is obviously lacking for the argument that the whole scope of the two principles is collected from this source of law[307].

---

[304] Article 38.1(b) and (c) of the ICJ Statute states: The court, whose function is to decide in accordance with international law . . ., shall apply:
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations. . .")

[305] See article 38.1.C ICJ Statute and Brownlie at page 16 explaining the meaning of this reference in the article

[306] See section 3.3, footnote 73

[307] Sep. opinion judge Weeramantry, ICJ Reports 1997, at page 208, see section 4.3.2.2 for further references

Despite the argumentation presented by Weeramantry, the conclusion has to be that the precautionary principle has not attained general applicability based on this source of international law.

5.2.2.2 The source of customary international law

In section 2.2.2 it is established that in order to determine whether a principle of law is derived from customary international law, or not, the same operation of search for opinio juris, through the examination of state practice, has to be performed as when establishing customary rules of international law[308].

The purpose of such an operation is to determine whether there is sufficient generality, uniformity and consistency expressed by the utterances of state practices to establish the required opinio juris within the world community, i.e., establish the acceptance of a norm of law, which binds, in essence, all[309].

In this particular case, the condition or criterion of generality[310] is verified at once by the fact that the review of instruments, presented in chapter 3, clearly show that almost all states today have agreed to be bound by the precautionary principle by either one, or more, of the regional and global treaties utilizing the principle[311].

What is more, the nearly universal consensus on the importance of the principle is also evident by the manifestation of willingness to co-operate in the adopting of the Rio declaration and it is Agenda 21 and this fact should be also taken into consideration when contemplating whether the norm is generally accepted or not. However, it is essential to keep in mind to this end, that these instruments are not legally binding on states per se. Thus, their mere existence can, and perhaps, should indeed be interpreted as important statements of intent and will of states concerning the issues enlightened therein, reflecting the general strive to approve of the concept. However, they cannot be regarded as direct evidences of the concept's legal status[312].

---

[308] See particularly footnote 33 in section 2.2.2

[309] Brownlie at page 6 and 7

[310] Here the word generality is referring to the factual situation that a majority (universality is not required, see Brownlie page 7) of the states in the global community is employing the norm under examination, as opposed to, the use of the word in sections 5.2 and 5.2.1 where it reflected the lack of definition attached to a particular principle

[311] See Trouwborst at page 93: example of regions where the precautionary principle has been incorporated through amendments of existing treaties or creation of entirely new ones: the Baltic Sea region, the Mediterranean Sea area, Africa concerning dumping and management of wastes, the Antarctic region, EU as a hole region through the incorporation of the principle into the Maastricht treaty; the total amount of legally binding instruments in which explicit reverences to the precautionary principle exists is 53. Of these are 14 global, 38 regional and 1 bilateral; see also Birnie and Boyle at page 118

[312] Brownlie contends that the most important devise in recognising generality is not to look for a universally applied norm but to focus on the abstention from protests concerning a certain norm. If the abstention from protests can be referred to a deliberate approval and not merely a non-interest in the issue, then there is a strong case for the criteria of generality being attained without explicit use by very many states, page 7 in fine and 8 first part. This is why the Rio Declaration is so important: by signing this policy document, a

Within the second and third criterions: the questions of consistency and uniformity are more intrinsically interconnected and therefore a little harder to evaluate[313].

To back up the argument that the principle is being applied in a uniform manner by most states (the requirement is not of complete uniformity[314]), the Hungarian and New Zealand claims, can, with favour, be pointed to (as can the Argentine claim, which will be demonstrated below). These, as already commented upon in section 4.4, show considerable similarities in their respective interpretation of the precautionary principle.

In addition, the unequivocal approval, by a great majority of states within the global community, of the formulation by the principle in the Rio declaration and the exact, or almost identical, reiteration of this formulation in the global environmental treaties concluded after the conference in Brazil, support this argument[315].

