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I. INTRODUCTION

The precautionary approach, although highly touted as a fundamental principle of international environmental law,[1] has become well-known for the confusion surrounding its interpretation and practical implications.[2] Confusion has emanated from definitional generalities[3] and variations[4] and

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[1] MALGOSIA FITZMAURICE, CONTEMPORARY ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 1 (2009).

[2] Arie Trouwborst, *The Precautionary Principle in General International Law: Combating the Babylonian Confusion*, 16 Rev. EUR. CMTY. & INT'L ENVTL. L. 185 (2007).

[3] For a review of definitional generalities, including the vagueness emanating from the articulation of the precautionary principle in Principle 15 of the Rio Declaration on Environment and Development, see Dawn A. Russell & David L. VanderZwaag, *Ecosystem and Precautionary Approaches to International Fisheries Governance: Beacons of Hope, Seas of Confusion and Illusion*, *in* RECASTING TRANSBOUNDARY FISHERIES MANAGEMENT ARRANGEMENTS IN LIGHT OF SUSTAINABILITY PRINCIPLES: CANADIAN AND INTERNATIONAL PERSPECTIVES 25, 59-60 (Dawn A. Russell & David L. VanderZwaag eds., 2010).

[4] Over fifty legally binding agreements and more than forty non-binding instruments refer to the precautionary principle. John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 17 (2002).

even debates over appropriate terminology.[5] A spectrum of precautionary measures exist and viewpoints on whether strong versions of precaution[6] or weaker versions[7] should prevail have differed.[8]

Progressions in clarifying the practical meaning of the precautionary approach have largely depended on international negotiation efforts. For example, the precautionary approach has become quite "crystal clear" in the ocean dumping context, with the 1996 Protocol[9] to the London Convention, 1972[10] adopting a reverse listing approach whereby only wastes listed on a global "safe list" may be disposed of at sea, but only after following a precautionary waste assessment review that considers reuse and recycling feasibilities.[11] Precautionary steps in the fisheries field, while continuing to be a work in progress,[12] have been further defined as requiring the establishment of precautionary reference points for fish stocks,[13] the

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[5] The term "approach" has often been preferred because of the perception that such wording better reflects the non-legally binding nature. Nicolas de Sadeleer, *Origin, Status and Effects of the Precautionary Principle*, *in* IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: APPROACHES FROM THE NORDIC COUNTRIES, EU AND USA 3 (Nicolas de Sadeleer ed., 2007).

[6] One of the strongest versions is reversing the burden of proof to proponents of development or risky activities to establish some level of safety or acceptability. NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 202-06 (2002).

[7] Weaker versions include a call for cost-effective measures and the need to justify regulatory measures by means of a scientific risk assessment. *See* Andrew Jordan & Timothy O'Riordan, *The Precautionary Principle in Contemporary Environmental Policy and Politics*, *in* PROTECTING PUBLIC HEALTH & THE ENVIRONMENT, IMPLEMENTING THE PRECAUTIONARY PRINCIPLE 15, 30-31 (Carolyn Raffensperger & Joel A. Tickner eds., 1999). For a review of disputes over the precautionary principle in the free trade area and the requirement for a rigorous risk assessment to support precautionary measures under the umbrella of the Sanitary and Phytosanitary Measures Agreement, see TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION, 331-42 (2009).

[8] *See generally* Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, 17 EUR. J. INT'L L. 445 (2006).

[9] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 36 I.L.M. 1.

[10] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 120.

[11] David L. VanderZwaag & Anne Daniels, *International Law and Ocean Dumping: Steering a Precautionary Course Aboard the 1996 London Protocol, but Still an Unfinished Voyage*, *in* THE FUTURE OF OCEAN REGIME BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON 515-550 (Aldo Chircop, Ted L. McDorman & Susan J. Rolston eds., 2009).

[12] Russell & VanderZwaag, *supra* note 3, at 60-61.

