Blind fear, that seeing reason leads, finds safer footing than blind reason stumbling without fear: to fear the worst oft cures the worse.
— William Shakespeare (1564-1616)

5. THIRD LEG OF THE TRIPOD: ACTION

5.1. Action

In the previous two chapters the first and the second leg of the precautionary tripod have been examined. Just as Apollo’s tripod would not have supported the Pythia with only two legs, the precautionary principle would be utterly meaningless without its third ingredient, the element of action. As discussed above, it is incorporated as a core element in virtually every definition of the principle, whether in legal instruments or literature.¹ To illustrate this point it suffices to call to mind that a generally accepted synonym of the precautionary principle is “the principle of precautionary action”.²

Some Observations on the Right and the Duty to Take Precautionary Action

As for the normative quality of the precautionary principle in general international law, it has become clear in the previous two chapters that, where there are reasonable grounds for concern that significant environmental harm may ensue, states are deemed to have a customary right to do something about it. Where, however, the anticipated harm is not only significant but also serious or irreversible, states must be considered to also have an obligation to take action.³ Hence, when the right conditions are met, precautionary action is not merely optional. In the words of the EU Court of Justice, under the precautionary principle “a public authority may be required to take action even before adverse effects have become apparent.”⁴ It is warranted to briefly contemplate this mandatory feature of precautionary action.

First and foremost, it is reflected in the majority of formulations of the precautionary principle that occur in international and national legal and

¹ See supra paragraph 2.3.
³ See, especially, supra paragraphs 3.3 and 4.3.
⁴ Alpharma, Case T-70/99, Judgment of 11 September 2002, paragraph 355; italics added. Also in the ITLOS Land Reclamation case, both Malaysia and Singapore agreed on this point; see the Verbatim Records of the sittings on 25 (p. 20, Schrijver for Malaysia) and 27 September 2003 (p. 32, Reisman for Singapore).
policy instruments and judicial proceedings. Almost invariably these are phrased in a compulsory fashion. When it comes to acting in a precautionary manner use is made of the words ‘shall’, ‘will’, ‘must’, ‘should’ and ‘ought to’, rather than ‘may’ and the like.\(^5\) Second, the scholarly record mirrors this predominance. Representative of the academic majority viewpoint is, for instance, the observation by Matthee and Vermersch that the precautionary principle “allows and even obliges” governments to adopt measures if and when “a reasonable fear for irreparable or serious damage exists.”\(^6\)

Not always is it easy to strike a proper balance between the parallel goals of writing concisely and writing clearly. It is submitted in this respect that for present purposes at least, it is best to err on the side of clarity. At the risk of stating the obvious, therefore, a feature of Principle 15 of the *Rio Declaration* and similarly drafted provisions will be briefly dwelt upon here that might seem self-evident to many, but maybe not all readers. When it is stipulated that scientific uncertainty shall not be used as a reason for ‘postponing’ measures to protect the environment, this prohibition logically comprises the situation where measures are not merely delayed but just not taken at all. The French *Code Rural*, for example, sets out that the absence of certainty “ought not to delay”

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\(^5\) Out of all provisions of legal instruments reviewed in Trouwborst, 2002, only Article 5(7) of the *SPS Agreement* contains permissive instead of obligatory language. See also Matthee & Vermersch, 2000, p. 66.

\(^6\) Matthee & Vermersch, *ibid.*, p. 60; see also at pp. 61 and 66. Other examples are the consensus among the participants to the 2000 Lauterpacht International Law Centre workshop on “The Precautionary Principle in Wildlife Conservation” (see Cooney, 2000), that “an obligation on decision-makers” is a “fundamental element” of the principle; DeFur & Kaszuba, 2002, p. 157, speaking of “the duty to act” as one of three basic elements of precaution; Borgers, 1999, p. 435, describing the duty to take protective measures as the core of the precautionary principle; Ebbesson, 1996, at pp. 119-120, similarly stating that “[t]he core is the understanding that precautionary measures *must* be taken” when there is reason to assume..., etc. (emphasis added); Canelas de Castro, 1999, p. 199, note 155, according to whom the principle “*demands* actions to prevent environmental degradation” (emphasis added); Cameron & Abouchar, 1996, p. 45, asserting that once relevant thresholds are crossed, there is “a positive obligation to terminate the harm” and that under these circumstances “regulatory inaction is unjustified”; Nollkaemper, 1996, p. 75, stating that, given fulfilment of conditions for the triggering of the precautionary principle, “prevention is mandatory”; the similar submission of Lemons *et al.*, 1997, p. 210, that the principle “requires” the adoption of preventive measures; Birnie & Boyle, 2002, p. 117, speaking of a “legal responsibility to act”; Hey, 1992, p. 305, stating that the principle “requires” that policy-makers adopt an approach ensuring that errors are made on the side of excess environmental protection; Marr, 2003, p. 79, speaking of an “obligation” to take the principle into account “as a legal principle”; Martin, 1997, p. 266, lining up various definitions all of which acknowledge the imperative nature of harm prevention; and Sands, 1995(a), p. 212. A permissively phrased version of the principle can be found in Federale Raad voor Duurzame Ontwikkeling, 2001, p. 18, where it is stated that in name of the precautionary principle measures *can* be taken.