Yet another fact, which speaks in favour of the conclusion that the requirement of uniformity is being attained in the case of the precautionary principle is connected to the fact that the principle, due to its generality, is inherently vague in stating what it – in terms of concrete actions – demands (what is claimed here is thus not that its overall goal or state of affairs are stated in vague manners in any sense), the interpretation of the concept by states does not have to be as unvaried as in the procedure of establishing uniformity in rules of law. What just have been argued can be translated into the assertion that, the vagueness in a principle is being directly connected and caused by the vagueness in the expressions of the opinio juris in the matter. In other words, the mere fact that the concept under examination here is a principle of law eases the criterion of uniform application a little. The generality of the main objects of the principle; to alter states attitudes towards potential environmental threats, to promote a more cautious attitude in general towards risks, and to establishing a firmer supervision of all activity a state's territory, relieves it from some of the burden in connection to the prerequisite of uniformity necessitated in the state practice in support of the claim of opinio juris[316].

However, the criterion of a uniform application of state practice, concerning the norm under examination, also has an aspect of time attached to it. This is because of the criterion, which obliges state practices to hold a quality of consistency, in order, to be taken into consideration. Thus, as to

---

majority of the worlds countries approved of the principle, even if many of them perhaps never had officially declared their views on it before

[313] Brownlie speaks of them, for example, under a common heading when listing the prerequisites for opinio juris, see page 7

[314] See Brownlie page 7

[315] Trouwborst at page 118: 172 states attended the Rio Conference, at least 115 heads of states in comparison to two in Stockholm 1972 were present and representing their states and the declaration was unanimously adopted; see furthermore article 3.3 of the Climate Change Convention, preamble article 9 of the Biodiversity Convention and article 2.2 of the OSPAR Convention for examples of the formulation of principle 15 being more or less literally reiterated by subsequent instruments to the declaration

[316] See Shaw page 82 referring to the ICJ in demonstrating the fact that the procedure of establishing opinio juris is a difficult and complex one: "[i]t is thus clear that the Court has adopted and maintained a high threshold with regard to the overt proving of the subjective constituent of customary law formation.

the context of evidences of opinion juris, state practice must be uniform, in both the sense that, those states using the norm in question must use it in a fairly similar manner, and, in the sense that, the application of the norm in this particular manner must reappear sufficiently often in time. It is this last part of the conditions of state practices, the part that necessitates consistency in time, which is also called the requirement of duration[317].

Assessing this – the last of the three criteria for the establishment of the required opinio juris – it becomes obvious that this is where the weak link is, between, on the one hand, the principle of precaution and, on the other, the affirmation that it is indeed a norm with generally binding effect.

As the review of the history of the principle show, the period in time from when the principle for the first time was stated in an international context up until today, is not a very long one. When the principle was invoked by Hungary in 1997, during its oral pleadings, only 18 years had passed since the principle for the first time was relied on in outspoken manner in an international context. Furthermore, not more than 5 years had passed since it was established as a principle governing the developmental and environmental issues in general, in a global context[318].

Even if there is a high probability, an issue I raised in section 4.4 in fine, that the requirement of duration does not pose the same obstacle on establishing the criterion of opinio juris today, as it perhaps did in 1997, I will discuss the situation of 1997 a little further. This is to show that even then there were possible ways to escape this obstacle of lack of duration.

One such possible manner, to get pass this requirement, is to rely on the argument that the time aspect of the criterion of consistency should not be focused on in the same manner as requirement of uniformity and generality.

Brownlie states to this end that the aspect of time is important only in proving a general and uniform custom. Therefore, if these two aspects of the state practice can be confirmed, which seem to be the case of the precautionary principle, a further examination of the duration of the practice does not have to be performed. Moreover there is, according to the same writer, examples of customary norms, which "have emerged from fairly quick maturing of the practice."[319]

Even if all of these assertions are true, as well as the claim from Brownlie that the international court of justice does not emphasise the time element in its practice[320], the fact still remains that the ICJ abstained to rely on the precautionary principle when the circumstances for such a reliance was present, according to Hungary, in the 1997 case. Thus, since the time aspect was the only criterion concerning the legal status of the precautionary principle in this particular adjudication process, which was left unconfirmed, we need to address the issue of duration some more, before settling for a conclusion on that particular matter.

