

# Legitimacy of International Environmental Law. The Sovereign States Overwhelmed by Obligations: Responsibility to React to Problems Beyond National Jurisdiction?

*Malgosia Fitzmaurice\**

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## Abstract

The present article analyses the legitimacy of fundamental principles of international environmental law in relation to the obligations of States to react to problems beyond national jurisdiction. Its hypothesis is that the implementation of the Environmental Impact Assessment (EIA) and the precautionary principle beyond States' jurisdiction overwhelms and burdens States unduly. This approach departs from the majority view found in the plethora of publications on this subject which has a very favourable approach to the beneficial contribution of these principles to international environmental law. However, the close and detailed analysis of these principles indicates that their operation within the realm of transboundary international environmental law is not without doubts as to their legal content and legitimacy. There is no question that there are many arguments which may contradict the ones presented in this article, but it has to be borne in mind that there is a number of unresolved issues with regard to both EIA and in particular the precautionary principle, such as their indeterminate content; their position in general international law; and the lack of generality in their formulation and application. As yet there is no clear evidence that

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\* Professor of Public International Law, Queen Mary University of London.

the benefits of the application of the precautionary principle outweigh the burdens. These principles are analysed from the point of view of their legitimacy.

The article analyses as well the legal content of the obligation of prevention; due diligence obligation and the precautionary principle.

## I. Introduction

The starting point of the analysis is the notion of the international community which was conceptualised by Professor *Tomuschat* in his seminal Hague lectures in 1993: *Obligations Arising for States Without or Against Their Will*.

“The international community is conceived of as a kind of authority that closely follows world events and bears responsibility for maintaining an orderly and peaceful international environment and for ensuring decent conditions of existence to every human being”.<sup>1</sup>

However, as Professor *Tomuschat* observed in a visionary manner, there are discernible tensions between such obligations and the concept of State sovereignty:

“What constraints flow from the constitution of the international community, and how are these constraints to be reconciled with the principle of sovereignty?”<sup>2</sup>

The title of this article may appear to be rather provocative. It emphasises burdens experienced by States in certain areas of international environmental law. The phenomenon of burdening States with numerous obligations incurring in relation to problems extending beyond their jurisdiction is very tangible. It also entails the question of legitimacy of such a development. International environmental law is one of those areas in which there is a steadily expanding number of obligations, which result in the imposition of quite significant duties on States. The uncontested general obligation underlying international environmental law is the prohibition of a State to use its territory in such a manner as to cause transboundary harm, which is well entrenched in international law and can be traced back to *Trail Smelter Ar-*

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<sup>1</sup> C. *Tomuschat*, *Obligations Arising for States Without or Against Their Will*, *Collected Courses of the Hague Academy of International Law* 241 (1993), 222.

<sup>2</sup> C. *Tomuschat* (note 1), 236.

bitration<sup>3</sup> and the *Corfu Channel* case<sup>4</sup> (the obligation of prevention). However, this obligation is a composite of many vague, ill-defined and woolly obligations of international environmental law which burden States. This article is devoted to the analysis of these obligations. The analysis of certain fundamental environmental obligations (such as the environmental impact assessment and the precautionary principle) will serve as an illustration of the question of legitimacy of the imposition of far-reaching obligations in the area of environmental protection on States. This dilemma was already investigated at an earlier stage of the development of international environmental law when such environmental obligations were at their inception.<sup>5</sup> The environmental obligations discussed in this article will also be analysed in the light of legitimacy as fairness, as understood by *Thomas Franck* in his seminal work.<sup>6</sup> The purpose of this article, however, is not a general, in-depth analysis of the principles discussed therein, as has already been done in many other publications.<sup>7</sup> The principles discussed in this article will only be analysed in the view of the burden of obligations they impose on States and their legitimacy in this respect. Their fundamental structure and role will be presented only in so far as it is necessary to substantiate the hypothesis of this article. Therefore, the article will mainly focus on pointing out inconsistencies and the lack of clarity in the application of fundamental principles of international environmental law in order to analyse them against the backdrop of their legitimacy and, in the final part of this article, of legitimacy understood as fairness. The approach to legitimacy of certain international environmental obligations is analysed from a perspective of the lack of consensus as to their imposition (an authoritarian approach) and of understanding legitimacy as fairness, which, as it was formulated by *Franck*, is closely related to the imposition of ill-defined, imprecise and burdensome obligations on States.

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<sup>3</sup> *Trail Smelter Arbitration (United States v. Canada)*, Award of 11.3.1941, United Nations Reports of International Arbitral Awards, Vol. III, 1903 (1965). See also *R. M. Bratspies/R. A. Miller* (eds.), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, 2006.

<sup>4</sup> *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, ICJ Reports 1949, 22.

<sup>5</sup> See *D. Bodansky*, *The Legitimacy of International Governance: A Coming Challenge For International Environmental Law?*, *AJIL* 93 (1990), 604.

<sup>6</sup> *T. Franck*, *Fairness in International Law and Institutions*, 1995.

<sup>7</sup> See e.g. *P. Birnie/A. Boyle/C. Redgwell*, *International Law & The Environment*, 3<sup>rd</sup> ed. 2009; *D. Bodansky/J. Brunnée/E. Hey* (eds.), *Oxford Handbook on International Environmental Law*, 2007.

The obligations contained in environmental law principles will be discussed only from the perspective of international law, excluding the European and national legal systems.

## II. The Fundamental Obligation of International Environmental Law: The Obligation of Prevention

The principle of prevention (and the corresponding principle of no-harm) are uncontested principles of international environmental law which have been incorporated in many international conventions and soft law instruments.<sup>8</sup> The prohibition of conducting or permitting activities within States' territories or common spaces without regard for the rights of other States or for the protection of the global environment, is without doubt one of the most fundamental principles of international law. It may be said that this rule of customary international law has its roots in a principle of good neighbourliness, which is reflected in the Latin maxim *sic utero tuo non laedas*. It may be stated that these principles have a twofold content: (1)

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<sup>8</sup> Conventions: United Nations Convention on the Law of the Sea, 1822 UNTS 3, Art. 194(1); Convention on Biological Diversity, 1760 UNTS 79, Art. 2; United Nations Framework Convention on Climate Change, 1771 UNTS 107, Art. 3(1). Art XI of the Additional Act of 26.5.1866 to the Boundary Treaties of 2.12.1856, 14.4.1862 and 26.5.1866 (ratified on 12.7.1866) reprinted in: ILR 24 (1961), 102 et seq.; Art. 4 of the Convention of 25.5.1954 between Yugoslavia and Austria concerning water economy questions relating to the Drava (entered into force on 15.1.1955) 227 UNTS, 111; Art. VII (2) of the 1960 Indus Waters Treaty; Art. 4 of the 1972 Convention Relating to the Status of the Senegal River; Arts. 7-12 of the 1975 Statute of the Uruguay River, reprinted in: *Actos Internacionales, Uruguay-Argentina, 1830-1980* (1981), 593.

Soft law documents: Principle 21 of the Stockholm Declaration of Human Environment, ILM 11 (1972), 1416 and Principle 2 of the 1992 Declaration on Environment and Development, ILM 31 (1992), 874; Art XXIX of the 1966 ILA Helsinki Rules. Recommendation 51 of the Action Plan for the Human Environment adopted by the United Nations Conference on the Human Environment in 1972: "Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged." Reprinted in United Nations publication, Sales No. E.73.II.A.14 and corrigendum, part one, chap. II.B; Declaration of Montevideo, adopted by the Seventh International Conference of American States, First Supplement 1933-1940 (1940), 109; Recommendation C (74)224 adopted by the Council of OECD on 14.11.1974 (OECD, *OECD and the Environment*, 1986), 142; Report of the United Nations Water Conference, Mar del Plata, 14.-25.3.1977 (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I., 51 et seq., especially Recommendation 86 (g); Principles 6, 7 of the Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilisation of natural resources shared by two or more states (adopted by the Governing Council of UNEP in 1978) available at <<http://www.unep.org>>, <<http://www.unwatercoursesconvention.org>>.

