Секция «Юриспруденция»

The precautionary principle

Усынин Максим Максимович
Студент
Санкт-Петербургский государственный университет, Юридический факультет, Санкт-Петербург, Россия
E-mail: maxim.usynin@gmail.com

The precautionary principle (PP) as an international instrument began to appear in the middle 1980s, having roots in the domestic legislation in West Germany.

Since then, the PP got wide recognition in regional and international environmental treaties and declarations, including the 1985 Vienna Convention, 1992 Rio Declaration, the 1992 Biodiversity Convention and the 2000 Biosafety protocol. The scope of the principle was extended to the protection of environment, human life and property, however, there are first sights of the economical reasons for justification under the PP (1984 Ministerial Declaration of the International Conference on the Protection of the North Sea).

The core of the principle is supposed to be reflected in the Principle 15 of the Rio Declaration. However, two forms of the PP are nowadays recognized: the strong (prohibiting action) and the weak (allowing precluded action) precaution.

The first major concern of justification of the preventive measures within the PP, that appeared before the International Court of Justice, was the Gabsikovo-Nagymaros case (Hungary v. Slovakia), that established the 2 tier-test for the preventive measures to be justified on the grounds of precaution.

In the space law the PP relatively coincides with the non-contamination principle, which is especially emphasized in the COSPAR requirements for the Category V missions.

Debates have risen around the status of precautionary principle within the WTO legal system under the WTO SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures). Two cases have fundamental status in regard to the implementation of precautionary principle within the WTO legal system: EC – Hormones and EC – Biotech.

In the EC – Hormones case the Appellate Body established that the precautionary principle was not included in the SPS agreement to justify the measures that are otherwise inconsistent with the Agreement; the PP was three times included into the text of the Agreement but is not exhausted by them, and finally, the implementation of the PP into the SPS agreement does not relieve a Panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement (implying the link to the PP as a customary principle of law and existing treaties).

The precautionary approach defined in the Art. 5.7 SPS Agreement is significantly different from the core principle of the Rio Declaration, since the Agreement additionally considers the temporary character of measures and the sufficient scientific evidence of risk.

In the EC – Biotech case, the Panel escaped from the need to define the status of the PP within the customary principles through the unusual interpretation of the Vienna Convention on the Law of Treaties and the relevance of the Convention on the Biodiversity and Protocol on Biosafety to the case, leaving two problems unsolved: whether the genetically modified

products pose any significant risk and whether the PP has got the status of customary principle of law.

The precautionary principle got statutory enforcement in national legal systems of the European Community (and the Member states), USA, Japan.

The present discussion exists around the current status of the PP, the precise formula of the principle, the proper risk assessment, the party who bears the burden of proof and the linkage between the PP and the principle of sustainable development.

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