---

[317] Brownlie at page 7

[318] See section 3.5.1 with references to the conclusions of the 1984 First International North Sea conference in Bremen, Germany and sections 3.5.2.2 and 3.5.2.3 concerning the Rio declaration and Agenda 21

[319] See page 7 where he gives the examples of rules regulating space and the continental shelf

[320] Ibid.

As Birnie and Boyle points out to us, the decision not to turn to the precautionary principle, for the settling of the dispute in 1997, might find its explanation in the fact that the court did not find the principle established as a customary norm as by then. However, equally possible as an explanation to this, is the scenario in which the court, in the Gabĉikovo-Nagymaros case, simply considered the environmental risks as sufficiently established in order to sidestep the application of the precautionary principle[321].

Finally, it is just reminded of that even if the reasons behind the court's decision in the judgement of 1997 were, in fact, linked to the condition of duration in state practice, it is anyhow proposed, that this is of subordinate meaning to the final finding on the examination of the question of connection between the precautionary principle and the source of international law, known as customary international law. This conclusion is reached because of what has been said in the beginning of the reasoning of the criterion of duration. That is, that the evaluation of the connection between the precautionary principle and customary international law, today has to be made in the light of the development of the context of international law, which has proceeded after the settlement of 1997. Given the fact that the ripening process of the norm has continued for more than 10 years since the Gabĉikovo-Nagymaros case, it should therefore not be surprising, if the court in the Argentine-Uruguay dispute, decides to consider the precautionary principle in the settling of the merits of the case, if it deems the circumstances for applying the norm to be at hands.

5.2.3 Final conclusions on the status of the precautionary principle

The above (sections 5.2 to 5.2.2.2) passage over, the main requirements of a norm containing the quality to bind the global community of states as a whole entity, as well as, the distinct features of a principle of law, has shown that, applied on the precautionary principle, this is, first of all, a principle of law, and second of all, binding upon all subjects of international law. The latter of the two confirmations is referring to the version of the precautionary principle, which is stemming from the source of customary international law; a version, which according to present study, at least, by now has support in international law.

The evidences of the required opinio juris, essential to all norms of this source of custom, can be derived from abundant examples of state practices establishing general and coherent application of the principle[322].

What is more, although the support for this conclusion cannot unequivocally be found in any decisions of the ICJ, since this institution

[321] See Birnie and Boyle at page 118

[322] See above in section 5.2.2.2 footnote 310 which, is referring to the binding conventions only. In excess of these, the principle is also reiterated by a number of so called soft law document, see also chapter 3 of Trouwborst in general

simply has not expressed its opinion on the matter, it has been asserted that another adjudicating body has indeed done so in the period of time between the Gabĉikovo-Nagymaros case and the filing by Argentine of its application to the ICJ.

In the settling of the1999 S*outhern bluefin tuna case,* the international tribunal for the law of the sea (ITLOS), relied on scientific uncertainties surrounding the conservation of tuna stocks, in order to, prescribe provisional measures to hinder the stock from becoming further depleted, until the dispute had been settled. By the terms of Birnie and Boyle: "[t]his has been regarded as an application of the precautionary approach"[323].

However, the writers to the just cited passage immediately supplemented this interpretation of the ITLOS finding with another possible way of interpreting the reliance on scientific uncertainties in the decision to approve the requested provisional measures. This is that the UNLOS, which was the legal framework applicable to the dispute, by itself in effect, requires an application of a precautionary approach[324].

Two aspects of interests, concerning what just have been stated in this section, needs some further elaboration and comments.

First, the highlighting of the views of international adjudicating bodies shall be explained. This should be understood as a reference to article 38.1(d) in the ICJ Statute, where the decisions of international tribunals are included as a form of subsidiary source of international law. Their importance can plausibly indeed also be considered even more weight, than that reference might suggest, due to the difficulty in finding evidences of particular customary norms elsewhere. Brownlie aptly explains this:

> Judicial decisions are not strictly speaking a formal source, but in some instances at least they are regarded as authoritative evidence of the state of the law, and the practical significance of the label 'subsidiary means` in Article 38.1(d) is not to be exaggerated. A coherent body of jurisprudence will naturally have important consequences for the law[325].

Second, it should be reminded of that in, at least one sense, it stands without any doubt that the precautionary principle constitutes part of the "fabric of environmental law", notwithstanding the outcome and conclusions of a study as to the principle's effect as generally binding[326].

