THE *IN DUBIO PRO NATURA* PRINCIPLE: AN ATTEMPT OF A COMPREHENSIVE LEGAL RECONSTRUCTION*

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ABSTRACT: The purpose of this Article is to propose a fresh look at the origin and the legal nature of the *in dubio pro natura* principle in international and comparative law perspectives. The Article will demonstrate that the principle *in dubio pro natura* must be distinguished from the precautionary principle and will show the evolving practice at national level. This practice is particularly significant because it locates the debate in the more general attitude of certain States to protect and put nature at the core of the legal reasoning. From this standpoint, it would also be possible to trace global developmental trends by observing the use of the related legal formants. Moreover, the Article will eventually assess whether the *in dubio pro natura* has been consolidating as a regional custom, and will argue that, *de jure condendo*, it can be qualified as a general principle of international law.

KEYWORDS: *In dubio pro natura* principle, precautionary principle, circulation of legal formants, general principle.

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SUMMARY: I. INTRODUCTION. – II. THE ABSENCE OF THE *IN DUBIO PRO NATURA* PRINCIPLE IN THE DEBATE AT THE INTERNATIONAL LEVEL. – III. THE NEED TO DISTINGUISH THE PRECAUTIONARY PRINCIPLE FROM THE *IN DUBIO PRO NATURA* ONE. – IV. THE *IN DUBIO PRO NATURA* CRITERION IN NATIONAL LEGAL EXPERIENCES. – IV.1. THE *IN DUBIO PRO NATURA* CRITERION AS PRECAUTIONARY PRINCIPLE. – IV.2. THE *IN DUBIO PRO NATURA* AS AUTONOMOUS CRITERION. – V. THE CIRCULATION OF THE *IN DUBIO PRO NATURA* CRITERION. – VI. THE LEGAL NATURE OF THE *IN DUBIO PRO NATURA* PRINCIPLE: A PARTICULAR CUSTOM OR A GENERAL PRINCIPLE OF INTERNATIONAL (ENVIRONMENTAL) LAW? – VI.1. AN INCHOATE REGIONAL OR A CONSOLIDATED PARTICULAR CUSTOM? – VI.2. A GENERAL PRINCIPLE OF INTERNATIONAL (AND NOT ONLY ENVIRONMENTAL) LAW? – VII. CONCLUDING REMARKS.

I. INTRODUCTION

The criterion *in dubio pro natura* (or *in dubio pro ambiente*, i.e. when in doubt, favor environment) is gradually emerging is some countries, aiming to solve uncertainties when dealing with environmental concerns. Despite the general trend in overlapping this principle with the precautionary one, the aim of this article is to explore whether the *in dubio pro natura* is a self-sufficient and autonomous criterion, both in epistemological and pragmatic terms. To this end, the argumentative pattern of this contribution addresses a main research question: in which terms do scholarly debates and narratives, as well as courts and legislatives, interpret the *in dubio pro natura* principle? Through a multidisciplinary approach that combines international and comparative law's approaches, the article focuses on those experiences that have already recognized the *in dubio pro natura* criterion for highlighting the potential interpretations of this 'conceptual pillar'.[1]

As a premise, it should be pointed out that references made to the Latin maxim *in dubio pro natura* do not always focus exclusively on nature as a whole. Sometimes, the idea underlying this criterion applies to elements of nature, such as forests and water, through

[1] Recently, two scholars have proposed the term 'conceptual pillars' in place of environmental principles with the aim of overcoming the semantic heterogeneity of the concept 'principle' in different legal systems; see Lavanya Rajamani, Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, Oxford, OUP, 2nd ed., 2021.

references to *in dubio pro bosque* (when in doubt, favor forests) and *in dubio pro aqua* (when in doubt, favor water), while the criterion *in dubio pro clima* (when in doubt, favor the climate) is also coming into use.

