

# *Study on the Precautionary Principle in Environmental Justice from the Perspective of Kunming Declaration*

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**Abstract:** A sound ecological environment is an important foundation for the sustainable and healthy development of mankind. The international community attaches more and more importance to the protection of the environment and biodiversity, and the process of the rule of law in global ecological protection is accelerating. The situation of protecting the ecological environment according to law has taken shape, while the destruction of the natural environment still exists. In many international environmental justice cases, the application of the precautionary principle and preventive justice measures is relatively few and insufficient. From the perspective of the Kunming Declaration, this paper clarifies the concept and theoretical basis of the Kunming Declaration and the precautionary principle, identifies the practical cases of the precautionary principle in international environmental law and analyzes its application status, summarizes the existing problems with the burden of proof, the inconsistency of relevant provisions and other problems, and makes clear and explicit provisions on the reasonable establishment of the burden of proof. It is conducive to improving the international environmental legal framework, enriching relevant legal theories, and proposing solutions that are more in line with the concept of environmental protection and sustainable development in order to strengthen the response to the global environmental judicial crisis, which is of great significance to promoting the development of international environmental rule of law and building a community of human and natural life.

## 1. Introduction

In recent years, climate change, biodiversity loss, desertification and frequent extreme weather events have posed serious challenges to the survival and development of mankind. In the face of these challenges, China has firmly practiced multilateralism and worked hard to build a global environmental governance system that is fair, reasonable and win-win through cooperation. In October 2021, China successfully hosted the first phase of the 15th Conference of the Parties (COP15) to the Convention on Biological Diversity, which issued the Kunming Declaration of the World Conference on Environmental Justice and proposed the establishment of the Kunming Biodiversity Fund, opening a new chapter in global biodiversity governance, putting forward the active adherence to the precautionary principle and the application of preventive justice measures to address global environmental challenges. Through the Kunming Declaration, countries solemnly

pledged to continue to steadily advance the process of mainstreaming biodiversity, incorporate the multiple values of biodiversity into policies and regulations, actively improve the global environmental legal framework, and strengthen the implementation of international environmental law.<sup>[1]</sup>

## **2. An overview of the Kunming Declaration and the theoretical basis of the Precautionary Principle**

### **2.1. Basic overview of the Kunming Declaration**

#### **2.1.1. Latest development of the Kunming Declaration**

In October 2021, the first phase of the 15th Conference of the Parties to the United Nations Convention on Biological Diversity (COP15) was held in Yunnan, China. With the active promotion and advocacy of China, the Parties adopted the Kunming Declaration of the World Congress on Environmental Justice, in which they jointly committed to improving the global environmental legal framework and promoting the mainstreaming of biodiversity protection.

The Kunming Declaration indicates that the rule of law plays an irreplaceable and important role in global environmental governance. All countries in the world should adopt an open, transparent, fair, efficient, affordable and accessible judicial process to determine fair adjudicatory rules, safeguard the environmental interests of the public, continuously optimize environmental public policies, improve the global environmental governance system, and maintain the harmony between man and nature. Therefore, it is necessary to uphold the concept of ecological civilization, continue to deepen international cooperation and exchanges in the field of environmental justice, and join hands to deal with global environmental crises, especially climate change, biodiversity loss and sustainable development, so as to build a common future of harmonious development between man and nature. The Kunming Declaration declared that judicial responses to global environmental crises should be strengthened, the principles of equity, common but differentiated responsibilities and respective capabilities, the principles of conservation and sustainable development and the use of natural resources, the principles of responsibility for damage, the impact of climate change, the protection of biodiversity, and the prevention and control of global environmental pollution should be upheld. To promote the professional development of international environmental justice, improve the professional ability of international environmental justice, increase the application of technology in the handling of international environmental judicial cases, and deepen international cooperation and exchanges,<sup>[2]</sup>we should adopt diversified judicial measures, actively adopt preventive judicial measures, rationally apply restorative judicial measures, and encourage the use of diversified judicial measures to resolve disputes.