[13] As called for under the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, July 24-Aug. 4, 1995, 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

encouragement of more environmentally friendly fishing gears and the expansion of marine protected areas.[14]

While the precautionary clarification trend will no doubt continue to proceed primarily through international consultative and negotiation processes, the potential role for international courts and tribunals to develop jurisprudential dimensions should not be ignored.[15] This article reviews how two main international adjudicative bodies, the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), have addressed the precautionary approach in a rather paltry manner to date. The cases reviewed display an underlying "jurisprudential jousting" over whether the precautionary approach is to be solely defined by state agreement or whether precaution may be based upon natural law foundations including the fundamental need to protect the environment on which human survival depends.

After surveying the paltry progression and jurisprudential jousting realities, the article concludes by discussing future directions in international precautionary approach litigation. Two cases before the ICJ hold promise to further advance judicial articulations.[16] However, key judicial limitations also continue, including the dominance of positivistic thinking and sensitivities over the appropriate judicial role in international legal development.[17]

II. PALTRY PROGRESSIONS

Three cases from the ICJ and four cases from ITLOS have raised the legal implications of the precautionary approach. However, very limited

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Migratory Fish Stocks, U.N. Doc. A/CONF.164/37, 34 I.L.M. 1542 (1995).

[14] David VanderZwaag, *The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides*, 33 OCEAN DEV. & INT'L L. 165, 168 (2002).

[15] For comprehensive reviews, see generally STEPHENS, *supra* note 7 and CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS (2011).

[16] *See* Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica) instituted on Dec. 31, 2011 and Aerial Herbicide Spraying (Ecuador v. Colom.) instituted on March 31, 2008. On April 17, 2013, the ICJ decided to join the Construction of a Road in Costa Rica along the San Juan River case to Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). *See* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Order (April 17, 2013), *available at* http://www.icj-cij.org/docket/ files/150/17350.pdf.

[17] Markus Krajewski & Christopher Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, 16 MAX Planck Y.B. U.N. L. 1 (2012), *available at* www.rph1.jura.uni-erlangen.de/material/rexte/ICJstateimmunity.pdf.

analysis and guidance has been provided by judges on its status and meaning.

A. ICJ Cases

The three ICJ cases confronting the application of precaution might be described as a "near miss," a "tangential touching" and a "feeble pat."

1. Near miss

In the 1995 *Nuclear Tests* case,[18] New Zealand, attempting to reopen a previous ICJ case from 1974 addressing French atmospheric nuclear testing in the South Pacific,[19] emphasized the importance of the precautionary principle, but the Court never addressed the merits. New Zealand argued the principle would shift the burden of proof on a state wishing to engage in potentially damaging conduct to show in advance that its activities would not cause contamination.[20] While the majority of the Court dismissed the case for lack of jurisdiction,[21] Judge *ad hoc* Sir Geoffrey Palmer, in dissent, lamented the missed opportunity for the Court to progressively develop the field of international environmental law and noted that the precautionary principle may now be a principle of customary international law relating to the environment.[22]

2. Tangential touching

In the *Gabčíkovo-Nagymaros Project (Hung./Slovk.)* case,[23] Hungary tried to justify its termination of a 1977 treaty with Czechoslovakia (succeeded by Slovakia) to jointly construct and operate a system of locks and barrages on the Danube River based upon various grounds, including the development of new norms of international environmental law such as

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[18] 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 (N.Z. v. Fr.) Case, Order, 1995 I.C.J. 288 (Sept. 22) [hereinafter *Nuclear Tests case*].

[19] Paragraph "67" of the previous case left open the possibility for resumed jurisdiction of the Court if the Judgment were to be subsequently "affected," and thus the key issue was whether proposed French underground nuclear testing came within the scope of the reserved jurisdiction. *Id.* ¶ 34.

[20] *Nuclear Tests case*, *supra* note 18, ¶ 34. The need for a full environmental impact assessment before France undertook further nuclear testing was also argued under the rubric of the precautionary principle. *Id.* at 412, ¶ 89 (Palmer, J., dissenting).

[21] By a vote of twelve to three. *Nuclear Tests case*, *supra* note 18, ¶ 68.

