The Precautionary Principle: From Paradigm to Rule of Law

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In the context of my doctoral dissertation, which is to be submitted to the Faculty of Law at McGill University, Montreal, Canada, I explore the role and function of the precautionary principle in the development and application of international environmental law. This question is one aspect of the larger dissertation project, which focuses on a series of soft law norms, including the common concern of humankind, common but differentiated obligations, and permanent sovereignty over natural resources. In the dissertation, I seek to trace the normative influence of these principles on the development of environmental law in the contexts of Antarctic environmental protection, protection of the ozone layer, the control of trade in endangered species, and high seas fisheries conservation.

The recent elevation of the precautionary principle to the level of a binding obligation in a series of international environmental conventions1 has been widely heralded as a major achievement. However, it raises questions concerning the effectiveness that the principle, as a binding rule of international law, is likely to have. In pursuing this inquiry, the principle may be considered in three different guises: as an influential paradigm; as an aspirational norm; and finally as a rule of law.

On one level, the precautionary principle signifies a new approach to environmental decision-making. It represents a recognition that the environmental effects

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of human actions are wide-ranging and unpredictable, and that environmental protection considerations must be incorporated, along with other goals, into decision-making processes. The notion of precaution has potentially far-reaching effects in that it calls for a rethinking of the division of labour between science and policy. It has long been understood that science cannot establish acceptable levels of risk of environmental impacts or determine the priority to be granted to environmental protection as compared with other objectives. These are political and normative questions. By requiring decision-makers to act in the absence of conclusive scientific evidence of the necessity of action, the principle essentially exhorts them to undertake the difficult but necessary task of assessing competing interests and objectives and seeking to find among them a common interest or acceptable compromise, based on scientific data but also on the interests and values of those who will be affected by the final decision. The influence of this approach as a paradigm may be observed in light of the evolution of international environmental law and policy over the course of the last three decades. This influence does not depend on the principle's normative or legal validity, but rather on a range of factors, including but certainly not limited to its persuasiveness and soundness.

Second, the precautionary principle may be contemplated as a norm that identifies a set of goals or aspirations and calls on actors to strive for their attainment, particularly through the progressive development of international law. Its capacity to guide legal development depends in large measure on its normative power, an elusive quality that arises from the principle's persuasiveness, its acceptance by a large number of actors in a wide range of forums, and its perceived validity as a guiding principle. The principle serves as a reference point against which the legitimacy of actions, decisions or rules may be evaluated. The effect of this normative power may be traced by examining the manner in which the precautionary principle is deployed in discourse about legal rules, and by considering the compatibility of resulting rules or instances of their interpretation with the principle.

It is generally assumed that the power of the precautionary principle will be enhanced through its articulation as a legally binding rule. This is likely to be the case, but not because it will henceforth be possible to identify and sanction its violation. By expressing the principle in the imperative rather than the conditional, its status is enhanced but its function remains essentially unchanged: the principle continues to serve as a reference point to evaluate the appropriateness or legitimacy of rules, decisions and behaviour within a treaty regime, but it becomes much more difficult for parties to avoid its invocation when they are seeking to justify their actions (or inaction). By taking steps to specify the principle's meaning and application in the context of a given treaty regime, the parties do not capture the