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## The PP: a Legal Fake?



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# Content

- + Its significance lies in its challenge to traditional legal systems, many of which are permeated by the need for certainty.
- + Praised by some, disparaged by others, the principle is no stranger to controversy.

# Valueless?

- + Principles of environmental law are nothing more than political principles intended to guide legislative and regulatory action.
- + In the absence of a specific legal or regulatory application to provide a supporting dynamic, principles would lack immediate and autonomous applicability.
- + If the lawmaker decided to ignore them, litigants could not invoke them.



valueless

# Questions left unanswered

- + What's a « principle »?
- + « Civil law » or « common law » principle?
- + A « customary rule »?
- + Not binding effect due to its vagueness
- + Constitutionalisation
- + « Obligation » or « faculty » to act in a context of uncertainty?
- + Burden of proof

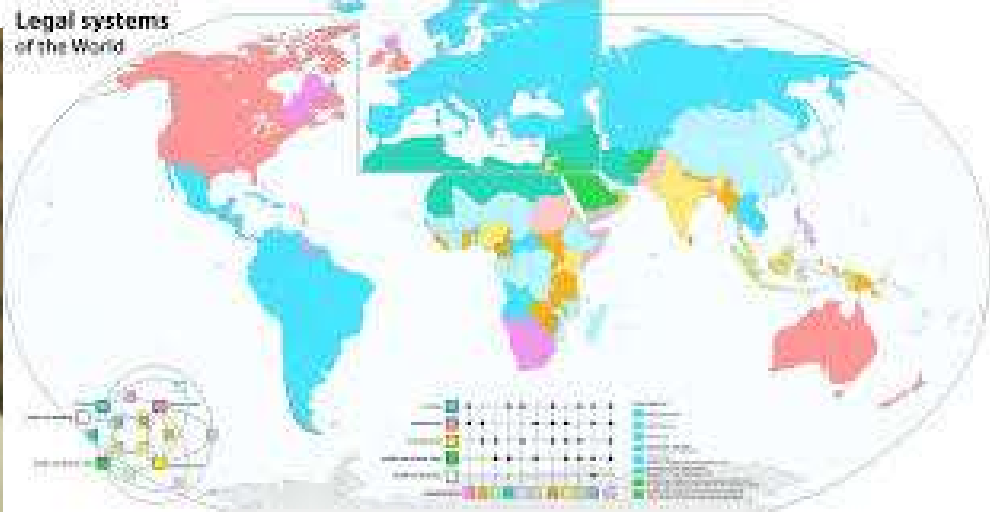
# What's a « principle »?

The concept of principle is **polysemous** and his meaning is likely to vary according to the legal culture.

The concept evokes different meanings depending on the legal system in which it is placed.

- + Indicating the essential characteristics of legal institutions (**descriptive principles**),
- + Designating of the fundamental legal norms (**basic principles**),
- + filling gaps in positive law by assigning a constitutional or legal value to rules which are not yet formally set forth in written sources of law although they are considered essential (**general principles of law**).

# « Civil law » or « common law »?



# « Civil law » or « common law » principle?

- + **COMMON LAW:** principles of equity, principles of statutory interpretation (the principle of legality), and principles of common law (estoppel, good faith or abuse of rights)
- + **CIVIL LAW:** general principles of law were created firstly by the Councils of State, secondly by the Courts of cassation, and thirdly by the Constitutional courts in order to review legislative, regulatory, and administrative measures impinging on the rights of legal subjects.
- + Legal principles have been shaped by courts through an inductive process in both legal families.

# A « principle » or an « approach »?

- + Disputes have arisen as to whether precaution should be labelled as a 'principle' or merely as 'an approach'.
- + This debate reflects different perceptions as to the suitable regulatory response to avoid environmental and health damages amid uncertainties.
- + Proponents of an 'approach' take the view that precaution is not legally binding, whereas a legal principle is clearly stated as such.



# A « customary rule »?

- + repeated use of State practice
- + consistent *opinio juris*

are likely to transform precaution  
into a customary norm

# A « customary rule »?

What's at stake?