[22] *Id.* at 412, ¶ 91 (Palmer, J., dissenting).

[23] Judgment, 1997 I.C.J. 7 (Sept. 25) [hereinafter *Gabčíkovo*].

the precautionary principle and the prevention of environmental damage.[24] The majority of the Court, while noting that "vigilance and prevention are required on account of the often irreversible character of damage to the environment,"[25] avoided any detailed analysis of the precautionary principle and took a procedural way out.[26] The Court found that the parties had an ongoing obligation to negotiate in good faith a joint operational regime that must take into account the norms of international environmental law and the principles of international watercourses.[27]

3. Feeble pat

In the *Pulp Mills on the River Uruguay (Arg. v. Uru.)* case,[28] Argentina, contesting the construction of two pulp mills in Uruguay adjacent to a transboundary river, alleged various procedural violations of the 1975 Statute of the River Uruguay,[29] including shortcomings in notifications and consultations, and breaches of key substantive international obligations such as pollution prevention and precaution.[30] As a central proposition, Argentina argued the precautionary approach should place the burden on Uruguay to prove that the pulp mills would not cause significant damage to the environment.[31] The majority of the ICJ, avoiding any detailed discussion of the precautionary approach, simply concluded that "while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that [the precautionary approach] operates as a reversal of the burden of proof."[32] The judgment has left considerable uncertainty over whether the Court was limiting its burden of proof conclusion to the specific treaty in question or was articulating a broader statement on precaution.[33] One author has concluded the ICJ eviscerated the precautionary principle.[34]

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[24] *Id.* ¶ 97.

[25] *Id.* ¶ 140.

[26] FOSTER, *supra* note 15, at 37-41.

[27] *Gabčíkovo*, *supra* note 23, ¶ 141.

[28] *Pulp Mills on the River Uruguay*, Judgment, 2010 I.C.J. 14 (Apr. 20).

[29] The Statute of the River Uruguay is a treaty signed by Argentina and Uruguay on Feb. 26, 1975 and entered into force on Sept. 18, 1976. *Id.* ¶ 1.

[30] *Id.* ¶ 55.

[31] *Id.* ¶ 160.

[32] *Id.* ¶ 164.

[33] Ralph Bodle, *Geoengineering and International Law: The Search for Common Legal Ground*, 46 TULSA L. REV. 305, 307 (2010).

[34] Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute Between International Tribunals Over the Reach of the Precautionary Principle*, 38 ECOLOGY L.Q. 527, 528 (2011).

B. ITLOS Cases

ITLOS has confronted the precautionary approach on four occasions, in one consolidated case addressing fisheries and three cases dealing with marine pollution and degradation.

1. Fisheries

In the *Southern Bluefin Tuna* cases,[35] New Zealand and Australia requested provisional measures from ITLOS to stop Japan from unilaterally increasing its catch levels of southern bluefin tuna and one of the central arguments was that Japan was failing to act consistently with the precautionary principle.[36] The Tribunal did not expressly discuss the precautionary principle but gave precaution an "implicit mention": "[I]n the view of the Tribunal the parties should in the circumstances act with *prudence and caution* to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna[.]"[37]

The provisional measures granted by the Tribunal were partly procedural in nature. Besides ordering each of the parties to refrain from conducting an experimental fishing program,[38] the Tribunal encouraged Australia, Japan and New Zealand to resume negotiations towards reaching an agreement on conservation and management measure and urged the parties to make further efforts to reach a conservation agreement with other states and fishing entities engaged in southern bluefin fishing.[39]

Separate opinions written by two of the judges did specifically address precaution but with minimal clarification. Judges Shearer and Laing both expressed the view that the Tribunal's provisional measures were based on considerations deriving from a precautionary approach.[40] Judge Laing

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[35] Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/order.27.08.99.E.pdf [hereinafter *Southern Bluefin Tuna cases*].

[36] *Id.* ¶¶ 28 & 29.