States have a duty to prevent and control transboundary pollution and environmental harm resulting from activities under their jurisdiction or control; and (2) States have a duty to cooperate in mitigating transboundary risks and emergencies by means of consultation, negotiation and, where necessary, environmental impact assessment.<sup>9</sup>

It may be noted that the duty of prevention is the basis of the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (Prevention Articles).<sup>10</sup> According to Art. 1, these Articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences. According to the International Law Commission (ILC) commentary these Articles apply to

“Any activity which involves the risk of causing significant transboundary harm through the physical consequences is within the scope of the articles. Different types of activities could be envisaged under this category. As the title of the proposed articles indicates, any hazardous and by inference any ultra-hazardous activity which involves a risk of significant transboundary harm is covered. An ultra-hazardous activity is perceived to be an activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions.”

Principle 21 of the Stockholm Declaration has been confirmed by the International Court of Justice (ICJ) in the Advisory Opinion on *Legality of Threat or Use of Nuclear Weapons*<sup>11</sup> as having entered into the body of customary international law and put in the context of general international environmental law. The ICJ applied this rule in a specific transboundary context in the 2010 *Pulp Mills* case<sup>12</sup> and the 2015 *Certain Activities carried out*

<sup>9</sup> P. Birnie/A. Boyle/C. Redgwell (note 7), 137.

<sup>10</sup> 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the ILCYB, 2001, Vol. II, Part Two.

<sup>11</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, para. 29.

<sup>12</sup> Principle 21: “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 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.” The UN Conference on the Human Environment, Stockholm Declaration 16.6.1972, UN Doc. A/CONF.48/14, ILM 11 (1972), 1416. Principle 2 of the Rio Declaration on Human Environment is almost identical in formulation. Principle 2 of the 1992 Rio Declaration. UN Conference on Environment and Development,

by *Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* cases.<sup>13</sup>

The majority view is that the State responsibility contained in this Principle

“must be read as a limitation on the right – in other words, that states have the right to exploit their own resources provided that they ensure that activities within their jurisdiction or control do not harm the environment beyond their territory”.<sup>14</sup>

The no-harm rule was also endorsed in the Advisory Opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* rendered by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS),<sup>15</sup> which relied on the *Pulp Mills* case. Both of these international judicial *fora* approach the obligation of prevention of transboundary environmental harm as the obligation of due diligence, the legal content of which is not well-defined.<sup>16</sup> The accepted view is that Principle 21 allows some degree of harm; the unresolved legal question is where the threshold is. There are different standards, among them “significant” harm or “substantial” and “serious” harm. The threshold of “significant” harm is relied upon by the majority of relevant international instruments, while “serious” is used in Art. 17 on Prevention.<sup>17</sup> The ILC has defined the term “significant” damage as meaning “[s]omething more than detectable but need not ... at the level of ‘serious’ or ‘substantial’”.<sup>18</sup>

The obligation of prevention consists of the following procedural obligations: obligation of prior notification; obligation to conduct an Environmental Impact Assessment (EIA); obligation to exchange information; the duty to consult and negotiate, each of them characterised by a very complex

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Rio Declaration on Environment and Development, 14.6.1992, UN Doc. A/CONF.151/5/Rev.1, ILM 31 (1992), 874. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, 14.

<sup>13</sup> ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. <<http://www.icj-cij.org>>.

<sup>14</sup> J. Knox, *The Myth and Reality of Transboundary Impact Assessment*, AJIL 96 (2012), 293.

<sup>15</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1.2.2011, ITLOS Reports 2011, 10.

<sup>16</sup> *Pulp Mills* (note 12), 14, para. 193; ITLOS Advisory Opinion, (note 15), para. 193, 68 et seq.

<sup>17</sup> Prevention Articles (note 10), 169.

<sup>18</sup> Prevention Articles (note 10), 152.

legal character. It may be said that such a rigorous and rigid division of obligations is slightly artificial and does not reflect reality. The components of prevention are frequently intertwined, e.g. the obligations of prior notification and consultation are also elements of EIA. The most important but also the most onerous is no doubt the obligation of the EIA, which will be discussed separately.

The general duty of States is contained in Prevention Art. 4 which imposes on States an obligation to cooperate in good faith and, if necessary, to seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimising the risk thereof.

The obligation of a prior notification is firmly entrenched in many Conventions. It is conducted in the preliminary stages of the planning phase of a hazardous activity. The State giving rise to a hazardous activity has the obligation to notify all States which may be affected by it, as stated in Art. 3 of the Convention Environmental Impact Assessment in a Transboundary Context (Espoo Convention).<sup>19</sup> This Article is quite specific as to the content of such an obligation. It is the State of origin (not a private entity), which has the obligation of prior notification. It is interesting to note that in case of the Espoo Convention, its Implementation Committee (in charge of non-compliance) fleshed out even the more detailed content of this obligation.<sup>20</sup> Detailed provisions on notification can be found as well in Art. 12 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention).<sup>21</sup> Art. 12 of the Convention provides that States planning to adopt measures which might have significant adverse effects on other watercourse States should notify these States. The notification must be given in a timely manner, and shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures. Art. 13 sets out a time limit of six months for a reply to be transmitted to the state of origin. The obligation of notification is also included in the Convention on Nuclear Safety.<sup>22</sup>

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<sup>19</sup> Convention on Environmental Impact Assessment in a Transboundary Context, 1989 UNTS 309.

<sup>20</sup> Report of the Implementation Committee on Its Twenty-First Session, Doc ECE/MPEIA/IC/2012/6, 20.6.2011, para. 12.

<sup>21</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc A/51/869 (1997).

<sup>22</sup> Convention on Nuclear Safety, 1963 UNTS 293, Art. 17(iv).

There are also several judicial decisions which reaffirm such an obligation. In the majority of the cases such an obligation is based on a treaty, such as in *Lac Lanoux* case,<sup>23</sup> *Pulp Mills* case,<sup>24</sup> and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* cases.<sup>25</sup> Costa Rica asserted that the obligation of prior notification is already based on general international law, which is not a widely held view.

Art. 8 of the Prevention Articles provides that the State of origin must notify the States that might be affected by its planned activity. The article also imposes an obligation to the States that receive the notification to reply within six months.<sup>26</sup>

In conclusion it may be said that there is an obligation of prior notification in international law, mainly based on conventional law. However, its status in general international law is not firmly agreed upon. Such an obligation refers to planned activities which would result in significant harm (which have a significant adverse effect). However, the specific formulations applied in these Conventions differ to a considerable degree, and there is no uniform definition of what is the exact content of such an obligation. There is also a relative paucity of international case-law.

The procedural obligation of prevention also includes the duty to cooperate, which according to some authors also subsumes the duty to consult and negotiate.<sup>27</sup> The duty to cooperate is well entrenched in international environmental law<sup>28</sup> and features in many Conventions and soft law instruments.<sup>29</sup> Within the context of international environmental law the duty

<sup>23</sup> Arbitral Award, *Lac Lanoux Arbitration (France v. Spain)*, (1957) 24 ILR 101, 281, 317, XII UNRIAA (1957).

<sup>24</sup> *Pulp Mills* (note 12), paras. 96, 121.

<sup>25</sup> *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases (note 13), Costa Rica asserted that Art. 3, para. 2, and Art. 5 of the Ramsar Convention provide for a duty to notify and consult. Secondly, it submits that Arts. 13 (g) and 33 of the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America establish an obligation to share information related to activities which may be particularly damaging to biological resources. (para. 106).

<sup>26</sup> Prevention Articles (note 10).

<sup>27</sup> I. Plakokefalos, *Prevention Obligations in International Environmental Law*, Yearbook of International Environmental Law 23 (2012), 20.

<sup>28</sup> The most instructive is the formulation in the UN Watercourse Convention Art. 8: "Watercourse states shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse", as it bases this duty on good faith.