The expression *in dubio pro natura* dates back at least to 1994, when it was used by the Brazilian scholar Luiz Fernando Coelho. At the conference *II Encontro Magistratura e Meio Ambiente,* the philosopher of law used this concept to refer to a theory of interpretation, integration and application of laws in the environmental context. With the aim of establishing common principles and rules of hermeneutics, Coelho intended to defend natural resources such as flora, fauna and water, embracing the philosophy of *deep ecology* and a holistic vision to be transposed into law.[2] According to him, as legal practitioners would be obliged to apply the most favorable rule to the social objective of nature conservation, the 'main criterion for resolving all these problems of applying nature protection rules will always be *in dubio pro natura*, the cornerstone of which will be a new natural law'.[3] It was only in 2008 that a holistic view of the legal relations between human beings and nature was introduced for the first time in the new Ecuadorian constitution and, consequently, the first – and only – reference to the *in dubio pro natura* principle was included in a constitutional text (see below, § 4.2). Since then, this criterion has been mentioned in a few domestic experiences, sometimes as an alternative of the precautionary principle.

At the international level, this principle has not been clearly recognized from a legal standpoint, except for a reference to *in dubio pro natura* in a dissenting opinion accompanying one of the most famous judgments rendered by the International Court of Justice fifteen years ago (see below, § 2).

However, it is noteworthy that the *World Declaration on the Environmental Rule of Law*, adopted by the International Union for the Conservation of Nature (IUCN) in 2016,[4] enumerates among its 13 principles the *in dubio pro natura* one, which has been described as following:

> 'In cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when

[2] Luiz Fernando Coelho, In dubio pro natura *interpretação crítica do direito ambiental*, in A. Sánchez Bravo (ed.), *Políticas públicas ambientales*, Sevilla, ArCiBel, 2008, 157 ff.
[3] Luiz Fernando Coelho, *supra* note 2, 170.
[4] The Union is composed of both government and civil society organisations (more than 1,400 in total and the input of more than 17,000 experts).

their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom'.[5]

Having briefly outlined these aspects, the article unfolds as follows. Section 2 introduces the debate at the international level on the *in dubio pro natura* brocardo. Section 3 explains why *in dubio pro natura* cannot be used as a synonym of precaution in international law and why it can be conceived as a broader notion, capable of being applicable to different scenarios. Section 4 illustrates all national cases currently mentioning the *in dubio pro natura*. Applying a functionalist approach, the aim of this inquiry is to highlight the meanings that this criterion can acquire. Subsequently, Section 5 offers an overview of the efforts made by some international organizations and associations to consolidate the *in dubio pro natura* through declarations and guidelines and the references to these documents in very recent national case law as demonstrations of the circulation of this legal concept worldwide. Section 6 assesses whether the *in dubio pro natura* has been consolidating as a regional custom, and argues that, *de jure condendo*, it can be qualified as a general principle of international law. Lastly, Section 7 proposes some final considerations.

II. THE ABSENCE OF THE *IN DUBIO PRO NATURA* PRINCIPLE IN THE DEBATE AT THE INTERNATIONAL LEVEL

In dubio pro natura fails to find proper conceptualization in international law. Neither international treaties nor soft law instruments adopted at the international level contribute to shed some light on this apparently very clear brocardo. In the *Guide to Latin in International Law*, the principle is defined as a 'a maxim meaning that, when in doubt as to whether an activity harmful to the environment should proceed, the doubt should be resolved in favor of protecting the environment.'[6] In other words, when in doubt as to whether an activity harmful to the environment should proceed, the doubt should be resolved in favor of protecting the

[5] The IUCN World Declaration on the Environmental Rule of Law was drafted by a team of World Commission on Environmental Law (WCEL) members at the 1st IUCN World Environmental Law Congress in April 2016 in Rio de Janeiro, Brazil. It was adopted by consensus in the final stages of the Congress. It is available here https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf The principles are the following: obligation to protect nature; right to nature and rights of nature; right to environment; ecological sustainability and resilience; in dubio pro natura; ecological functions of property; intragenerational equity; intergenerational equity; gender equality; participation of minority and vulnerable groups; indigenous and tribal peoples; non-regression; progression.