[37] *Id.* ¶ 77 (emphasis added). For a critique of the limited addressing of precaution, see David Freestone, *Caution or Precaution: A Rose by Any Other Name. . .?* 10 Y.B. INT'L ENVTL. L. 15 (1999).

[38] Except with the agreement of the other parties or unless the experimental catch was counted against its annual national allocation. *Southern Bluefin Tuna cases*, *supra* note 35, ¶ 90(1)(d).

[39] *Id.* ¶ 90(1)(e)(f).

[40] Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, 305, 309 (Shearer, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Shearer.27.08.9

noted that the Tribunal did not *per se* engage in an explicit reversal of the burden of proof but took a cautious approach, which he saw as commendable. Further debate would best be reserved for the merits stage of the case, that is, the arbitral tribunal.[41]

2. Marine pollution and degradation

In the *MOX Plant* case,[42] Ireland, seeking provisional measures to stop the commissioning of a mixed oxide (MOX) fuel facility by the UK, also invoked the precautionary principle with a key argument being that the burden of proof should be on the UK to establish the plant's commissioning would not cause serious harm to the marine environment.[43] Once again ITLOS did not explicitly refer to the precautionary principle nor delve into jurisprudential details but did note the need for caution: "[P]rudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate[.]"[44]

The Tribunal did grant provisional measures, although not those specifically requested by Ireland, based upon the fundamental duty to cooperate in the prevention of marine environmental pollution. The Tribunal required various forms of cooperation including: exchanging of further information regarding possible consequences for the Irish Sea arising from commissioning of the MOX plant; monitoring risks or effects of operation of the plant for the Irish Sea; and devising appropriate measures to prevent pollution of the marine environment which might result from the operation of the plant.[45]

Judge Wolfrum in his separate opinion did discuss the precautionary approach more substantively. He indicated support for a burden of proof reversal approach:

9.E.pdf. Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, 305, 309 (Laing, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Laing.27.08.99.E.pdf.

[41] *Id.* ¶ 21. The arbitral tribunal subsequently in an award of August 4, 2000 declined jurisdiction, see Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sean (UNCLOS): Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan) (Award on Jurisdiction and Admissibility), 39 I.L.M. 1359 (2000).

[42] The MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95, 96, *available at* http://www.itlos.org/fileadmin/iitlos/documents/cases/case_no_10/order.03.12.01.E.pdf (request for provisional measures).

[43] *Id.* ¶ 71.

[44] *Id.* ¶ 84.

[45] *Id.* ¶ 89.

> There is no general agreement as to the consequences which flow from the implementation of this principle other than the fact that the burden of proof concerning the possible impact of a given activity is reversed. A State interested in undertaking or continuing a particular activity has to prove that such activities will not result in any harm, rather than the other side having to prove that it will result in harm.[46]

He justified not granting Ireland the provisional measures specifically requested on two main grounds. He emphasized the exceptional nature of provisional measures and the lack of some evidence of marine environmental risk in the short time period before the arbitral tribunal would consider the case on the merits.[47]

In the *Straits of Johor* case,[48] ITLOS also displayed an indirect and limited approach to addressing precaution. Malaysia, seeking provisional measures to require Singapore to suspend land reclamation activities, argued various breaches of the UN Convention on the Law of the Sea, including a failure to undertake an adequate environmental impact assessment, and also alleged that Singapore was acting contrary to the precautionary principle.[49] The Tribunal avoided detailed discussion of the principle and simply noted once again that "prudence and caution" were required.[50] The Tribunal prescribed provisional measures: it called upon Malaysia and Singapore to cooperate and to enter into consultations in order to promptly establish a group of independent experts to study the effects of Singapore's land reclamation and to propose measures to address any adverse effects; and the Tribunal directed Singapore not to conduct its land reclamation in ways that might cause serious harm to the marine environment.[51]

The latest ITLOS case to address the precautionary approach has certainly shown the most progression in doctrinal discussion and development. On February 1, 2011, the Seabed Disputes Chamber of ITLOS issued its *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons or Entities with Respect to Activities in the*

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[46] MOX Plant case (Ir. v. U.K.) (Dec. 3, 2001), Case No, 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 131,134 (Wolfrum, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf.