<sup>29</sup> OECD, Recommendation of the Council on Principles Concerning Transfrontier Pollution, Doc C(74)224 (14.11.1974). Several Principles of the Rio Declaration are based on the



to cooperate was confirmed by the judicial practice of the ICJ<sup>30</sup> and the ITLOS.<sup>31</sup> The duty to consult and negotiate is also mentioned in several international documents (Conventions and soft law instruments).<sup>32</sup> The legal character of these obligations is rather vague and ill-defined. There is no uniformity regarding their content as it varies in all relevant Conventions. Furthermore, there is a marked lack of guidance regarding the implementation of such obligations.<sup>33</sup>

The Articles on Prevention deal with the obligation to enter into consultations. Art. 9 sets out the criteria for conducting consultations based on the “equitable balance of interests” (Art. 10). Such duty is based on good faith. There is also sizeable case-law which supports the duty to enter into consultations and negotiations. The classical case with regard to the duty to consult and negotiate is the *Lac Lanoux* arbitration in which the Arbitral Tribunal gave a detailed guidance.<sup>34</sup> The ICJ in the *Pulp Mills*<sup>35</sup> case and the *Costa Rica/Nicaragua* case<sup>36</sup> and the ITLOS in the *MOX Plant* case<sup>37</sup> also made statements to this effect. In *Costa Rica/Nicaragua* case the Court established a direct link between due diligence, EIA and the duty to consult

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duty to cooperate, such as 6 and 7. The ICJ acknowledged this principle in *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, [1974] I.C.J. Reports 33, para. 78.

<sup>30</sup> In *Pulp Mills* case the Court said that: “[i]t is by co-operating, that the States concerned can jointly manage the rules of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question”, (note 16), para. 77, 49.

<sup>31</sup> ITLOS, in the *MOX Plant* case the ITLOS said that “[t]he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention, and general international law”. *MOX Plant case (Ireland v. United Kingdom)*, (ITLOS Request for Provisional Measures), (1999), para. 20.

<sup>32</sup> See e.g. Principle 19 of the Rio Declaration; Art. 197 of the UNCLOS; Arts. 10 and 17 of the UN Watercourse Convention; Art. 17 of the Convention on Nuclear Safety; Convention on Biological Diversity Art. 14(1)(c), (in the context of the EIA); Art. 5 of the Convention on Long Range Transboundary Air Pollution.

<sup>33</sup> *I. Plakokefalos* (note 27), 22.

<sup>34</sup> Arbitral Award, *Lac Lanoux Arbitration* (note 23), para. 22 of the Award.

<sup>35</sup> ICJ, *Pulp Mills* case “[t]here would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose”, (note 16), para. 147, 57.

<sup>36</sup> ICJ, Nicaragua contended that Costa Rica breached its obligation to notify, and consult with, Nicaragua in relation to the construction works. Nicaragua found the existence of such obligation on three grounds, namely, customary international law, the 1858 Treaty, and the Ramsar Convention.

<sup>37</sup> *MOX Plant* case (note 31), para. 89.

and negotiate.<sup>38</sup> Despite the fact that the duty to consult and negotiate is a norm of customary international law and is included in several international instruments and international decisions, it is not free of ambiguities, which mostly are due to the lack of clarity concerning the legal content of such obligation, the consequences it entails, and the role played by good faith. For example, in case of the offshore gas and oil activities, a drawback of the obligation is that the State of origin may proceed with the planned activity without a duty to obtain the consent of the potentially affected state. Therefore, the lack of a firm definition of the duties to cooperate, consult and negotiate, coupled with the privileged position of the originator of transboundary harm, contribute to a general confusion concerning the obligations of States within the context of the obligation of prevention.<sup>39</sup>

It may also be stated that in all cases before international courts and tribunals, the procedural obligations analysed had derived from a particular treaty and therefore the findings of international judicial institutions were confined to the narrow interpretation of the provisions of treaties at hand. Thus, it may be said that such findings cannot serve as general guidance.

*Plakokefalos* includes into the obligation of prevention emergency notification as denoting the outer limits of prevention.<sup>40</sup> This obligation refers to when the accident has already occurred but has not yet become transboundary. Principle 18 of the Rio Declaration provides for such an event. There are several Conventions which contain such a provision. For example in the realm of high risk activities, nuclear law has two relevant Conventions.<sup>41</sup> Another Convention is the 1997 Convention on the Transboundary Effects of Industrial Accidents which has an extensive system of notifica-

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<sup>38</sup> ICJ, *Costa Rica v. Nicaragua* case: “The Court reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk. (para. 104, 45 ). However, the duty to notify and consult does not call for examination by the Court in the present case, since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.” Certain Activities carried out by Nicaragua in the Border Area, *Nicaragua v. Costa Rica* (note 13), para. 168, 61.

<sup>39</sup> *I. Plakokefalos* (note 27), 25.

<sup>40</sup> *I. Plakokefalos* (note 27), 25.

<sup>41</sup> Convention on Early Notification of a Nuclear Accident, 1439 UNTS 275; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, ILM 25 (1986), 1377. It may be noted that also the UN Watercourse Convention contained a similar provision in Art. 14. Riparian States are under an obligation to notify each other without delay in a case of emergency that might have transboundary impact.

tion.<sup>42</sup> According to *Plakokefalos*, this Convention goes further than most of the others. Annex IX contains detailed provisions on the content and the method of communication of the emergency notification. The first Conference of the Parties of the convention adopted an Industrial Accident Notification System (IANS) with a very specific obligation of States in case of an accident.<sup>43</sup> Arts. 16 and 17, Articles on Prevention, are relevant in emergency notification.<sup>44</sup> Art. 16 obliges the State of origin to develop contingency plans for responding to emergencies, where appropriate, in cooperation with the State likely to be affected and competent international organizations. Art. 17 imposes an obligation on the State of origin without delay and by the most expeditious means, at its disposal, to notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

In conclusion, the obligation of prevention seems to be well entrenched in international environmental law, at first blush posing no major legal problems in its implementation. However, as it was analysed in this section, such a view is far from reality. This is a composite obligation and the content of its various elements is very vague, differently formulated in international legal instruments and lacks generality. States are burdened with implementing very differently formulated and perceived obligations of prevention in the plethora of environmental agreements, without a general rule to rely on. Therefore the most fundamental obligation in international environmental law, which content is so unpredictable and woolly, cannot be said conform to the legitimacy requirements as it will be explained in Section VI of this article.

It may also be said that this obligation, under the general *chapeau* of “the obligation of prevention”, includes in fact two rather different institutions: the classical obligation of prevention and the obligation of prevention concerning emergency situations, which goes much further than the “classical obligation of prevention” and is even more burdensome, and its inclusion in the ambit of the obligation of prevention may raise doubts.

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<sup>42</sup> Convention on the Transboundary Effects of Industrial Accidents. 2015 UNTS 457. Art. 8(1) provides that State parties shall have contingency plans in case of an emergency, while Art. 10 provides that States shall immediately notify all possibly affected states in case an industrial accident occurs.

<sup>43</sup> *I. Plakokefalos* (note 27), 25 et seq.

<sup>44</sup> Art. 17: The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

### III. The Obligation of Environmental Impact Assessment

There is a view expressed that the EIA is a corollary of Principle 21 of the Stockholm Declaration.<sup>45</sup> There is no doubt that the obligation to conduct an EIA at the stage of planning an activity is now well established in international law.<sup>46</sup> It has been included in numerous international Conventions, including the Espoo Convention<sup>47</sup> and soft law instruments, the most representative being Principle 17 of the Rio Declaration. The Espoo Convention defines environmental impact assessment as “*a procedure for evaluating the likely impact of a proposed activity on the environment*”. EIA’s purpose is to provide national decision-makers with information about possible environmental effects when deciding whether to authorize the activity to proceed and how to control it. This article will analyse the obligations of States in transboundary context, and how the application of the EIA impacts their obligations outside their jurisdiction. It must be said, however, that the transboundary EIA is inexorably linked with the domestic dimension of the EIA.