[6] Aaron X. Fellmeth, Maurice Horwitz, *Guide to Latin in International Law*, Oxford, OUP, 2009, 126.

environment.'[7] This statement reflects 'to a degree the "precautionary principle" commonly adopted in international environmental law instruments.'[8]

Back to 1997, the International Court of Justice in the *Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*) case dealt extensively with environmental issues, confirming the evolution of international environmental law, which was said to have gradually embraced new concerns and concepts, such as the one of sustainable development:

> 'Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – […] new norms and standards have been developed […]Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.'

The Court also added that: 'This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[9]

The dispute between Hungary and Czechoslovakia (then Slovakia) concerned the construction of a system of locks on the river Danube, regulated by a bilateral treaty, which was likely to have a considerable impact on the environment. In talking about the suspension of the Hungarian works at Dunakiliti which impaired the interests of Czechoslovakia under the treaty, Judge Herczegh in his dissenting opinion stressed the existence of a conflict of interests between, on the one hand, the financial interests of Czechoslovakia, and, on the other hand, the Hungarian interest in safeguarding the ecological balance jeopardized by the project. He added: '*in dubio pro natura*',[10] without however exploring in detail the meaning of this brocardo, which was also unknown to pivotal soft law instruments of international environmental law, such as the Rio Declaration on Environment and Development of 1992 that notoriously defined what precaution means.[11]

Traces of the *in dubio pro natura* principle can be found in the Harmony with Nature resolutions adopted by the UN General Assembly, starting from 2009. Despite their non-binding nature, they are extremely advanced in trying to overcome the limits of the Anthropocene, though focusing more on the 'interconnections between humankind and

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[7] Ibid.
[8] Ibid.
[9] Case concerning the Gabcikovo Nagymaros project, *Hungary v. Slovakia* [1997] ICJ Reports 7, para. 140.
[10] Dissenting opinion of Judge Herczegh,184.
[11] See https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

nature', and on the protection of the ecosystems as a way to contribute to the co-existence of humankind,[12] rather than on the protection of nature *per se*. It seems that Harmony with Nature resolutions, despite their innovative character, which cannot be clearly denied, in leaving an anthropocentric approach aside, do let it re-enter from the backdoor, by promoting a sustainable development which however perpetuates in the end the dichotomy between humankind and nature.[13] A step forward has been undertaken by the most recent resolution adopted in times of COVID-19 pandemic,[14] where the rights of nature emerge, along with relevant State practice and Earth Jurisprudence, and the proposal of a planetary wellbeing:

> 'With the acceleration of climate change and ecosystems being pushed to collapse, the human right to a healthy environment cannot be achieved without securing Nature's own rights first. More precisely, the human right to life is meaningless if the ecosystems that sustain humankind do not have the legal rights to exist. Furthermore, the rights of each sentient being are limited by the rights of all other beings to the extent necessary for the maintenance of the integrity, balance and health of larger ecological communities'.[15]

There is a trend to take some steps forward towards ecocentrism – 'in which the lives of all human and non-human species matter'[16] – and where the resolution acknowledges that 'humanity accepts the reality that its well-being is derived from the well-being of the Earth and that, to sustain all life on the planet and guarantee future generations of all species, it is necessary to live in harmony with Nature and be guided by the laws of the Earth'.[17] The principle of *in dubio pro natura* has never been explicitly invoked, but one cannot disregard the attention to nature, by encouraging a transformative change also in the way humankind conceives economics and development.

A more evident affirmation of what *in dubio pro natura* might entail, even without explicit recognition, comes from the jurisprudence of the Inter-American Court of Human Rights,

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[12] A/RES/74/224 (2019) paras. 9-10.
[13] These two paragraphs have been recurrent in several resolutions, starting from A/RES/68/216 (2013): '9. Invites States: (a) To further build up a knowledge network in order to advance a holistic conceptualization to identify different economic approaches that reflect the drivers and values of living in harmony with nature, relying on current scientific information to achieve sustainable development, and to facilitate the support and recognition of the fundamental interconnections between humanity and nature; (b) To promote harmony with the Earth, as found in indigenous cultures, and learn from them, and to provide support for and promote efforts being made from the national level down to the local community level to reflect the protection of nature'.
[14] A/75/266 (2020).
[15] Ibid, para. 41.
[16] Ibid, para. 94.
[17] Ibid, para. 36.