#### **2.1.2. Judicial measures in the Kunming Declaration**

In protecting international and national environmental rights and interests, resolving environmental disputes, advocating the application of diversified judicial measures, and summarizing and refining judicial practice experience, the Kunming Declaration put forward four major judicial measures.<sup>[3]</sup> Article 4 of the Kunming Declaration states that we should actively participate in preventive judicial measures. Implement the precautionary principle, and use diversified judicial measures such as injunction and pre-lawsuit preservation to prevent the occurrence and expansion of ecological environmental damage. For example, the preventive environmental public interest litigation case on the protection of endangered wild animals "green peacocks" in Yunnan Province heard by Chinese courts has provided useful experience for

international environmental judicial practice. The other three judicial measures are to prioritize the application of restorative justice measures, explore and improve the public interest litigation system, and encourage the use of diversified dispute resolution methods. Among them, the article mainly focuses on the implementation of the precautionary principle in Article 4 of the Kunming Declaration and the active adoption of preventive judicial measures, mainly explores the problems in international environmental judicial cases, and makes corresponding improvements and puts forward corresponding suggestions.

## **2.2. Overview of the precautionary principle and preventive justice measures**

### **2.2.1. Definition of the precautionary principle**

The precautionary principle is generally regarded as an extension of the principle of national environmental resource sovereignty and non-harm to the foreign environment, which means that a government has the responsibility to protect its own activities or behaviors from harming the foreign environment by taking preventive measures.<sup>[4]</sup> In the context of practical experience and the application of scientific knowledge and understanding, damage prevention must be the "golden principle" for the environment, which is ecologically and economically significant. To put it simply, the precautionary principle consists of three points: first, the severity of the environmental harm caused by the risk; Second, the uncertainty of the risk of environmental damage; Third, whether it conforms to national conditions and interests of all countries. When the environmental harm has reached a certain degree and there is a potential for environmental damage, the precautionary principle can be applied to deal with international environmental justice cases in accordance with the national conditions and the capacity of national governance.<sup>[5]</sup>

### **2.2.2. Preventive justice measures**

A restraining order. Injunction, also known as injunctio, is a relief measure in equity law in the Anglo-American law system, derived from the writ system in English law. Injunction refers to "an order made by the court in response to the request of the party or the use of power to prohibit the party from performing an act that may cause damage or compel the party to perform an act".<sup>[6]</sup> Temporary measure. Provisional Measures are an incidental procedure in the proceedings of the International Court of Justice. The earliest concept appears in article 41 of the Statute of the Permanent Court of International Justice, and the current Statute of the International Court of Justice also uses interim measures, which means that "the court shall have the power to take any interim measures for the protection of the respective rights of either party if the circumstances deem it necessary." In general, the interim measure is to protect the rights of the parties before the final decision is made, not limited to the applicant State, and to avoid the infringement of rights due to unavoidable or imminent risks before the substantive decision is made.<sup>[7]</sup> However, the definition of interim measures is not clearly elaborated, but is more defined as "the necessary measures taken to prevent the further deterioration of disputes between the two parties and the irreparable loss of the rights of the two parties involved in the process of adjudication, and to ensure that substantive results can be obtained in the end."<sup>[8]</sup>

The application of injunction and interim measures shows the practical significance of preventive justice measures, which have constituted a preventive justice guarantee and played a certain role in protecting the security of the international environment.

### **3. International environmental legal regulation of the precautionary principle**

#### **3.1. Rio Declaration**

The precautionary principle, defined in Principle XIV of the Rio Declaration of 1992, has become the most commonly used definition. "States shall cooperate effectively to prevent or impede any activity that causes serious degradation of the environment or is determined to be harmful to human health, and to prevent the movement or transfer of substances to other States," Principle 15 states, "A lack of sufficient scientific certainty shall not be used as a reason for delaying the adoption of relevant and cost-effective measures to prevent environmental degradation."<sup>[9]</sup> In addition, Principle 17 stipulates environmental impact assessment, and Principle 19 stipulates that the precautionary spirit is reflected in the advance and timely exchange of information on environmental hazard activities, which is the first declaration to stipulate and embody the precautionary principle.