It is argued that the existence of a norm of general international law which burdens States has to have a precise legal content, especially in relation to quite onerous environmental obligations such as the EIA. As it will be shown in this section, the obligation of the EIA is quite vague and has a very murky legal content.

The ICJ referred to it as a norm of customary international law in both *Pulp Mills* case and *Nicaragua/Costa Rica* cases. In the *Pulp Mills* case the Court held:

“[T]he obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment when there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource” (para. 204).

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<sup>45</sup> *J. Knox* (note 14), 292.

<sup>46</sup> *A Gillespie*, *Environmental Impact Assessments in International Law*, *Review of European Community and International Environmental Law* 17 (2008), 232.

<sup>47</sup> See, e.g. *Convention on Long Range Transboundary Air Pollution*, 1302 UNTS 57, Art. 2; UNCLoS, Art. 206; *World Charter for Nature*, UNGA Res 37/7, UN Doc A/37/L.4 and Add 1 (1982) paras. 11(b) and 11(c); *UNEP Guidelines of 1987 on Goals and Principles of Environmental Impact Assessment*, UNEP Resolution GC 14/25.

According to *Boyle*, this statement of the Court approaches transboundary EIA

“as a distinct and freestanding obligation in international law – reflecting Principle 17 of the Rio Declaration on Environment and Development, the Espoo Convention,<sup>48</sup> and Article 7 of the ILC draft articles on transboundary harm”.<sup>49</sup>

However, in its *Pulp Mills* judgment the Court observed that

“it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment”.<sup>50</sup>

According to *Boyle*, the Court also held view that EIA is a necessary element of the general obligation of due diligence in the prevention and control of transboundary harm. *Boyle* is of this view that this finding suggests that

“the content of the obligation may evolve over time, and will reflect the capabilities of the party concerned and the particular circumstances of the case”.<sup>51</sup>

In *Certain Activities carried out by Nicaragua in the Border Area*, the EIA was also invoked as a necessary procedural environmental obligation related to the duty not to cause harm.<sup>52</sup>

The Court confirmed the status of the EIA by stating that

“[t]he Parties broadly agree on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State’s jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions”.<sup>53</sup>

As stated above, in the *Pulp Mills* case the ICJ said that the content of the EIA is to be defined by recourse to domestic law. The same approach was adopted by the ILC.

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<sup>48</sup> Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 999 UNTS 171.

<sup>49</sup> A. Boyle, Developments in International Law of EIA and Their Relation to the Espoo Convention, <<https://www.unece.org>>, 1.

<sup>50</sup> *Pulp Mills* (note 12), para. 205, 83 et seq.

<sup>51</sup> A. Boyle (note 49).

<sup>52</sup> *Costa Rica v. Nicaragua* (note 13), para. 100, 43 et seq.

<sup>52</sup> *Costa Rica v. Nicaragua* (note 13), para. 102, 44 et seq.

<sup>53</sup> *Costa Rica v. Nicaragua* (note 13), para.102,44 et seq.

The ITLOS Deep Seabed Chamber in its Advisory Opinion relied on the findings of the ICJ in relation to the EIA as a norm of general international law as also relevant to the Area and deep seabed mining therein. Therefore, the EIA conducted with respect to activities in the Area by the sponsoring states and contractors should not only follow obligations laid down in the recommendations and regulations on seabed mining issued by the International Seabed Authority (ISA), but due to the general character of the EIA<sup>54</sup> “the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations”.

According to Art. 7 of the Prevention Articles, the State of origin has to conduct a risk assessment prior to its authorisation of a hazardous activity, including the EIA. However, the comments to the Article do not specify what the content of the risk assessment should be.<sup>55</sup> *Plakokefalos* states as follows regarding the choice of national law:

“[t]his line of reasoning clearly cannot lead to a satisfactory result, since it is obvious that the multitude of technical issues that may arise can create significant disagreement between states. This may relate to both the appropriateness of a given technical solution and the interpretation of the EIA studies.”<sup>56</sup>

The same author suggests correctly that in order to avoid such conflicts, setting a minimum standard is necessary. Such a standard should be the Espoo Convention, as

“[i]t is not as strict as the Protocol on Environmental Protection to the Antarctic Treaty and is not as lenient as the relevant ILC Prevention Articles”.<sup>57</sup>

In the meantime, the Espoo Convention has become a global Convention due to the 2001 amendment to this Convention which has entered into force in 2014, and allows the accession by United Nations (UN) Member States not being members of the United Nations Economic Commission for Europe. Therefore, it might be presumed that the Espoo Convention has the potential of setting a general, uniform international standard for the EIA. Such a possibility is, however, very remote, as the legal landscape is far more complicated. There is a complex nexus of various environmental treaties which contain provisions relating to EIA, the Espoo Conventions and the Protocol on Environmental Protection to the Antarctic Treaty which are

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<sup>54</sup> ITLOS, Advisory Opinion (note 15), paras. 149 and 150.

<sup>55</sup> Art. 7 of the ILC Prevention Articles (note 10), 158.

<sup>56</sup> *I. Plakokefalos* (note 27), 15.

<sup>57</sup> *I. Plakokefalos* (note 27), 15.

devoted to the EIA entirely, as well as, soft law documents such as the United Nations Environment Programme (UNEP) Guidelines on EIA. Finally, domestic legislation has to be mentioned, as it is inexorably connected with the transboundary regulation, as stated by the ICJ. Such a “mosaic” of national and international rules results in States facing uncertainty. An example of the complex and uncertain legal obligations in relation to the EIA is the threshold which triggers off the EIA procedure. Admittedly, the most widely accepted instruments is the threshold of “significant environmental effect”, as it is required by the UNEP EIA Goals and Principles, the Espoo Convention, the Convention on Biological Diversity and the US – Canada Air Quality Agreement for example. However, this is not always the case and in other international conventions of crucial significance, such as the formulation in the United Nations Convention on the Law of the Sea (UNCLOS), two thresholds are used: “substantial pollution” or “significant and harmful changes to marine environment”. It is suggested that the term “substantial” refers to a higher threshold. However, having in mind that the two standards are disjunctive, it is argued that the lower standard will apply in any event.<sup>58</sup> These formulations are unclear and it is surprising that in the international convention of fundamental importance, standards triggering the EIA are so confusing and lack clarity in formulating the obligations of States. The other exception of the threshold of “significant” is the Antarctic Protocol where the EIA is to be triggered off if the activity has at least “minor or transitory impact”. On the other hand, the UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared by two or more States, defines “significant effect” as “any appreciable effect on a shared natural resource” and excludes *de minimis effect*.<sup>59</sup> As Craik observes, there is yet another difficulty, i.e. the futility if not impossibility of the abstract determination of the threshold of “significance”. In the majority of cases such an evaluation was made on case-by-case basis, thus emphasising the lack of the general rule. The difficulty in relation to the EIA is that such an evaluation is both technically complex and a context-specific exercise. Therefore, the most challenging aspect is an objective assessment of the potential harm, whilst in reality it is subjective.<sup>60</sup>

The general conclusions drawn from this Section are the following. The EIA has become a general international law obligation (as confirmed by the ICJ) whose transboundary content is not well-defined. According to the

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<sup>58</sup> N. Craik, *The International Law of Environmental Impact Assessment*, 2008, 133.

<sup>59</sup> UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States, ILM 1074 (1978), N. Craik (note 58), 133.

<sup>60</sup> N. Craik (note 58), 133 et seq.

ICJ each and every State has to define its legal content in domestic law. Its standards are vague, such as the threshold which triggers the obligation to conduct an EIA. It is unquestionable, however, that its implementation puts an enormous burden on States. It is well documented that the EIA is very important in a transboundary context; however, as argued in this study it is unclear and murky content may lead to unreasonable demands by States (as evidenced e.g. by the *Costa Rica v. Nicaragua* case), resulting in the imposition of overwhelming responsibilities. One of the most unclear and challenging elements of the EIA within the transboundary context is the lack of international standards and the determination of its content according to domestic law, which results in great uncertainty for States and the lack of uniformity.

