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After the publication of his well-appreciated book, Evolution and Status of the Precautionary Principle in International Law, Arie Trouwborst delivers here a thought-provoking new book, Precautionary Rights and Duties of States. The title in itself is provoking and exciting, given the fact that it constitutes an unprecedented assertion of the existence de lege lata of precautionary ‘rights and duties of States’ with regard to the protection of the global environment and health in the realm of public international law doctrine. In contrast to many books and articles published in recent years on the precautionary principle, this book is not about the status of this rather complex principle in the international legal order. In the same vein as Trouwborst’s first book, it recognizes that the precautionary principle is part of international customary law and then deals specifically with the definition and the criteria for the implementation of the precautionary principle.

Support for the precautionary principle as a fully fledged norm of customary law comes from the fact that the criteria for the formation of customary international law have been amply fulfilled. Thus, Trouwborst considers that State practice that is ostensibly inconsistent with the precautionary principle should be viewed in the context of either ‘persistent objection’ or ‘non-compliance’ (at 9). The book starts from the premise that post-modern societies are faced with a multitude of more or less grave and more or less likely threats to nature and the environment, the assessment of which is hampered more often than
not by the labyrinthine complexity of ecosystems. In this context, Trouwborst rightfully affirms that the ‘Ariadne’s thread provided by international law to guide states through this maze of uncertain environmental hazards is the precautionary principle’ (at 4). The main question raised by the book is ‘what are the rights and duties of States pursuant to the precautionary principle under general international law?’.

Concluding that the precautionary principle embodies a norm of customary international law is one thing; determining what it means customary international law to guide states wherever there are reasonable grounds for concern (based on the best information available) that significant harm to the environment may occur, including in situations of scientific uncertainty regarding the cause, extent and/or probability of the potential harm. This novel and thoughtful approach by Trouwborst clearly shows that the precautionary principle applies to all types of environmental harm wherever located, but not to all levels of harm, and that likewise the principle applies to all types of uncertainty, but not to all levels of uncertainty.

Here one may regret that Trouwborst did not consider that risk is an autonomous element of the definition of precaution in international law. Indeed, focusing on the criterion of ‘threat to environmental harm’ tends to confuse or conflate the risk criterion and the damage (or harm) criterion, which, although inextricably linked in some situations, may be distinct in other situations. Risk as such is not mutatis mutandis ‘the combined effect of the probability of occurrence of an undesirable event and its magnitude’, as suggested by Trouwborst. Risk may only refer to the probability of an event without necessarily dealing with its gravity, particularly in a context of scientific uncertainty where the seriousness and the gravity of environmental effects are not always known. The complexity of dialectics between the risk criterion and the damage criterion does not appear sufficiently clearly in the definition of precaution presented by Trouwborst in the in-depth analysis portion of his book.

That being said, Arie Trouwborst – in a rather original perspective – brings new light to the debate regarding the legal implications of the precautionary principle by conceptualizing the content and the legal meaning of the ‘right of States to precautionary action’ and the ‘duty of States to take precautionary action’. What we may call the ‘right ratio’ and the ‘duty ratio’ appear whenever there are reasonable grounds for concern (based on the best information available) that significant harm to the environment may occur, including in situations of scientific uncertainty regarding the cause, extent and/or probability of the potential harm. This novel and thoughtful approach by Trouwborst clearly shows that the precautionary principle applies to all types of environmental harm wherever located, but not to all levels of harm, and that likewise the principle applies to all types of uncertainty, but not to all levels of uncertainty.

The exploration of the scope of the precautionary principle does not stop with the definition of the element of precaution in the international legal order. Precautionary Rights and Duties of States is also revolutionary in the sense that it presents a new approach to the issue of implementation of the precautionary principle. Some interesting interpretations are offered on certain typical precautionary measures such as precautionary bans, safety margins, precautionary measures in the context of pollution, research, environmental impact assessment, clean production methods and others. Trouwborst concludes that the list of international and national measures that may serve to implement the precautionary principle is nearly interminable. However, he limits that assertion by emphasizing the fact that some criteria do limit states’ leeway in implementing the principle. In other words, when certain thresholds of gravity and likelihood of occurrence of damage are crossed, States are obligated, or entitled, as the case may be, to take precautionary action that is effective and proportional and comports with the given circumstances.

Another interesting and crucial feature is the issue of the burden of proof in the context of scientific uncertainty. By opposing the traditional model (actori incumbit probatio) to the precautionary model and basing his reasoning on State practice, case-law and doctrine, Trouwborst highlights the reasons for a precautionary allocation of the burden of proof. From the in-depth analysis of such a precautionary burden of proof, it appears that the precautionary principle lowers the standard of proof but does not, after all, reverse the burden of proof. It is thus for States invoking their right to take precautionary action, and for States challenging the lack of precautionary action on the part of other States, respectively, to demonstrate the presence of reasonable grounds for concern that significant and/or irreversible harm may be caused.

Finally, Trouwborst’s rather progressive and provoking reflection on the implementation of the precautionary principle touches what is often considered to be a no-man’s land in the legal scholarship related to the precautionary principle: the issue of socio-economic interests. Although the main purpose of precaution under general international law is to protect the environment, socio-economic factors and considerations of cost-effectiveness are part of the ratio legis for the precautionary principle, the latter being at the heart of the overarching principle or concept of sustainable development. Therefore, with the precautionary principle there is room for States to balance environmental, social and economic interests. Trouwborst’s analysis stresses what we may call this ‘opened legal texture’ of precaution and develops new paths for international legal theory. Indeed, most of the literature

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on the precautionary principle that has been written over the past few years has focused on its status in international law.

*Precautionary Rights and Duties of States* goes beyond the traditional writings on this complex principle and brings new foresight on its legal implications. The book is a must for every international lawyer involved at the academic level and in practice. Arie Trouwborst’s contribution to the legal understanding of this post-modern principle will remain a classic in public international law doctrine as it shows the *what, where, when* and *how* of precautionary action in the international legal order.

*Makane Moise Mbengue*
Ph.D. Research Scholar
New York University School of Law
Global Hauser Law Program