#### **3.2. Convention on Biological Diversity**

In its preamble, the Convention on Biological Diversity clearly states that "it is essential to prevent, anticipate and address the root causes of serious reduction or loss of biological diversity." Articles 7 and 14 of the Convention also provide for elements directly related to the precautionary principle, such as "identification and testing", "environmental assessment and minimization of adverse effects". Principle 3 of the Framework Convention on Climate Change states: "Each Party shall take preventive measures to anticipate, prevent or, as far as possible, reduce the causes of climate change and to minimize its adverse effects."

#### **3.3. United Nations Convention on the Law of the Sea**

Part XII of the United Nations Convention on the Law of the Sea contains general principles for environmental protection. Article 194 provides that "States, individually or together, where appropriate, shall take such measures as may be necessary in conformity with this Convention to prevent, reduce and control any source which may pollute the Marine environment", although the words "precautionary principle" are not explicitly specified. However, in conjunction with Articles 192 and 206 of the United Nations Convention on the Law of the Sea, which provide for the assessment of the possible effects of damage to the Marine environment, the spirit of the precautionary principle is implicit in these provisions.<sup>[10]</sup> The United Nations Convention on the Law of the Sea, adopted on June 19, 2023. The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (BBNJ Agreement) reaffirms the obligation of States Parties to take all measures to fulfil their obligation to ensure that pollution resulting from hazardous events or activities does not spread beyond areas in which they exercise authority under the Convention. Article 5 clearly states that the Contracting parties shall, in appropriate circumstances, follow the precautionary principle or the general principle of preventive methods.<sup>[11]</sup> This also confirms that the emphasis on damage to the Marine environment in the Convention has been strengthened, and the concept of governance has changed from focusing on rehabilitation after the event to prevention before the event.

#### **3.4. Other relevant legal documents**

Article 9 of the Nairobi Declaration states: "It is better to prevent environmental damage than to expend much money and effort to repair it." Preventive action should include favourable planning

of all activities that may affect the environment." The third paragraph of the Marmol Declaration also refers to "compliance with the precautionary measures of the Rio Declaration and other important work building." Article 10, paragraph 6 of the Qatar Protocol on BioSafety also provides that "the lack of scientific certainty due to insufficient relevant scientific information and knowledge shall not prevent the Party from taking relevant decisions on the import of living organisms, as appropriate, in order to avoid or minimize such potential adverse effects".<sup>[12]</sup>

## **4. Judicial practice status and analysis of the application of the precautionary principle**

### **4.1. World Trade Organization**

The first WTO case involving the precautionary Principle was the Hormonal Beef case between the United States and the European Union.<sup>[13]</sup> The ruling addressed the application of the precautionary principle in international trade. The World Trade Organization initially ruled in favor of the United States, and the European Union appealed, arguing that the precautionary principle should be banned because of scientific uncertainty about the hormones' safety. The use of the precautionary principle may lead to the reversal of the burden of proof and the lowering of the standard of proof. The United States claimed that the precautionary principle had not become customary international law at this time, and the appellate Body held that there was no concrete basis for using the precautionary principle to evaluate the risk of preventing damage, pointing out that the EU had not submitted sufficient evidence to prove the existence of the liability for damage, and rejected the EU's request. The "hormone beef case" has had a significant impact, and the World Trade Organization has referred to the ruling in this case for issues involving the precautionary principle.

For example, in the Apple case brought by the United States against Japan,<sup>[14]</sup> The United States considers some of Japan's measures to restrict apple imports to be severe, and Japan points out that under the precautionary principle, more stringent measures should be taken to control import and export risks. In its ruling, the Appellate Body cited the ruling in the "Hormone beef case" as saying that the precautionary principle has not developed into customary law in the field of international law, and the use of the precautionary principle to assess damage may be customary international law. In short, although the World Trade Organization has not recognized the precautionary principle, it has recognized the role and status of damage prevention, which has laid a good foundation for the development and application of the precautionary principle in the future.