There is no doubt that the burdensome obligations of States are even more pronounced in relation to the Strategic Environmental Assessment (SEA), which goes much further than the EIA in the obligations imposed on States.<sup>61</sup> Admittedly, there is no norm at present of customary international law relating to the SEA, but existing international instruments, such as the 2003 Kiev Protocol to the Espoo Convention, include very far-reaching obligations, which at some point may become part of the body of the customary international law. One of the most extensive obligations (different from the EIA) is that it is not only related to the transboundary impacts. It obliges the party to carry out SEA in relation to plans and programmes which are likely to have significant environmental (including health) effects, regardless where these impacts are located. One of the provisions, which is different from the EIA, is that the State also submits “reasonable alternatives”, which include a specific list of requirements that should be included in States’ reports where reasonable. This requirement to specifically justify the decision based on these alternatives goes further than the qualified obligations to look at the alternatives under the Espoo Convention. Finally, there is a mandatory requirement of monitoring.<sup>62</sup>

*Craik* argues that because the SEA Protocol is in fact directed at general environmental decision making and not only at the transboundary harm, it encroaches to a higher degree on traditional areas of State sovereignty. The whole basis of the Protocol is built on a premise that each State will have an internal environmental impact assessment in place, which goes further than

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<sup>61</sup> “Assessment of the Effects of Certain Plans and Programmes on the Environment”; Council Directive, 01/42, OJ 2001 1.197/30. See also 2003 Protocol on the Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, entry into force 2010.

<sup>62</sup> *N. Craik* (note 58), 157, 158.



the requirement in international law (but is included in the European Union [EU] Directive).<sup>63</sup>

#### IV. The Precautionary Principle

The precautionary principle is even murkier and even less defined than the EIA, which, at least in general terms, is acknowledged as part of general international law. It may be said that during the intervening years, the general discussion regarding the legal status of the precautionary principle has not moved very much forward but nonetheless it is still considered to be the most controversial development in international environmental law.<sup>64</sup>

This article will only analyse the precautionary principle in relation to its status and States' obligations in international law under this principle, not in domestic law or the European law. It may be said that the debate concerning the precautionary principle has started after its formulation in the 1992 Rio Declaration (Principle 15).<sup>65</sup>

The debate concerning the place in international environmental law of the precautionary principle was quite aptly described by *Gillespie*:

“This principle, despite its relative simplicity, has been the subject of endless debate for the following sixteen years, over exactly what it means, and what its implications may be. Rather than ushering in an era of relatively certainty, with the provision a new principle to help guide the international community through increasingly difficult international environmental problems, the complete opposite happened, and the exact status of the principle, or what it means is commonly held to be uncertain. The purpose of this paper is to try to remove some of that uncertainty, and show exactly why the principle developed, what standing it has, and finally, how to interpret and apply it.”<sup>66</sup>

This principle is surrounded by controversy, starting with the terminology. It has been widely debated whether it is a “principle” or an “approach”.

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<sup>63</sup> *N. Craik* (note 58), 159.

<sup>64</sup> *J. B. Wiener*, Precaution, in: D. Bodansky/J. Brunnée/E. Hey, *The Oxford Handbook* (note 7), 599.

<sup>65</sup> “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.”

<sup>66</sup> *A. Gillespie*, *The Precautionary Principle and the 21<sup>st</sup> Century: A Case Study of Noise Pollution in the Ocean*, *IJMCL* 22 (2007), 61 et seq.

The supporters of its state as an “approach” have taken the view that the precaution is not legally binding, in contrast to a legally binding principle.<sup>67</sup>

It is included in numerous Conventions.<sup>68</sup> However, as it was stated, the precautionary principle or approach is not universally applied and States

<sup>67</sup> *N. Peel*, *Precaution: A Matter of Principle, Approach or Process?*, *Melbourne Journal of International Law* 17 (2004), 283 et seq. See, *J. B. Wiener*, who is of the view that the precautionary principle may not be a principle (note 64), 603.

<sup>68</sup> Such as: 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3, entered into force 1.1.1989 (as amended 29.6.1990, 25.11.1992, 17.9.1997, and 3.12.1999): Preamble: “Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries ...”; 1992 United Nations Framework Convention on Climate Change, ILM 31 (1992), 854 (entered into force 21.3.1994): Article 3: “Art. 3 The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socioeconomic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties”; 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, UN Doc EB.AIR/R. 84 (entered into force 5.8.1998): Preamble: “Preamble Resolved to take precautionary measures to anticipate, prevent or minimize emissions of air pollutants and mitigate their adverse effects, Convinced that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that such precautionary measures to deal with emissions of air pollutants should be cost-effective”; 2001 Stockholm Convention on Persistent Organic Pollutants, ILM 40 (2001), 531, (17.5.2004): Art. 1 (Objective) Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants. Art. 8(9) The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in Annexes A, B and/or C; 1991 Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa, ILM 30 (1991), 773 (entered into force 22.4.1998); 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, ILM 39 (2000), 1027 (entered into force 11.9.2003); Preamble: “Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development ...” Article 1 (Objective): “In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.” Article 10(6): “Lack of scientific certainty due to insufficient relevant

have been selective in this respect. It was adopted in the United Nations Framework Convention on Climate Change and Convention on Biological Diversity but not in the 1994 Nuclear Safety Convention, the 1995 Washington Declaration on the Protection of the Marine Environment from Land-based Activities or the 1998 Rotterdam Prior Informed Consent Convention. This principle varies as well in the setting of the threshold of harm. Principle 15 of the Rio Declaration and the Climate Change Convention require a risk of “serious or irreversible harm” before the principle becomes applicable but treaties on the protection of marine environment do not. It is also argued that in some cases there is the reversal of the burden of proof while in others it just lowers the standard of proof, but to what level is not clear.<sup>69</sup>

A similar view is held by *Böckenförde* who states that

“However, despite its growing presence in international law and although often regarded as a principle of international law or even part of customary international law, there is still considerable controversy over how to articulate or define

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scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects”. Article: 11(8): “Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects”; 1980 Convention on the Conservation of Antarctic Marine Living Resources, 1329 UNTS 47 (entered into force 7.4.1981), Article 2(3) 3: “Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation: (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment; (b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in subparagraph (a) above; and (c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.”, see *J. Peel*, *The Precautionary Principle in Practice. Environmental Decision-Making and Scientific Uncertainty*, (2005), Annex I.

<sup>69</sup> *P. Birnie/A. Boyle/C. Redgwell* (note 7), 160.

a precautionary principle of law. A single universally shared version of the principle does not exist ... [t]he precautionary principle is worded differently almost each time it is articulated. Some writers have counted different versions of the principle in international environmental law documents and not all of the different approaches do easily co-exist with one another.”<sup>70</sup>

The existing (sparse) case-law is rather inconclusive. The ITLOS in *Southern Bluefin Tuna*,<sup>71</sup> *MOX Plant*,<sup>72</sup> and *Land Reclamation*<sup>73</sup> cases, expressed a rather reluctant view on the existence of the precautionary principle (pleaded by claimant parties in both cases), favouring the phrase “prudence and caution” (paras. 79 of the *Bluefin* case and 84 of the *MOX Plant* case).

In the *MOX Plant* case Judge *Wolfrum* clearly stated that customary law status of this principle was “*still matter for discussion*”.<sup>74</sup> The ITLOS Seabed Chamber of 2011 Advisory Opinion was more favourable to acknowledge this principle but it still did not fully accord to it a general international law status. The Chamber held that the existence of the precautionary principle in many treaties and in the Rio Declaration, “has initiated a trend making this approach a part of customary international law”.<sup>75</sup>

The International Court of Justice very briefly alluded to this principle in the 2010 *Pulp Mills* case. The Court held that

“while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof”.<sup>76</sup>

The controversial nature of the precautionary principle was well evidenced by the WTO jurisprudence.<sup>77</sup> The *Beef Hormones* case clearly reflected the divisive approaches to this principles. The European Community

<sup>70</sup> M. Böckenförde, *The Operationalization of the Precautionary Approach in International Environmental Law Treaties – Enhancement or Facade Ten Years After Rio?*, *ZaöRV* 63 (2003), 313, 314.