[47] *Id.*

[48] Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, 7 ITLOS Rep. 10, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/order.08.10.03.E.pdf.

[49] *Id.* ¶ 74.

[50] *Id.* ¶ 99.

[51] *Id.* ¶ 106.

Area.[52] The Council of the International Seabed Authority (ISA), at the behest of Nauru, requested an advisory opinion regarding the legal responsibilities and extent of liability of states sponsoring deep seabed mineral activities. The Chamber noted that the two sets of regulations adopted by the ISA on prospecting and exploring for polymetallic nodules (2000) and for polymetallic sulphides (2010) both require sponsoring states to apply a precautionary approach, as reflected on Principle 15 of the Rio Declaration, in order to ensure effective protection of the marine environment from harmful activities which may result from activities in the Area beyond national jurisdiction.[53] The Chamber indicated that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring states which is even applicable outside the Regulations:

> This obligation applies in situations where scientific evidence covering the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligations of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.[54]

While this recognition of "precautionary due diligence" certainly represents a step forward, the opinion may still be viewed as rather meager on other fronts. The Chamber stopped short of recognizing the precautionary approach as a principle of customary international law although the Chamber did observe that with the incorporation of the precautionary approach into a growing number of international treaties and instruments there is "a trend towards making this approach part of customary international law."[55] The Chamber did not provide a detailed jurisprudential analysis of the precautionary approach and merely noted the various questions of interpretation left open by Principle 15 of the Rio Declaration, such as "serious or irreversible damage" and "cost-effective measures."[56] The Chamber did not find that sponsoring states would be strictly liable for the activities of their sponsored entities,[57] although a strict

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[52] Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[53] *Id.* ¶ 125.

[54] *Id.* ¶ 131.

[55] *Id.* ¶ 135.

[56] *Id.* ¶¶ 128-29.

[57] However, as noted by Freestone, the wording of the United Nations Convention on the Law of the Sea itself may weigh heavily against this conclusion. *See* David Freestone, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 105 AM. J. INT'L L. 755, 759 (2011).

liability approach might best ensure pollution prevention and precaution are followed in practice.[58]

III. JURISPRUDENTIAL JOUSTING

A history of ambiguity and dispute has surrounded the appropriate meaning to be given to the third source of international law set out in Article 38(1)(c) of the ICJ Statute, namely, general principles of international law recognized by civilized nations.[59] A "legal positivism" approach would restrict the derivation of rules and principles from the will of states as manifested in treaties, customary international law and general principles of international law.[60] A positivist view would restrict the latter category to general maxims commonly applied in municipal legal systems and perhaps to general principles found in various international declarations and other soft law instruments.[61]

A "natural law" approach, held by one group of original drafters of the statutory language,[62] thought the category of general principles would enable the Court to apply natural law principles. Such principles of "objective justice" may be drawn from common human values and reason.[63]

Two ICJ judges have stood out for jousting in the environmental context against the dominant positivistic judicial philosophy towards international law. Judge Cançado Trindade, from Brazil and a member of the Court since 2009, has been perhaps the strongest advocate of natural law, while Judge Weeramantry, from Sri Lanka and a member of the Court from 1991-2000,[64] has also jousted against the strictures of legal positivism.

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[58] *See* Bruce Pardy, *Applying the Precautionary Principle to Private Persons: Should It Affect Civil and Criminal Liability?"* 43 LES CAHIERS DE DROIT 63 (2002) (asserting that the precautionary principle should be applied in civil cases but not criminal cases). For a further review of the strict liability arguments, see Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area, Case No. 17, Written Statement of International Union for Conservation of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group of Aug. 19, 2010, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/statementIUCN.pdf.

[59] *See*, PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 26 (3rd ed. 2009).

[60] *Id.*

[61] *Id.* at 26-28.

[62] Drafters of the Statute of the Permanent Court of Justice in the early 1920s. *Id.* at 26.