### **4.2. International Tribunal for the Law of the Sea**

The International Tribunal for the Sea regards the precautionary principle as international customary law, and the application of the precautionary principle is equivalent to lowering the standard of proof and shifting the burden of proof accordingly.<sup>[15]</sup> In the 1999 Southern Bluefin Tuna Cases,<sup>[16]</sup> The precautionary principle was applied. The main cause of the case is to protect the southern tuna, Japan, New Zealand and Australia signed the Southern Tuna Conservation Convention, which sets the maximum allowable catch of the contracting parties. New Zealand and Australia filed an arbitration case against Japan at the International Tribunal for the Law of the Sea (ITLOS), asking the judges to take interim measures and issue an injunction against Japan's unilateral increase in the catch. The decision in the case noted that "due to scientific uncertainty in the protection of tuna stocks, the measures applied may pose a risk of serious harm to the southern tuna population." The Tribunal found that an interim measure was necessary and found in favour of New Zealand and Australia on the basis of scientific uncertainty. The ruling does not directly apply the precautionary principle, in which "scientific uncertainty" is a core element of preventive justice

measures. The International Tribunal for the Law of the Sea further called on all parties to exercise caution in uncertain circumstances to ensure that effective conservation measures are in place to minimize damage to southern tuna species. In his ruling, Judge Laing also stressed that the decision in this case was based on the precautionary principle.

In the Mixed Oxide Fuel Plant Case<sup>[17]</sup>. The International Tribunal for the Law of the Sea has made recommendations on the application of the precautionary principle. The case was made in 2001 when Britain allowed a mixed-oxide fuel plant to be built in Sheffield, near the Irish Sea, whose main task was to produce energy from processing nuclear fuel. Ireland is concerned that the plant's processing could pollute the Irish Sea and has asked the court to take interim measures to block Britain's permission to operate the plant. Ireland later argued that the burden of proof should fall on the UK under the precautionary principle, and the court eventually ruled that Ireland had insufficient evidence to reject the claim, but ruled that the basis for better environmental protection under the Southern Tuna case could be scientifically inconclusive. Judge Wolfrum emphasized that to apply the precautionary principle, the burden of proof should be on the polluter.

In the "International Seabed Development Advisory Case."<sup>[18]</sup>It was made clear that the precautionary principle applied and that the sponsoring State was also obliged to carry out environmental impact assessments on the guarantors and to continuously assess and monitor the impact of deep-sea activities on the Marine environment.<sup>[19]</sup>This shows that the precautionary principle has been better applied in relation to damage to the Marine environment and has also contributed to the development of preventive justice measures.

#### **4.3. International Court of Justice**

The International Court of Justice has always been very cautious about the precautionary principle, in the Pulp Mill case on the Uruguay River.<sup>[20]</sup>It is the first time that the International Court of Justice has explicitly pointed out the precautionary principle in the body of the judgment, and also indicates the general international obligations established by customary international law. In this case, Argentina sued Uruguay, on the grounds that the wastewater and exhaust gas discharged by the pulp mill authorized by Uruguay seriously polluted the Uruguay River, in violation of the treaty signed by the two countries to protect the Uruguayan river. Argentina argued that, in accordance with the precautionary principle, Uruguay had the burden of proof that the effluent from the pulp mill would not pollute the Uruguay River and would not cause serious harm. The International Court of Justice rejected Argentina's application and made a relevant interpretation of the precautionary principle. The Court held that the application of the precautionary principle and preventive judicial measures could not produce the effect of reversing the burden of proof. Since Argentina could not prove the material damage caused by the pulp mill to its environment in the case, the Court ruled that Uruguay had violated its procedural obligations. The establishment of a pulp mill is not a breach of substantive obligations. In this case, two important issues concerning the application of the precautionary principle are clearly explained. First, the precautionary principle does not reverse the burden of proof. Secondly, with regard to the standard of burden of proof, the Court held that the application of the precautionary principle did not reduce the standard of proof. The International Court of Justice required Argentina to provide clear and conclusive evidence of the serious pollution of the environment caused by the discharge of the pulp mill in the morning, and required Argentina to provide clear evidence of Uruguay's violation of the treaty signed by the two countries. The Court has repeatedly stressed that the risk of environmental damage does not lower the standard of proof and must be proved by corresponding evidence. It can be seen that the application of the precautionary principle will not lead to the reversal of the burden of proof, nor will it reduce the standard of proof, but will also reduce the risk

of environmental damage.