<sup>71</sup> 1999 Order in *Southern Bluefin Fin Tuna Cases (New Zealand v. Japan); Australia v. Japan*, Request for Provisional Measures <<https://www.itlos.or>>.

<sup>72</sup> *MOX Plant* case (note 31).

<sup>73</sup> ITLOS, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 10.9.2003.

<sup>74</sup> Separate Opinion of Judge *Wolfrum* in *MOX Plant* case (note 31).

<sup>75</sup> ITLOS, Seabed Dispute Chamber, Advisory Opinion (note 15).

<sup>76</sup> In this respect see the different view of Professor *Wolfrum*. Separate Opinion in the *MOX Plant* case (note 31).

<sup>77</sup> WTO, *EC Measures Concerning Meat and Meat Products* (hereinafter *Hormones* case) WTO Doc. WT/DS48/AB/R (16.1.1998); *European Communities-Measures Affecting and Marketing of Biotech Products*, (*Biotech* case) WTO Doc. WT/Ds291/R; WT/DS292/R; WTDS293/R (29.9.2009).

argued that this principle was part of the body of customary law and applicable to both basement and management of a risk, and that it informed the meaning and effect of Arts. 5.1 and 5.3 of the WTO's Agreement on Sanitary and Phytosanitary measures (SPS Agreement). The United States supported the view that it was not a principle but an "approach", which makes it more flexible as a concept. Canada argued that it was only an emerging principle of international law, requiring further crystallisation.

The WTO Appellate Body relied mostly on the arguments presented by these two States. It made an important statement that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.<sup>78</sup> The *Biotech* case was similar in its content regarding the precautionary principle. The European Community (EC) argues that it has become a fully-fledged principle of international law.<sup>79</sup> The United States and Canada presented a very similar reasoning to that in the *Beef Hormone* case and denied the existence of the precautionary principle, arguing that it was only an approach, due to the lack of one consistent formulation of this principle. The United States strongly disagreed "*that precaution has become a rule of international law*" and that the precautionary principle can be considered a general principle or norm of international law, as it does not have a "*single agreed formulation*". The United States then continued that a precautionary principle is not a principle of international law, or even more so not a rule of international customary law, for the following reasons: (i) it cannot be approached as a "*rule*" because it does not have a clear content and therefore cannot be said to offer authoritative guide to States' conduct; (ii) it cannot be said to reflect the practice of States, as it cannot be defined which States embraced this principle; and (iii) considering that the precaution cannot be defined, and, therefore, could not possible be a legal norm, it cannot be argued that States apply it from sense of legal obligation.<sup>80</sup>

The Panel observed that the EC did not specify in its submission what was understood by general principles of international law: principles of customary law or general principles of law, or both.<sup>81</sup> The Panel confirmed its observation as the legal nature of the precautionary principle which was made on *Beef Hormones* case. The case-law of the World Trade Organization (WTO) is very instructive as the evidence of the general definitional

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<sup>78</sup> *Biotech* case (note 77), 42 et seq.

<sup>79</sup> *Biotech* case (note 77), 42 et seq.

<sup>80</sup> *Biotech* case (note 77), 42.

<sup>81</sup> *Biotech* case (note 77), 42 et seq.

problems and the lack of clarity of the legal character of the precautionary principle.

Another issue concerns the substantive character of this principle. In this area there is also a marked lack of clarity. There is a general view that the application of this principle is related to the notion of risk. Risk implies damage which is defined by its threshold (“irreversible”; “grave”), so that the application of precaution is somewhat limited.<sup>82</sup> It is also argued that the nature of the precautionary principle is not static but evolving, which is understandable, considering that it is based on the development of science. This element adds only uncertainty of the application of this principle.<sup>83</sup> Finally, there is no uniform application; it will depend on the region where it is applied. There is a problem of capabilities of States which means that States cannot be subject to the same obligations deriving from the application of this principle. The assessment of the precautionary principle will vary from State to State, depending on economic, financial and technological capabilities, in relation to the risk management.<sup>84</sup> Traditionally, the precautionary principle was approached in two forms: the weak and the strong. The weak one is exemplified by the formulation in Principle 15 of the 1992 Rio Declaration on Environment and Development. The strong version is to be found in the 1982 United Nations Charter for Nature for example, which states that when a “*potential adverse effects are not fully understood, the activities should not proceed*”. The other example the 1998 Wingspread Definition is well-known:

“[w]hen an activity raises threats of harm to human health or to the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically”.<sup>85</sup>

The weak form of this principle is not usually a subject of critical comments, unlike its strong version.

The most outspoken critic of the precautionary principle is Professor *Sunstein*. In one of his publications on this principle, he gives the following summary:

“The precautionary principle has been highly influential in legal systems all over the world. In its strongest and most distinctive forms, the principle imposes a burden of proof on those who create potential risks, and it requires regulation

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<sup>82</sup> *L. Boissons de Chazournes*, The Precautionary Principle, UNEP, Precaution from Rio to Johannesburg: Proceedings of a Geneva Network Roundtable, 2002, 12.

<sup>83</sup> *L. Boissons de Chazournes* (note 82), 11.

<sup>84</sup> *L. Boissons de Chazournes* (note 82), 11.

<sup>85</sup> The 1988 Wingspread Statement on the Precautionary Principle.

of activities even if it cannot be shown that those activities are likely to produce significant harms. Taken in this strong form, the precautionary principle should be rejected, not because it leads in bad directions, but because it leads in no directions at all. The principle is literally paralyzing – forbidding inaction, stringent regulation, and everything in between. The reason is that in the relevant cases, every step, including inaction, creates a risk to health, the environment, or both. This point raises a further puzzle. Why is the precautionary principle widely seen to offer real guidance? The answer lies in identifiable cognitive mechanisms emphasized by behavioral economists. In many cases, loss aversion plays a large role, accompanied by a false belief that nature is benign. Sometimes the availability heuristic is at work. Probability neglect plays a role as well. Most often, those who use the precautionary principle fall victim to what might be called ‘system neglect’, which involves a failure to attend to the systemic effects of regulation. Examples are given from numerous areas, involving arsenic regulation, global warming and the Kyoto Protocol, nuclear power, pharmaceutical regulation, cloning, pesticide regulation, and genetic modification of food. The salutary moral and political goals of the precautionary principle should be promoted through other, more effective methods.”<sup>86</sup>

*Sunstein* does not object to a weak version of the precautionary principle, but nonetheless does not accord to it his full approval. He argues that it is such an obvious principle, even “*banal*”,<sup>87</sup> that it is not worth discussion. This is hardly an expression of the acceptance of a principle, but it is a dismissal of its importance and worth. Further, *Sunstein* expresses the view that this principle is “*hopelessly vague*”.<sup>88</sup> It does not specify “how much precaution is the right amount of precaution?”. It is cost-blind; and some precautions are simply not worth-while. *Sunstein* further argues that the real problem is elsewhere; this principle does not offer any guidance – “*not that it is wrong, but it forbids all course of action, including regulation. It bans every step it requires*”.<sup>89</sup>

The criticism of the precautionary principle by *Sunstein* is perhaps slightly excessive but nevertheless he aptly observes its weaknesses, which are mostly its inherent vagueness, the lack of detailed content; and, as he correctly noted, the lack of a general guidance. The application of this principle imposes on States very considerable burdens. It is acknowledged that the application of Best Environmental Practices (BEP) and Best Available Tech-

<sup>86</sup> C. *Sunstein*, Beyond the Precautionary Principle, The University of Chicago Law School Chicago Unbound Public Law and Legal Theory Working Papers, 2003. See also C. *Sunstein*, Law of Fear. Beyond Precautionary Principle, (2003).

<sup>87</sup> C. *Sunstein*, Law of Fear (note 86), 24.

<sup>88</sup> C. *Sunstein*, Law of Fear (note 86), 26.