[63] *Id.*

[64] He was Vice-President of the Court from 1997-2000. *Presidency*, INTERNATIONAL COURT OF JUSTICE, *available at* http://www.icj-cij.org/court/index.php?p1=1&p2=3.

A. Judge Cançado Trindade

In his separate opinion in the *Pulp Mills* case, Judge Çançado Trindade lamented over the missed opportunity for the ICJ to affirm and elaborate on the general principles of international environmental law including the precautionary principle. He stated, "It escapes my comprehension why the ICJ has so far had so much precaution with the precautionary principle."[65] He further reflected, "The Hague Court . . . is not simply the International Court of Law, it is the International Court of *Justice*, and, as such, cannot overlook *principles*."[66]

After reviewing the historical and scholarly debate as to whether the category of general principles of law recognized by civilized nations opens the door to natural law principles, he embraced and encouraged a natural law approach. He noted, "General principles of law . . . emanate . . . from human conscience, from the universal juridical conscience, which I regard as the ultimate material 'source' of all law."[67] He saw it as "imperative to keep on swimming against the current, to keep on upholding firmly the application of general principles of law, in addition to the pertinent positive law."[68] In his view, examples of principles having an axiological dimension and reflecting the values of the international community include prevention, precaution, sustainable development and intergenerational equity.[69]

While stopping short of a reverse burden of proof analysis, he did expand somewhat on the precautionary principle. He noted the principle calls for consideration of alternative sources of acting in the face of probable threats or dangers.[70] He highlighted the need for reasonable assessment, before the issuance of authorizations, in the face of probable risks and uncertainties. Such assessment may include a complete environmental impact assessment, careful environmental risk analysis and further environmental studies.[71]

B. Judge Weeramantry

Also a proponent of "judicial activism" in developing the principles of international environmental law, Judge Weeramantry adopted what might

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[65] *Pulp Mills on the River Uruguay*, Judgment, 2010 I.C.J. 14, 135-61 ¶ 67 (Apr. 20), *available at* http://www.icj-cij.org/docket/files/135/15885.pdf.

[66] *Id.* ¶ 220.

[67] *Id.* ¶ 62.

[68] *Id.* ¶ 206.

[69] *Id.* ¶ 210.

[70] *Id.* ¶ 71.

[71] *Id.* ¶ 96.

be described as primarily a "sociological jurisprudence," that is, looking to historical and present social/cultural practices for general principles of international law.[72] For example, in the *Gabčíkovo-Nagymaros* case, he found the sustainable development principle, in relation to balancing development and environmental dimensions of harnessing streams and rivers, may be derived from numerous legal systems, including those in Asia, the Middle East, Africa, Europe, the Americas and the Pacific.[73] In the *Legality of the Threat or Use of Nuclear Weapons* case,[74] he deciphered from various ancient civilizations a prohibition on hyper-destructive weapons in time of war.[75]

In the *Nuclear Weapons* case, he also recognized the potential "supplementary door" of natural law in general principle evolution. He emphasized that key principles of environmental law, such as the precautionary principle, trusteeship of the earth resources, the burden of proving safety relies upon the author of the act complained of, and polluter pays, do not depend for their validity on treaty provisions. "They are part of customary international law. They are part of the *sine qua non* for human survival."[76]

In his dissent in the *Nuclear Tests* case,[77] Judge Weeramantry would have allowed New Zealand to reopen the 1974 case. He indicated likely support for New Zealand's key principled arguments regarding France bearing the burden of proof to show its underground nuclear testing activities would not cause contamination and the necessity for an environmental impact assessment before proceeding.[78]

IV. CONCLUSION

The precautionary approach continues to be subject to considerable confusion and controversy in international environmental law with the two key international tribunals, the ICJ and the ITLOS, providing rather paltry guidance to date.[79] The adjudicatory processes have not yet engaged in

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[72] For a further noting of his interdisciplinary approach to international law, see Trevor R. Updegraff, *Morals on Stilts: Assessing the Value of Intergenerational Environmental Ethics*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 367 (2009).