This is in the context of all those international treaties, the so called conventional international law, which refers to the principle. These make of course, by way of contractual obligation, the principle binding for all state parties to each such treaty.

---

[323] Southern Bluefin tuna cases (Provisional Measures) (New zealand and Australia v. Japan) ITLOS Nos. 3 § 4. See Birnie and Boyle at page 119

[324] Ibid.

[325] Brownlie page 19, footnote omitted

[326] Trouwborst page 34

5.3 Propositions of a possible outcome of the Paper Mills Dispute (Argentina/Uruguay) based on the conclusions of the precautionary principle

The main focal point in the Argentinean application to the ICJ, concerning the basis of the dispute, is the bilateral *Statute of River Uruguay*[327], signed in 1975. This treaty is prescribing a joint mechanism for optimum and rational utilization of the River Uruguay under the administration of an administrative commission of the river Uruguay, the CARU, created by the statue and constituted by representatives from both states[328].

According to the 1975 statute the two governments undertake to notify, communicate with and consult the other party (through the CARU) whenever a change in their settled use of the river is at hands that "liable to affect the navigation, water quality ..."[329]

The consultation/communication obligation entails, or more correctly expressed, presupposes a further obligation to assess possible impacts of the environment in order to have material to present to the other party showing that the planned project's or activity is well within the limits of the obligation of the Statute to protect, preserve and prevent harm to the river[330].

It is suggested that the immediate consequence of a generally binding precautionary principle upon the claim by Argentina would be twofold, two consequences that would have been inevitable regardless of the Statute of the River Uruguay.

The assertion by Argentina that Uruguay have, through its authorisation of the Paper mill plants on the Uruguayan side of the river, acted in contradiction of its international obligation would first of all, attain firmer support in general if, the substantial duty claimed to be unfulfilled (in this case the obligation of conducting EIA is one of those), also has support in customary law. Secondly, the generally binding precautionary principle would also affect the formal procedure of the dispute settlement, since it would probably carry with it a placing of the burden upon Uruguay to prove that the paper mills would not adversely impact the river, once Argentina has made a prima facie case of its fears of risks threatening its environment. This is an implication which value and importance to the outcome of practical issues should not be underestimated.

In practical terms, all this may entail that, in accordance with the precautionary principle, Uruguay will be prohibited by the ICJ from continuing with its activity on the paper mill plants until it is able to present

---

[327] The statute is included as Annex I in the *Application Instituting Proceedings filed in the Registry of the Court on May 4th, 2006* by Argentina
[328] Application by Argentina page3 paragraph 6
[329] *Statute of River Uruguay* article 7
[330] See Application by Argentina, Annex I, articles 35, 36, 41 and 42 of the statute

such evidences to convince the court that the risk of environmental harm caused by their plans are stable at an acceptable level. This scenario is, at least, requested by Argentina both in its main claim and in its request for provisional measures (the latter request has already been denied though, since the court took the position that the authorisation of the mills not in itself was of such irrevocable nature as to prejudice the finding of the court in the merits of the case[331]).

> Whereas Argentina contends that the continued construction of the mills "would set the seal on Uruguay's unilateral effort to create a 'fait accompli' and to render irreversible the current siting of the mills, thus depriving Argentina of its right to have an overall, objective assessment of the environmental impact carried out in order to determine whether or not the mills can be built, or whether they should be built elsewhere, or on the basis of criteria other than those currently applied"[332]

5.4 The analysis of the general matter: the development of principles of law

In this, the last of the analytic sections of the paper, I find it appropriate to start by returning to the questions instigating the undertaken examination of the precautionary principle. Because, as stated in section 1.1 the main purpose with this paper is to propose a general notion on how non-binding principles becomes binding principles of law, I must now, use the findings of the examination of the particular principle to formulate such a notion.

The examination of the precautionary principle should to this end – notwithstanding the possible importance of the understanding of this particular principle in itself – be seen as an illustration, through the use of an practical example, of the general notion on development of principles.