<sup>89</sup> C. *Sunstein*, Law of Fear (note 86), 26.

nology (BAT) are compulsory measures under the precautionary principle.<sup>90</sup> These requirements burden States even further. For example, the 1987 Second North Sea Declaration<sup>91</sup> and the Parocom Recommendation 89/1,<sup>92</sup> both of which include “*best available technology*”; and “other appropriate measures to be adopted” (content of which is not defined) within the framework of the precautionary principle.

Therefore, it may be said that the precautionary principle, even to a greater extent than the EIA, imposes a heavy and burdensome set of obligations on States outside their jurisdiction while planning or engaging in an activity which potentially impacts on other States’ environment. However, the substantive content of the legal obligations in the framework of the precautionary principle is very poorly defined. There is no uniformly set for the threshold of risk which triggers off the application of this principle; there is no defined content of measures which have to be adopted by a State to comply with obligations deriving from this principle. This principle is also quite confusing from the point of view of its place in the framework of customary international law. International litigation also highlighted the lack of understanding concerning the burden of proof related to the invocation of the precautionary principle. Even the great enthusiasts and supporters of this principle admit that there is an issue with its inherent vagueness and the lack of guidance.<sup>93</sup> It is suggested by some authors that due to the principle’s drawbacks, it is perhaps more useful to give up an attempt to have a well-defined set of rules, in favour of its application to be carried out on the case-by-case basis “*where value judgment based on moral, cultural, economic and political interests need to be weighed up*”.<sup>94</sup> In the view of the present author this is not a viable suggestion. First of all, States need to be certain as to the general legal content of the principle, in order to apply it on case-by-case basis, in particular that its application involves balancing a lot of very different interests and each and every of them carrying a complex substantive content.

The confusion surrounding the precautionary principle in practice is illustrated by its application within the framework of the International Mari-

<sup>90</sup> A. Trouborst, *Precautionary Rights and Duties of States*, 2006, 173.

<sup>91</sup> Paragraph Xvi (1) of the 1987 North Sea Declaration cited in: A. Trouborst (note 90), 173.

<sup>92</sup> Recommendation 89/1 on the Principle of Precautionary Action cited in: A. Trouborst (note 90), 173.

<sup>93</sup> M. Pyhälä/A. C. Brusendorff/H. Paulomä, *The Precautionary Principle*, in: M. Fitzmaurice/D. Ong/P. Merkouris (eds.), *Research Handbook on International Environmental Law*, 2005, 221.

<sup>94</sup> M. Pyhälä/A. C. Brusendorff/H. Paulomä (note 93), 221.



time Organisation (IMO), especially in relation to shipping, in relation to the International Convention of the Pollution from Ships (MARPOL). The MARPOL does not include the precautionary principle in its text. However, the Maritime Environment Protection Committee (MEPC) of the IMO adopted a Resolution on Guidelines on the Incorporation of the Precautionary Principle in the Context of the Specific IMO Activities in 1995.<sup>95</sup> This lengthy document can be summarised as follows:

- “(i) the IMO supports the precautionary approach not principle, and adopted its formulation in line with Principle 15 of the Rio Declaration;
- (ii) the precautionary approach has to be applied in case of uncertainty:  
However,
- (iii) it has to be cost-effective;
- (iv) environmental impact assessment forms an indispensable part of the implementation of the precautionary approach;
- (v) access to dissemination of information should be promoted;
- (vi) national and international research (such as risk analysis) must be conducted;
- (vii) the conservation of the marine environment may be achieved through the adoption of economic incentives;
- (viii) the IMO through various programmes will assist countries where necessary in improving their capabilities of achieving the IMO standards;
- (ix) new practices will be introduced based on best environmental practice and the best available technology.”

This summary indicates that the precautionary principle has a very broad and rather vague legal content. Interestingly, one of the Guidelines mentions the EIA as “*an indispensable part of the implantations of the precautionary approach*”. Such a statement is the best evidence of the misunderstanding surrounding the precautionary principle, as from the points of view of theory and practice of international environmental law the two procedures have a very different role and the legal content.

The discussion within the IMO concerning the application of this principle to shipping activities clearly indicates that States consider it a burdensome encroachment on their sovereignty. The issue of the application of the precautionary approach has proved to be very contentious within the context of shipping. Even the most environmentally aware States such as Norway have indicated that it was opposing the application of this principle. Norway argued that the UNCLOS does not envisage environmental precautionary measures in relation to ships which meet international standards,

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<sup>95</sup> Annex 10, MEPC 37/22, Add. 1.

therefore, in their view, the application of the precautionary principle in addition to international standards of shipping, is simply redundant and troublesome.

New Zealand already expressed its concern about the diversion of single hull tankers to other than European waters as a consequence of the measures adopted by the EU following the *Prestige* catastrophe which were not even precautionary but of preventive character. This State also emphasised that the adoption of the precautionary approach was likely to raise inspection costs. Some States (such as the Russian Federation) very strongly opposed any regional and unilateral measures which impeded commercial navigation. Therefore, it may be presumed that some precautionary measures, even regional, which impact on world navigation are not fully agreed on or even supported by States. China stressed the importance of freedom of navigation and environmental protection, but only as a properly balanced within the structure of international law. Therefore, as evidenced by the above views, States appear to oppose the introduction of stricter and burdensome measures which are represented by the application of the precautionary principle (or even at times preventive principles) in addition to already existing very strict international standards.<sup>96</sup>

## V. The Due Diligence Obligation

The issue, which in the view of the present author is linked to the general unclear character of underlying all international environmental law obligations, is that they are due diligence obligations, which in itself is a very vague standard. No-harm principle is a due diligence obligation, which underlies all obligations relating to protection of the environment.<sup>97</sup>

The due diligence obligation in international environmental law includes the following elements: States must establish and maintain an adequate institutional process to be able to prevent harm; and that process must be employed effectively.<sup>98</sup> However, the application of due diligence does not guarantee that harm would not happen (Art. 3 of Draft Articles on Preven-

<sup>96</sup> A. Bisiaux *et al*, Highlights from the Fourth Meeting of the Consultative Process, Earth Negotiations Bulletin 4, 5.6.2003.

<sup>97</sup> On due diligence see T. Koivurova, Due Diligence, in : MPEPIL, <<http://opil.ouplaw.com>>.

<sup>98</sup> R. Johnstone, Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility, 2015, 44 *et seq.* citing e.g. *Pulp Mills* case (note 12), para. 192, 78; ITLOS Advisory Opinion (note 15), para. 117 and 2001 ILC Draft Articles on Prevention (note 10).

tion of Transboundary Harm). One of the difficulties in setting out States' obligations is that there is no uniform standard of due diligence fitting all circumstances and the paucity of international law practice, judicial or otherwise, makes very complex to define the standard of due diligence.

The standard of due diligence, as it was perceived by the ILC during its work on the 2001 Liability Articles, appears to be very logically and clearly formulated at first blush. The ILC conceived this standard as appropriate and proportionate in relation to the degree of the risk of transboundary harm in a particular instance. It means that ultra-hazardous activities posing a high risk require from States of origin a much higher standard of care both in designing policies and of the vigour in enforcing them. The ILC enumerates the issues which have to be taken into consideration in cases of such activities, such as its location, special climate conditions, materials used in an activity and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors in determining due diligence requirement in each case. However, the ILC noted that such standard is not definitive and may change with time. As the ILC explained what may be considered a reasonable and proportionate procedure at one point of time, may not be considered as such at some later point. Therefore, according to the ILC, the concept of due diligence is fluid and has to keep abreast with technological and scientific developments.<sup>99</sup>

It is quite obvious from the approach adopted by the ILC to the formulation of due diligence that this standard is far from clear and therefore its murky content influences the formation and burdens for States deriving from the fundamental principles of international environmental law. The statement of the ILC regarding the gradation of due diligence standard in case of ultra-hazardous activities is deceptively clear but in practice impossible to apply without an objective assessment of the level of ultra-hazardous activities. The standard of due diligence which is subject to changes and therefore lacking a firm and well-defined content, impacts adversely on all international law obligations, which it underlies. The ILC refers in very loose terms to the development of technology and science as impacting on the changing notion of the standard of due diligence. It does not specify the extent of such a development and how States should consider such a development. Imprecise notions when applied to fundamental obligations of international environmental law, can result in growing burdens on States, imposed without their consent.