[73] *Gabčíkovo*, Separate Opinion, 1997 I.C.J. 7, 97-110 (Sept. 25).

[74] Advisory Opinion, 1996 I.C.J. 226 (July 8).

[75] *Id.* at 478-82 (Weeramantry, J., dissenting).

[76] *Id.* at 502-04.

[77] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 Dec. 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 317 (Sept. 22).

[78] *Id.* at 342-45.

[79] *See* Francesco Francioni, *Realism, Utopia, and the Future of International*

detailed discussions or jurisprudential clarifications. Rather than drawing from the extensive academic literature surrounding the precautionary approach, the ICJ and ITLOS stand out for their overall procedural leanings to place the responsibility on disputing states to sort out the practical implications of precaution through further cooperative consultations and negotiations.

Two environmental cases before the ICJ may offer an opportunity to revisit the precautionary approach.[80] In the *Aerial Herbicide Spraying* case, Ecuador is claiming Colombia's spraying of toxic herbicides near and over the border with Ecuador has violated various rights under international law including the obligations of pollution prevention and precaution.[81] In the *Construction of a Road in Costa Rica along the San Juan River* case, Nicaragua is claiming numerous customary and conventional international law breaches by Costa Rica in allowing a major road construction and other activities to pollute the shared San Juan River.[82] While an explicit breach of the precautionary principle/approach has not been pleaded, Nicaragua may further develop precautionary arguments based on convention obligations, such as the Convention on Biological Diversity expressly listed as being breached, and the reservation of the right to further amplify and specify Costa Rica's obligations under general international law.

Environmental Law, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 442, 453-54 (Antonio Cassese ed., 2012).

[80] It remains uncertain whether a third case, brought by Australia against Japan to stop Japan's "scientific whaling" program in the Southern Ocean, will also provide the ICJ with an opportunity to address the precautionary approach. The application to institute proceedings filed on May 31, 2010 alleges various obligations breached, including responsibilities under the International Whaling Convention and the Convention on Biological Diversity but no specific precautionary breach was pleaded. *See* Application Instituting Proceedings, Whaling in the Antarctic (Austl. v. Japan) (May 31, 2010), *available at* http://www.icj-cij.org/docket/files/148/15951.pdf.

[81] *See* Application Instituting Proceedings (Ecuador v. Colom.), 2008 I.C.J. Pleadings 10 (Mar. 31, 2008). For a review of the dispute, see Jessica L. Rutledge, *Wait a Second: Is That Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice between the Environment and Human Rights*, 46 WAKE FOREST L. REV. 1079 (2011). [Editor's note: On September 13, 2013, the *Aerial Herbicide Spraying* case was removed from the Court's list at the request of Ecuador, which reached an agreement with Colombia over Colombia's aerial spraying. *See* Aerial Herbicide Spraying (Ecuador v. Colum.), Press Release (Sept. 17, 2013), *available at* http://www.icj-cij.org/docket/files/138/17526.pdf.]

[82] *See* Application of the Republic of Nicaragua Instituting Proceedings against the Republic of Costa Rica (Nicar. V. Costa Rica) (Dec. 21, 2011), *available at* http://www.icj-cij.org/docket/files/152/16917.pdf (Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica) later joined with Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)).

While the legal door for further clarifying and perhaps empowering the precautionary approach has been opened by two ICJ judges in particular, progressive development through further litigation remains doubtful due to various factors. Positivistic thinking continues to dominate among international lawyers and judges.[83] A conservative role for judges in the further development of international law may be an expected practical reality in light of the political background of many judges,[84] the need to bolster judicial legitimacy with sovereign states, and the thinness of consensus that undergirds international law.[85]

Clearly, the main routes for further developing and implementing the precautionary approach in international law should be through existing multilateral environmental agreements and the negotiation of additional precautionary provisions and measures. The need to get firm precautionary grips on the looming expansion of nanotechnologies[86] and the increasing number of chemicals in the environment[87] especially stand out, but a broad range of precautionary challenges remain to be addressed from climate change to fisheries management.[88]

Academic voices supporting strong versions of the precautionary approach must not be forgotten,[89] including the progressive advocacy of Professor Jon Van Dyke. In a 2006 article, he maintained that the precautionary principle at a minimum serves to reverse the burden of proving a certain activity does not or will not cause damage to the state

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[83] For a description of the ICJ as a stock-taking rather than a ground-breaking body, see Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 FORDHAM INT'L L.J. 232, 258 (2008).