Many treaties in force are the outcome of a cumbersome and lengthy negotiation process.

A customary rule may bind States that are not parties to the agreements providing for such a rule.

# A « customary rule »?

- + WTO *Beef Hormones*, the AB found that it was 'unnecessary, and probably imprudent ...to take a position on this important, but abstract, question'.
- + In *Gabcíkovo-Nagyramos* the ICJ managed to avoid a direct ruling on the application of the principle



# A « customary rule »?

- + Nodules and Sulphides Regulations transform the non-binding PP Rio Statement « *into a binding obligation* » ( § 127). Moreover, the PP is « *an integral part of the **general obligation of due diligence** of sponsoring States, which is applicable even outside the scope of the Regulations* » ( § 130).
- + Accordingly, the PP is «*a **contractual obligation***» ( § 133).

ITLOS, Seabed Dispute Chamber, 1 February 2011

# Not binding effect due to its vagueness

- + Not binding on the grounds that the PP is highly indeterminate and consequently does not provide ready answers to disputes in a context of scientific uncertainty.



# Variety of Definitions

## **Conference on Environment and Development:**

'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.'

**OSPAR:** The Contracting Parties shall apply the PP, 'by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances .... introduced into the marine environment may bring about hazards to human health .... even when there is no conclusive evidence of a causal relationship between the inputs and the effects'

# Variety of thresholds

1992 UN Conf.

1992 OSPAR

Threats of serious or irreversible damage

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Lack of full scientific certainty

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Cost-effective measures to prevent environmental degradation.

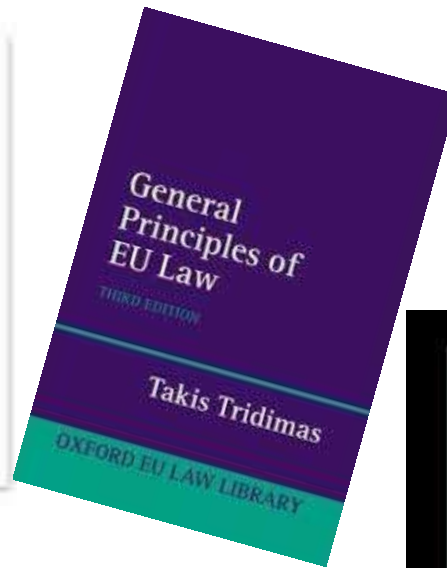
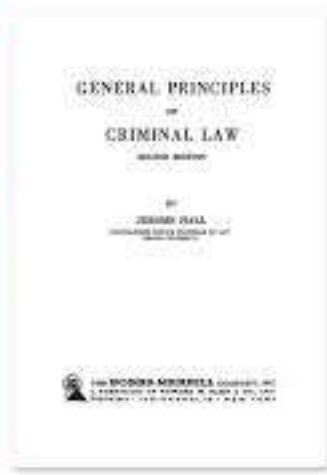
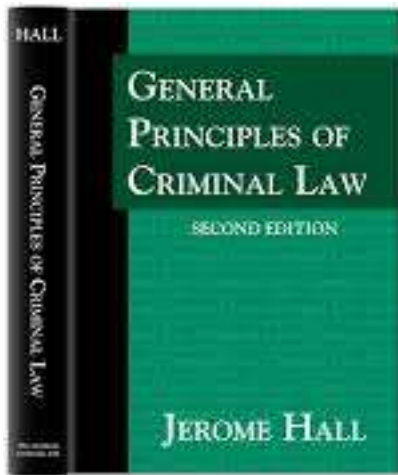
Hazards to human health

- + Harm living resources
  - + Damage amenities
  - + Interfere with legitimate uses of the sea
- 