The 2011 Advisory Opinion of Deep Seabed Dispute Chamber confirmed the vague character of this standard:

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<sup>99</sup> ILC Report (2001) GAOR A/55/10, 394, para. 11.

“The content of ‘due diligence’ obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that ‘due diligence’ is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity”.<sup>100</sup>

## VI. Legitimacy of Far-Reaching Environmental Regulations

Although international environmental law has developed “*through a consensual rather than an authoritative process*”, the phenomenon of authority plays an ancillary role, and therefore, the issue of legitimacy is very relevant.<sup>101</sup>

“To begin with, there is the continuing authority of norms, once states have consented to them. Why should a state continue to be bound by a norm, once its interests change and it no longer consents? To answer this question, we need some notion that states can bind themselves through promises—that consent is a legitimate basis of obligation, and that obligations persist over time.”<sup>102</sup>

Having analysed obligations deriving from fundamental principles of international environmental law, the EIA and the precautionary principle, it is quite obvious that at times they depart from the consensualist model. The question thus may be posed whether the imposition of certain far-reaching environmental obligations without an explicit consent of the States concerned is legitimate.

As was shown above, in many cases, certain norms of international environmental law are a product of an authoritative law-making such as in the case of the IMO’s application of the precautionary principle despite the lack of consent from its member States. It was imposed by the “authority”, i.e. the IMO, without consent of the States which treated it as burdensome and unwanted addition to already very strict and exacting rules. It may also be said that many provisions relating to the implementation of the EIA in certain Conventions are a product of the decision of the organs of these Conventions, such as in the 1997 Convention on the Transboundary Effects of

<sup>100</sup> ITLOS, Seabed Dispute Chamber Advisory Opinion (note 15), para. 117.

<sup>101</sup> *D. Bodansky* (note 5), 604.

<sup>102</sup> *D. Bodansky* (note 5), 604.

Industrial Accidents, which has an extensive system of notification, in which the Conference of the Parties adopted an Industrial Accident Notification System (IANS) with very specific obligations of States in case of an accident, which are stricter and more extensive than in any other international instrument. Moreover, in many Multilateral Environmental Agreements (MEAs) which did not include a precautionary principle, it was introduced by the decision of the highest body of a MEA, separate from the parties to the MEAs. Such an example is the 1972 London Convention, where the Consultative Meeting of the Parties (governing and political decision-making body of the Convention) adopted a Resolution that

“appropriate measures are taken where there is reason to believe that substances or energy 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.”<sup>103</sup>

A view can also be expressed that such authoritarian practices are at odds with the legitimacy perceived as fairness, a theme which was elaborated in seminal works of Professor *Franck*. The full account of this author's theory exceeds the framework of this article. However, it is worthwhile to remind the main tenets of his theory in order to pose the question whether far-reaching obligations of States outside their jurisdiction fall within legitimacy understood as fairness. It was emphasised by *Franck* that the key factor of legitimacy is fairness, which accommodates a popular belief that a system of rules must be firmly rooted in a framework of formal requirements about how the rules are made, interpreted and applied to be fair.<sup>104</sup> The belief that a rule is legitimate reinforces the perception of its fairness and contributes to compliance. Fairness, he further explains, is the only formula which will command respect and ensure compliance.<sup>105</sup> The attributes of legitimacy are, *inter alia*, determinacy and coherence. The first of these, determinacy, is defined by *Franck* as

“the ability of a text to convey a clear message. To appear transparent in the sense that can see through the language of a law to its essential meaning”.<sup>106</sup>

The perceived legitimacy of a rule also relies on generality (coherence) of principles the rules apply. The belief of illegitimacy is rooted in the rule's lack of generality; i.e. its applicability only in one instance. Such rules are, as

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<sup>103</sup> London Dumping Convention Amendments (1991).

<sup>104</sup> *T. Franck* (note 6), 7 et seq.

<sup>105</sup> *T. Franck* (note 6), 13.

<sup>106</sup> *T. Franck* (note 6), 30.

Franck observes, “unprincipled”; “they do not treat likes alike and they therefore lack coherence”.<sup>107</sup> A rule is coherent

“when its application treats cases alike and when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every ‘similar’ or ‘applicable instance’”.<sup>108</sup>

Therefore, in the view of the present author, these principles fail the test of fairness. There is no general understanding relating to the place and role of these principles in general international law or their legal content, as evidenced by various cases before international courts and tribunals and even the views of certain Judges.

Cases before the ITLOS were inconclusive and the Tribunal in its Orders refrained from referring to the precautionary principle as such but rather relied on “*prudence and caution*” formula. Even such an ardent supporter of the precautionary principle as the Seabed Dispute Chamber of the ITLOS approached it as an incipient principle of international environmental law. The content of these principles is ill-defined, or even not defined at all in international environmental law. The ICJ stated in cases which concerned the EIA that although this is a rule of customary international law, its content is variable and depends on domestic legislation, which fails setting an international standard. The crucial element of the EIA (and of the precautionary principle), the threshold of harm at which these principles are triggered off, is not precisely defined and its formulations in various documents vary to a considerable degree.

The content of the precautionary principle has no consistency and generality. Its formulations vary in different MEAs, its content is uncertain; and its place in general international law disputed. The cases before the WTO clearly evidence complete lack of common understanding as to the normative value of this principle and its content as well as its procedural application, i.e. the question of the reversal of burden of proof. There is no uniform application of this principle, which is also partly due to the operation of the principle of common but differentiated responsibilities, which advocates a varied application of principles of international environmental law in developed and developing countries. Some experts are of the view that the precautionary principle is best applied on a case-by-case basis, which defies the very idea of fairness, based on generality.

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<sup>107</sup> T. Franck (note 6), 38.

<sup>108</sup> T. Franck (note 6), 38.

In light of the observations above, it may be said that the legitimacy, of the EIA and in particular of the precautionary principle is doubtful due to the notable lack of consent of States in their formation and application in certain cases. Loose and imprecise formulations of these principles and the lack of clear message result in the lack of fairness, which seriously undermine their legitimacy.

## VII. Concluding Remarks

The present article's hypothesis is that the implementation of the environmental impact assessment and the precautionary principle beyond States' jurisdiction at times overwhelms and unduly burdens States. The close and detailed analysis of these principles indicate that their operation within the realm of international environmental law is not without doubts as to their legal content and legitimacy. The analysis of the composite elements of the fundamental obligation not to cause harm to the areas beyond States' jurisdiction or control indicates that there is the lack of uniformity and clarity in the formulation. They impose quite significant burdens on States (including both the EIA and in particular the precautionary principle). There is no doubt that the clear and well-defined formulation of EIA will benefit the protection of the environment. In relation to the precautionary principle there is no clear evidence that the benefits of the application of the precautionary principle outweigh the burdens. Recent practice in international environmental law has not dispersed concerns relating to these fundamental principles of international environmental law. The debate regarding their character is still continuing and appears not to lead to any conclusive findings. It may also be said that even the most fundamental principle of prevention and its component elements are woolly and have a very varied legal content. The creation of more MEAs adds only to a burden to be borne by States in the future which in turn raises the question of legitimacy. The present author supports the advancement in the protection of the environment but based on well-defined principles, which have a high level of generality, uniformity and clarity and do not burden States unduly. Different formulations of these principles in MEAs result in a different level of burdens imposed on States.

It has to be observed as well that these principles cannot be perceived as developing (or "new"), as they have been widely incorporated in various MEAs during a very significant period of time. Regrettably, their formulation and application have not resulted in major changes in view of generality

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and uniformity, and the burdens they impose are increasing. The consensual basis for their formulation and application has been replaced by an authoritarian approach by the organs of international institutions imposing such principles on States without their consent, and even in the face of opposition, as indicated by the practice of the IMO.