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# Sustaining Resources for the Future



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## **Submission Format**

Oral

## **Decision**

Oral Abstract

## **Initial Submission**

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203

# **An analytical framework to review judicial decisions based on the precautionary principle with a case-study application**

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## **Abstract**

The precautionary principle (PP) has been applied in environmental policy and law internationally in the assessment and management of uncertain risks (in areas of activity such as co-incineration of waste, mobile phone antennas, GMO crops, chemicals). Different legal roles in different jurisdictions have depended on legal cultures and also on political, economic and environmental contexts. At the level of individual jurisdictions the application of the principle has shown some ambiguity in the interpretation of the concept of precaution, insufficient knowledge of the potential impacts and lack of mechanisms and operational frameworks to support decisions. This has hindered the functioning of administrative justice and generated discretion and unpredictability in the decision process. This study intends to develop a systematic analysis of legal proceedings in a national jurisdiction in order to clarify how the PP has been interpreted and applied by the courts in the analysis of conflicts associated with serious risks to the environment and to public health. It is also intended to contribute to the debate on when and how to apply precautionary measures, thus seeking also to participate in the search for solutions to a more balanced resource utilization and management and a more sustainable society. In order to evaluate the degree of consistency of the courts' decisions in relation to comparable risks and their proportionality in relation to the seriousness of hazards, a theoretical framework was developed based on three attributes considered key elements of

the implementation of PP: level of seriousness of hazards, level of evidence required, level of severity of precautionary measures.

A case-study application of this framework was developed for Portuguese courts. The judicial cases where the PP was invoked between 2007 and 2014 were considered, in the areas of waste incineration, high voltage power lines, dam and wind farm construction. The judicial outcomes in the different judicial bodies and the role of the PP were analyzed. Different positions among the courts were observed, with contradictory arguments in the same judicial case or in similar cases: they use different sources of evidence, give priority to different interests and require different levels of evidence to apply precaution. The results obtained allow also to conclude that the decision to apply the PP or not appears unclear, with ambiguities in determining the level of seriousness of the hazards and the level of uncertainty that justifies the invocation of the PP. The courts do not refer to the case-law of the Court of Justice of the European Union, thus assuming their autonomy in applying the PP. In order to counter this situation, more explicit legal requirements and criteria for the analysis of uncertain risks and the weighting of interests by area of activity, for the level of evidence required and also for the analysis of the proportionality of decisions in relation to the levels of uncertainty and of seriousness of the hazards are proposed.

Keywords: precautionary principle, environmental risk management, judicial cases

## **Topic Areas**

9d Legal Aspects of Sustainable Development

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