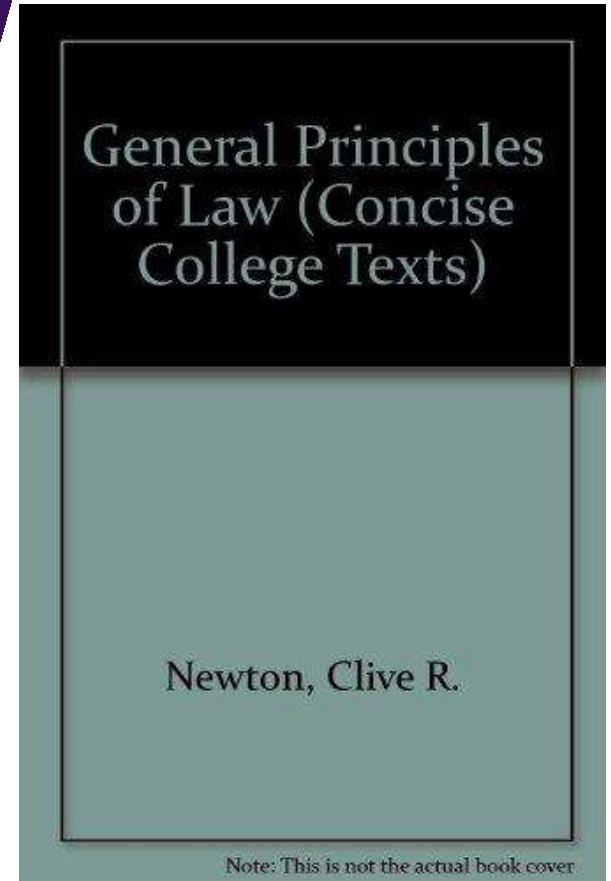
No conclusive evidence of a causal relationship between the inputs and the effects

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Preventive measures



**The PP is not more  
inderterminate  
than other general  
principles of law**





# Constitutionalisation of the PP

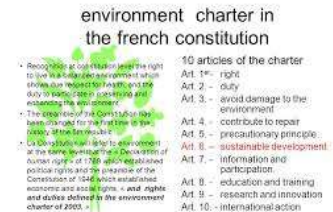
## + French Charter for the Environment

1. Direct effect

2. Scope of ambit (issues): environment and not health

3. Scope of ambit (persons): public authorities (Court of cassation expands precautionary tort obligations to private parties)

4. Cumulative thresholds: (a) significant damages; (b) precautionary and proportionate measures; (c) science-based



## PP as a rule of interpretation

Owing to its constitutional status, the PP may bear determinative influence on the interpretation of rules of a lower tier:

- a) determination of the ambit
- b) Determination of the procedure
- c) Burden of proof

# « Obligation » or « faculty » to act in a context of uncertainty?

- + If consequences of a proposed activity are uncertain, the activities should not be undertaken until further research clarifies the risks.
- + *“Where there is uncertainty as to the existence or extent of risks to human health, the institutions **may** take protective measures without having to wait the reality and seriousness of those risks become fully apparent” (National Farmers’ Union)*
- + The fact that it is not possible to carry out a full scientific RA does not prevent the public authorities *‘from taking preventive measures, at very short notice, where such measures appear essential given the level of risk to human health, which the authority has deemed unacceptable for society’ (Pfizer, para.160)*

# Burden of proof

- + Administrative approach: the proponent of the activity should bear the burden with regard to resolving uncertainty over possible impacts
- + Inequality of knowledge/power (confidential information) between applicants and regulators

# *Waddenzee case law*

- + 'Where doubt remains as to the absence of adverse effect on the integrity of the site', the Directive requires, in line with the PP, the competent authority to refrain from issuing the authorisation.
- + The authorisation can only be passed where the assessment demonstrates the absence of risks for the integrity of the site.



# *Waddenzee* case law

The burden of proving harm in a context of uncertainty is thus shifted from nature agencies to the developers who must demonstrate safety.

*in dubio pro natura!*

*probatio diabolica?*



# The shift of the burden of proof in courts

In *Pulp Mills*, the ICJ considered that 'while a PA 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.'



The Indian Supreme Court held that the 'onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign'.

*Vellore Citizens Welfare Forum v. Union of India and Ors* (1997) AIR 734.

# Companion Principles

PP is merely a device in a battery of principles

+A) other environmental principles

+B) General Principles of International law (non-discrimination, fundamental rights)





conclusions



WASSILY KANDINSKY SQUARES WITH CONCENTRIC RINGS



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