#### 4.4. Other regions

On May 26, 2021, in the case of Friends of the Earth Netherlands v. Royal Dutch Shell, the first trial judgment implied and applied the precautionary principle in the corporate environmental litigation, ruling that Royal Dutch Shell should adjust its energy conservation and emission reduction plan according to the relevant targets of the Paris Agreement and achieve effective control of waste discharge within the prescribed time limit. It will help improve the effectiveness of climate governance for diverse environments and provide corresponding assistance to countries in need.<sup>[21]</sup>

On December 31, 2020, the "Yunnan Green Peacock case" was the first rare wild animal and plant protection case decided by preventive environmental judicial measures in China.<sup>[22]</sup> This case is praised as the people's court in the trial of environmental civil public interest litigation implemented the principle of "protection first, prevention first" and created a typical innovative case of the use of the precautionary principle, reflecting the people's court's efforts to stop, eliminate or control the ecological environment damage at the source within a reasonable range, and jointly promote high-quality economic and social development and better protect the ecological environment. Adhering to the priority of protecting the ecological environment and actively applying preventive judicial measures, the concept of preventive litigation has been deeply rooted in the hearts of the people, reflecting the environmental judicial concept of the new era of "harmonious coexistence between man and nature".

To sum up, in the above cases, New Zealand, Argentina, Australia and other countries have explicitly recognized and applied the precautionary principle to solve relevant international environmental judicial cases. France, Uruguay, Japan and other countries, as opponents of the case, have not opposed the application of the precautionary principle in international environmental judicial cases, and actively provide relevant evidence to prove that their country has complied with the application of the precautionary principle. There are more and more environmental judicial cases that apply the precautionary principle and preventive judicial measures both in the international community and in various countries, among which the following problems also exist: the relevant provisions of the precautionary principle and preventive judicial measures in various countries are not uniform, and there are some drawbacks and deficiencies in the distribution of the burden of proof.

#### 5. Suggestions on the application of the precautionary principle from the perspective of the Kunming Declaration

First, cases of international environmental law or domestic law concerning biodiversity conservation should actively apply the precautionary principle and preventive justice measures proposed in the Kunming Declaration. Since the provisions on the precautionary principle and preventive judicial measures are not uniform in each country, the International Court of Justice and the court with jurisdiction can make favorable judgments in favor of the ecological environment and form relevant judicial interpretations applicable to each country.

Secondly, the precautionary principle does not affect the distribution of the burden of proof, because the precautionary principle can be understood as an obligation rather than a principle, and the breach of the obligation is a factual act, which requires "who claims, who proves", and therefore does not create the problem of reversing the burden of proof and does not lower the standard. The assumption that the precautionary principle is merely a principle, and that the same entities must be granted rights, may affect the standard of the burden of proof and the distribution of the burden.

Third, the precautionary principle does not imply a lowering of the standard of proof. The

International Court of Justice does not have clear provisions on the standard of proof. According to the judicial practice cases of the International Court of Justice, a higher burden of proof is required beyond reasonable doubt in cases of serious nature involving State responsibility. International environmental cases often involve the corresponding State responsibility, and the International Court of Justice requires the parties to provide "convincing" preparatory evidence, so the precautionary principle will not affect the distribution of the burden of proof and the standard of proof.

## 6. Conclusion

The application of the precautionary principle and preventive judicial measures in international environmental justice has become the trend of dealing with environmental justice in the new era, and also reflects the concept of sustainable development. Curbing environmental damage from the source and minimizing the damage to the international environment can reduce disputes and better realize fairness and justice. Based on judicial functions, continuously expanding the breadth and depth of judicial cooperation, and extensively building international consensus on environmental judicial protection are of great significance to promoting the development of international environmental rule of law and promoting the construction of a community of human and natural life.

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