Having stated this, perhaps it is necessary to emphasise the obvious relativity of strength of the following formulation of a general notion of development of principles of law. It should thus, be kept in mind that this section is modest attempt of the writer to this paper – who is well aware of the very limited resources, time and material she has utilised while conducting this study – to explain one of the striking general features of the whole system of international law. No more importance, than this last comment allows, should this attempt therefore be rewarded with. It should be seen as one possible explanation to a course of events, distinguishing for international law, among many equally appealing, as well as, possible explanations, nothing more.

---

[331] Order of 13 July 2006 concerning the Argentine request for provisional measures p. 18 – 19, paragraphs 73 – 77

[332] Order of 13 July 2006 concerning the Argentine request for provisional measures, p. 5, citation marks in original

In the effort of doing this here, the subordinated questions should be addressed, which were also raised in section 1.1:

- What features distinguishes principles of law from other principles and rules of law?
- Can principles of law can become binding without turning into rules and?
- How do the effects of principles of law divert from the effects of rules?

Lastly, in this section, in connection to the issue discussed in this part of the analysis, some elementary thoughts on how the understanding of the development of legally binding principles can be connected to the understanding of the fundaments of international law (as defined section 1.1) will be given, as some brief concluding remarks.

5.4.1 Distinguishing principles of law

What was first settled in chapter 2, concerning the issue stated in the heading to the present sub-section, was that the substantive containment of a principle, which stands without connections to the legal sphere, and the containment of its counterpart; a principle of law, does, in essence, have nothing to do with the different categorization of the two.

However, this assertion has to be modified a little, when considering the first requirement of a legal principle, which is the requirement of prescribing a certain behaviour or state of affairs. The first distinct feature of a principle of law, it was established, is thus that it should have the regulative character to achieve enough normativity to qualify into the group of notions we call norms[333].

Now, looking at the expressions of the precautionary principle that have been given, in chapters 3 and 4, they appear to verify that the requirement of a regulative character stands as a firm precondition for a principle to, at all, come in question as legally binding. The development of the principle of precaution seems to confirm the course of events in this direction, which is illustrated by the comparison, for example of, on the one hand, an early formulation of the principle in the 1987 *Declaration of the Second International Conference on the Protection of the North Sea*:

> in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary *approach is necessary* which *may require action* to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.[334]

And, on the other hand the formulation in the 1992 *OSPAR Convention* which states that:

[333] Section 2.2
[334] Paragraph VII of the preamble, emphasis added

The Contracting Parties *shall apply*:

c. the *precautionary principle*, by virtue of which *preventive measures are to be taken when* there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects[335];

as well as, the interpretation by New Zealand of the principle in its application of a request of the situation to the ICJ in the *Nuclear tests Case* where it asserted that states must provide proof of an activity's harmlessness in order to have the permission of international law to continue with a said activity which harmlessness has been questioned[336].

The emphasised words in the two quotes, as well as, the demonstration of in what sense New Zealand relied on the principle, stands to show that the formulation of the concept has moved from a context of a goal setting and ´dream scenario` describing sphere of international policy, into, the sphere of regulative principles, which contains the required regulative character as well as the conditions for it to become applicable[337].

The way of interpreting the principle by New Zealand clearly shows its regulative character, in the sense that, their interpretation describes the principle as explicitly handing out the regulative conditions for states to adhere to in order to be in accordance with international law[338].

Turning now to the features, which is claimed to differentiate principles of law from rules of law, and what the example of the precautionary principle can tell us, in terms of, confirmation or rejection of this proposition? In section 2.3, I discussed these features quite extensively. The purpose here is not to reiterate that argumentation once again, but, to simply lift out and remind of the main propositions from that section.

First, it was asserted that principles of law (thus principles with the necessary regulative character, as just explained) in opposition to rules of law must be of a more wide-scoped nature, which gives them an appearance of vagueness[339].

I argued that this vagueness, or generality, is necessary for principles because it stems from the fact that principles must be possible to trace back to, and still in their application closely linked to, considerations of moral rights conceived to be of utmost importance by the subjects of international law[340].

Before continuing on to the next feature separating principles of law from rules, I will comment upon the just handed propositions.

---

[335] See section 3.5.3, emphasis added
[336] See section 4.2.1 in fine
[337] See section 2.2
[338] See section 4.2.1, in fine
[339] See section 2.3
[340] Ibid.