[84] Regarding the political dimensions of international judicial elections, see Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011); see also Sir Geoffrey Palmer, *Perspectives on International Dispute Resolution from a Participant*, 43 VICT. U. WELLINGTON L. REV. 39 (2012).

[85] Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L. L. 949, 965 (2011).

[86] *See, e.g.*, John Quinn, *EU Regulation of Nanobiotechnology*, 9 NANOTECHNOLOGY L. & BUS. 168 (2012); *see also* Oren Perez, *Precautionary Governance and the Limits of Scientific Knowledge: A Democratic Framework for Regulating Nanotechnology*, 28 UCLA J. ENVTL. L. & POL'Y 29 (2010).

[87] *See* David L. VanderZwaag, *The Precautionary Approach and the International Control of Toxic Chemicals: Beacon of Hope, Sea of Confusion and Dilution*, 33 HOUS. J. INT'L L. 605 (2011).

[88] Russell & VanderZwaag, *supra* note 3, at 59-60.

[89] *See* Noah M. Sachs, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 U. ILL. L. REV. 1285, 1307 (2011).

seeking to initiate an environmentally sensitive activity.[90] He also emphasized the need for vigilant stewardship of natural resources in light of the many mistakes made in recent years.[91]

Whether the precautionary approach will eventually evolve into a strong judicial lance remains to be seen. Judicial jousting has hardly begun and numerous issues have yet to be fully faced. They include the jurisprudential foundations of general principles,[92] their appropriate role[93] and the possible synergies of precaution with other principles, such as intergenerational equity[94] and sustainable development,[95] and doctrinal developments in human and environmental rights.[96] The fragmented world of international adjudication[97] also raises the prospect of differing judicial interpretations of precaution. At the very least, the world community deserves better reasoned decisions with expanded policy considerations in future cases addressing the precautionary approach.[98]

The ICJ and ITLOS do have critical supportive roles to play in the quest for protecting global public goods[99] and reaching for utopia,[100] but more than doctrinal progressions may be necessary. Further democratization of

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[90] Jon M. Van Dyke, *Liability and Compensation from Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. & POL'Y 13, 18-20 (2006).

[91] *Id.* *See also* Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L L. 379 (1996).

[92] On the need to rethink the sources of international law and their theoretical underpinnings, see generally Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U.J. INT'L L. & POL. 1049 (2012).

[93] While some have viewed general principles as a subsidiary source of international law, others have viewed the category as embodying the highest principles of international law. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 4-5 (1987). For a further review of the question of normative hierarchy, see generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

[94] *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 91-92 (2011).

[95] *See* Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Norm,* 23 EUR. J. INT'L L. 377 (2012).

[96] *See* Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2007).

[97] *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012).

[98] On the need for sound and persuasive legal argumentation and reasoning, see Ellis, *supra* note 85, at 971.

[99] *See* André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769 (2012).

[100] *See* Isabel Feichtner, *Realizing Utopia through the Practice of International Law*, 23 EUR. J. INT'L. L. 1143 (2012).

international dispute resolution has been advocated but not yet heeded.[101] The armour of state sovereignty continues to hinder the progressive and precautionary development of international law.[102]

[101] For example, expanding the contentious jurisdiction of the ICJ to intergovernmental organizations and granting the right to request advisory opinions to subjects other than states. Antonio Cassese, *The International Court of Justice: It is High Time to Restyle the Respected Old Lady, in* Cassese, *supra* note 79, at 239.

[102] For a comprehensive review of the progressive possibilities and limits, see RUSSELL A. MILLER & REBECCA M. BRATSPIES (eds. 2008), PROGRESS IN INTERNATIONAL LAW.