The first of these two propositions needs no further discussion since the generality of the precautionary principle has been discussed at length in previous section concerning the legal status of that particular principle[341].

Therefore, it is possible to simply, based on that reasoning, conclude that the presented example of the precautionary principle supports the proposition that principles of law must be of a general character in terms of their expression of consequences, following upon applicability.

The second proposition, connected to the feature of generality, or vagueness, seems to be to a little harder to establish firmly, seen from a general perspective of jurisprudence at least.

Focusing on the reasonableness in the assertion put forward that the specific character and purpose of principles of law has to, in fact, be possible to derive from their closer connection to moral considerations than other norms, the answer, based on the review of the development of the precautionary principle, must be affirmative. To this end, it is possible to rely both, on the fact that the principle originated in the realisation of the impacts on environment made by man, as well as, the argumentation given by Weeramantry in this direction in the Gabcikovo-Nagymaros Case[342].

The first fact can be coupled to moral considerations in that the danger to environment, caused by man, gave birth to the discussion of what this danger could have for influence on the utility of the man-used resources. In addition, furthermore also, and more importantly, it can be coupled to the discussion on a moral level of humanity's right to harm the intrinsic value of the environment[343].

Even though the argumentation by Weeramantry, in the case referred to above, concerned another principle than the precautionary, this does not affect the possibility to use his argumentation in this section. For what is in search for here is the affirmation of a notion on the development of principles in general. To this end, the reasoning about sustainable development functions just as well as the precautionary principle.

The last feature that, according to the theory of law relied on in present paper, separates principles of law from rules of law, is the possibility of two contradicting principles of law to be weighted against each other when found applicable to the same situation[344].

This is just like the proposition most recently discussed possible to affirm, based on the method of deriving the notion from the specific context to the general, as one of the constituting conditions of principles of law. Thus, in the review of this paper, the reasoning of judge Weeramantry, in his separate opinion in the Gabĉikovo-Nagymaros Case, explicitly refer to a principle (albeit not directly the precautionary principle but its, in some senses, mother concept the sustainable development) as a device, for the settlement of which one, out of two, contradictory principles that shall prevail, through the granting more weight to one of them.

---

[341] See reasoning presented in sections 5.2 and 5.2.1

[342] See section 3. and separate opinion of Weeramantry in the Gabcikovo-Nagymaros Project Case page 96-110

[343] Trouwborst page 5

[344] See section 2.3

The core of this reasoning, which also functions as a demonstration of the theory of law construed by Dworkin, is aptly described in a citation from the separate opinion:

> The problem of steering a course between the needs of development and and the necessity to protect the environment is a problem alike in of the law of development and of the law of environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs.
>
> To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The unattainability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result[345]

As a concluding remark in this matter it should be pointed to that, once again, the roots of principles, in moral considerations, appears to be more closely linked to their existence, as well as more importantly, their application, than in the case of rules of law.

If we conceive the theory of law, as suggested in section 2.3, then we do not find that judges and all other interpreters of international law have been given, by the constitution of this law, the authority to determine the relative importance of two rules based on considerations of reason and the relative strength of each rule but, indeed so when it comes to principles of law.

To conclude this section it is stated that, according to the writer of this paper at least, the three sub question of the main query: of how principles of law develop in general, are indeed to be answered as described at length in chapter 2. These answers are in a brief version, as is confirmed by the example of precautionary principle, that principles of law:

- differs from other principles through the requisite of being regulative. Differ from rules, through the attachment of more general consequences upon application, as well as, the possibility to be weighed when colliding with a clashing norm of the same status.

- Is possible to regard as legally binding, since they are often applied and utilised in the settling of international disputes over legal rights, this presupposing that we construe the law to entail more than rules, otherwise international courts would not be settling cases under law;

- have different practical effects than rules, in that they, cannot be seen as firm in their execution. This is furthermore coupled to the fact that they are more general. However, it should not be confused with the, sometimes raised, assertion that they are not as mandatory as rules.

[345] Weeramantry, sep. opinion at page 90

Their effects are instead to be conceived as demanding behaviour in a certain direction or, as requesting an over-all state of affair (leaving the means for that achievement dependent on, either, the discretion of the subjects of the law, or, further development of sub-principles or rules).

5.4.2 Final conclusions on the development of principles of law

After the establishment that the precautionary principle, at least in some versions, stems from customary international law, there appears to be no obstacle for the following main proposition.

Reasoning based on principle might be – given the particular principle has attained the necessary feature of being regulative and conditional – considered as reasoning within the frames of the rule of law.

The notion rule of law is in this context given the meaning that it is a notion that describe norms which has binding effects on the subjects of law. What therefore remains to be added to the list of prerequisites for a principle to attain legality, in the sense to attain the power to bind and not merely advice, subjects of international law is, what is referred to above as, the link to a particular source of law[346].

In conclusion, to the matter of the existence of a link to the sources of law, it is asserted that, it is the specific source of law, which a particular norm is attached to that decides its scope of application in terms of what subjects it binds.

What also is clear from the example of the precautionary principle is that a principle might have roots in more than one source, necessitating the thorough examination of the link to each source, in order to, establish under what circumstances the principle is validated through one, or the other, of the source in question[347].

An overall red thread, running through this part of the paper, has been the attempt to find a way of connecting the concept of principle to the fundamental conception of international law. This fundamental conception has been defined in section 1.1 as the way a particular legal system understands the creation, changes and development of the material parts of the system.

To this end, it is suggested, in a summary manner, that even though the ruling theory of law – the theory, which is determining what is law and what is not – should in general be understood as the rule of law[348], this does not entail, that the reasoning based on moral allocation of rights automatically must be rejected.

The line of thoughts, behind the last remark, is that moral considerations might very well be depicted in a principle of law, which is validated through one or more of the sources of law accepted by the rule of law. This

[346] See sections 5.2.2, 5.2.2.1 and 5.2.2.2
[347] See section 5.3.2
[348] A theory, which accepts no discretionary deliberation when an individual or group of individuals is set to determining the law in particular cases

conclusion finds some support also in the enlisting of the law-creating sources of international law by Ian Brownlie in his compilation of principles establishing the foundation of the entire system of international law.

To this end he infers, under the heading ´general principles of international law` that, this is the name of a group of norms, which might just as well be derived from customary law, general principles of law (as in Article 38. 1(c)) or, from the (subsidiary) source of logical propositions stemming from judicial reasoning[349].

The main assertion here thus being that a norm, applicable in international relations, should perhaps not be conceived, at all times, as firmly established and connected to one of the conventional sources of law, as perceived to be the prerequisite for legal norms of international law, by most interpretations[350].

Sometimes the legacy of a norm is perhaps more complex than those sources admits, having, as it might, lost connection to its original source and gained the connection to another.

5.5 Questions left unanswered: the need for further studies

For obvious reasons this paper is only dealing with a small part of the issues of interests concerning the precautionary principle. What this paper has left uncommented, among other things, is the implications, on international procedural law in general and the rules of state responsibility in particular, which the generally binding precautionary principle most likely brings with it. This an area that seems to be most natural to continue to examine, once it is established the principle of precaution is part of international customary law, since one of the effects of the principles seems to entail reversing of the burden of proof in international disputes concerning the environment.

What is left unanswered in this context is how to determine what the trigger points for the reversing of the evidential burden are, and, how much evidence of real risk of harm the complainant needs to display to establish its prima facie right to a trial of the complaint.

Another issue necessary to examine further, if we are to fully understand the value and meaning of the concept of precaution within international environmental law, is the other (notwithstanding the procedural effect) concrete effects of the principle. Just how must a state act, in order to adhere to the principle of precaution, in its ordinary administration of matters?

A third gap in our knowledge concerning the precautionary principle is the connection between the legal principle, as such, and scientific knowledge. The conditioning of the application of the principle to scientific evidences of the status of the environment, forces the interpreter of the principle, to take into consideration arguments of facts into his decision of whether the principle is applicable or not. This necessitates in turn an examination of what level of risk it takes (in each particular type of area of

[349] Brownlie, page 18
[350] Brownlie page 3 and 4

application) for the principle to be applicable and more importantly, on what scientific facts these limits in practice are to be based on and how they are to be understood.

Bibliography

Birnie, P. & Boyle, A.	´International Law and the Environment, 2nd edition, Oxford University Press, Oxford, United Kingdom, 2002
Brownlie, I.	´Principles of Public International Law`, 6th edition, Oxford University Press, Great Britain, 2003
Dworkin, R.	´Taking Rights Seriously`, Harvard University Press, Cambridge, Massachusetts, USA, 1977
Hafner, G.	´Risks Ensuing from Fragmentation of International Law`, Officila Records of the General Assembly, Fifty-fifth Session, Supplement No 10 (A/55/10), annex, p. 321
McIntyre & Mosedale	´The Precautionary Principle as a Norm of Customary International Law`, 9JEL, 1997, pp. 221 – 241
Molenaar	´Coastal State Jurisdiction over Vessel Source Pollution`, Dordrecht, Netherlands, 1998
Okowa, P.	´State Responsibility for Transboundary Air Pollution in International Law, Oxford University Press, Great Britain, 2000
Palmer, G.	´Environment: the International Challenge`, Victoria University Press, Wellington, New Zealand, 1995
Perczenik, A.	´Juridikens metodproblem: rättskällelära och lagtolkning`, Almqist och Wiksell Förlag AB, Stockholm, 1974

Shaw, N. ´International Law`, 5th edition, Cambridge University Press, Great Britain, 2003

Steele. K ´The precautionary principle: a new approach to public decision-making?`, Law, Probability and Risk (2006) 5, Oxford University Press, pp. 19 – 31

Trouwborst, A. ´Evolution and Status of the Precautionary Principle in International Law`, Kluwer International Law, Dordrecht, Netherlands, 2002

Honoré, T. Legal Philosophy in Oxford, http://www.law.ox.ac.uk/jurisprudence/hart.shtml

MacCormick, N. ´Ronald Dworkin – Mr Justice`, The Times Literary Supplement, http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/the_tls/article3003761.ece

United Nations Division on Sustainable Development, http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter6.htm

Van der Burgt ´Dealing with Contaminated Dredged Materials with reference to the Oslo Convention 1972 and the New Paris Convention 1992, Permanent International Association of Navigation Congresses, Netherlands, http://cat.inist.fr/?aModele=afficheN&cpsidt=3536607

Joint Nature Conservation Committee ´The Convention for the Protection of the Marine Environment in the North-East Atlantic, http://www.jncc.gov.uk/page-1370

The OSPAR Commission web page, http://www.ospar.org/eng/html/welcome.html

Web page of Miljöstyrelsen, Miljöministeriet Denmark, http://www2.mst.dk/common/Udgivramme/Frame.asp?http://www2.mst.dk/udgiv/Publications/1999/87-7909-203-9/html/bil01_eng.htm

Web page of Swedish Government ´Agenda 21 – en sammanfattning http://www.regeringen.se/content/1/c6/01/86/84/6de2900f.pdf`

Web Page of International Maritime Organisation, http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681#7

Table of Cases and Instruments

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London) 11 ILM (1972) 1294

Protocol to London Dumping Convention 36 ILM (1997) 7

Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo) 11 ILM (1972) 262

Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris) 13 ILM (1974) 352

Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (Paris) 32 ILM (1992) 1072

Vienna Convention for the Protection of the Ozone Layer (VCPOL) 26 ILM (1987) 1529

Ministerial Declaration Calling for Reduction of Pollution of the 2nd International Conference on the Protection of the North Sea, 27 ILM (1987) 835

ILC Draft on Responsibility for States for Internationally Wrongful Acts, 2001, YILC, vol.II (Part two)

Estatuto del Rio Uruguay (Salto)1975 *www.noalaspapeleras.com.ar/**estatuto_del_rio_uruguay**.pdf*

Ministerial Declaration on Sustainable Development in the ECE Region (Bergen), UN. Doc. A/CONF. 151/PC/10 (1990), 1YB Intl Envtl Law 429

World Charter for Nature, UNGA Res. 37/7, 37 UNGAOR Suppl. (No. 51) at 17, UN Doc. A/ 37/51 (1982)