which recognized the right to a healthy environment, not the *human* right to a healthy environment, in its landmark Advisory opinion of November 2017.[18] The right to a healthy environment 'constitutes a universal value', having both an individual and a collective dimension,[19] and, most importantly, it is 'an autonomous right', because, 'unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals'.[20] As a consequence, and this is the relevant passage, 'it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right'.[21] If the right is autonomous, even though related to other human rights, both in its collective and individual dimension, and it disregards evidence of possible risks for humankind – the latter approach being, as we will see further, relevant for the precautionary principle – it means that the environment must be protected in itself and that humankind benefits from the protection of the environment, because it is part of it. Against this backdrop, the *in dubio pro natura* principle can flourish, because it relies on a right to a healthy environment and allows the consideration of nature as primary in a potential conflict of interests which might arise between more economic aspects and nature. This has proved to be particularly developed by national courts in Latin American countries, where, indeed, the right to a healthy environment and the rights of nature are either part of constitutions or affirmed in jurisprudence.

III. THE NEED TO DISTINGUISH THE PRECAUTIONARY PRINCIPLE FROM THE *IN DUBIO PRO NATURA* ONE

It might be tempting to say that the *in dubio pro natura* principle is equivalent to the precautionary principle. As we said, however, referring to the jurisprudence of the Inter-American Court of Human Rights, this is not entirely appropriate. In this paragraph, after briefly analyzing the precautionary principle, the article will explain why *in dubio pro natura*

[18] Inter-American Court of Human Rights Advisory Opinion OC-23/17 [2017]. See also Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* [2020].
[19] OC-23/17, para. 59.
[20] Ibid., para. 62.
[21] Ibid.

cannot be used as synonym of precaution in international law and why it can be conceived a broader notion, capable of being applicable to different scenarios.

Commentators have extensively discussed the nature of the precaution as a principle – and, if so, whether aspirational or binding rule – or approach, or strategy.[22] Some authors are convinced that precaution has ripened into a norm of customary international law.[23] Others, however, prefer to use the concept as principle: '[i]f the precautionary principle is viewed not as a customary law rule but simply as a general principle then its use by national and international courts and by international organizations is easier to explain'.[24] Precaution must be surely appreciated as 'one of the central concepts for organizing, influencing and explaining contemporary international environmental law and policy'.[25]

As it is well-known, the principle was created in national law: the German *Vorsorgeprinzip* dates back to 1972 when it was incorporated in the *Immissionsschutzgesetz* (Federal Emission Control Act). At the international level, the precautionary principle was first endorsed in the 1982 UN Charter for Nature, and later codified in Principle 15 of the 1992 Rio Declaration:

> 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of

[22] On the precautionary principle, see, *inter alia*, among hundreds of studies, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml, James E. Hickey Jr, Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, in *Virginia Environmental Law Journal*, 14:3, 1995, 423-454; David Freestone, Ellen Hey (eds), *The Precautionary Principle and International Law: The challenge of implementation*, The Hague-London-Boston, Kluwer Law International, 1996; Ronnie Harding, Elizabeth Fisher (eds), *Perspectives on the Precautionary Principle*,Leichhardt-New South Wales, Federation Press, 1999, 29 ff.; Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*,The Hague-London-Boston, Kluwer Law International, 2002; Lawrence Boisson de Chazournes, *Le principe de précaution: nature, contenu et limites*, in C. Leben, J. Verhoeven (eds), *Le principe de précaution. Aspects de droit international et communautaire*, Paris, Panthéon Assas, 2002, 65 ff.; Fabio Bassan, *Gli obblighi di precauzione nel diritto internazionale*, Napoli, Aracne, 2006; Andrea Bianchi, Marco Gestri (eds), *Il principio di precauzione nel diritto internazionale e comunitario*, Milano, Giuffrè, 2006; Jonathan B. Wiener, *Precaution*, in D. Bodansky, J. Brunnée, E. Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford, OUP, 2007, 597 ff.; Alessandro Fodella, Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale*, Torino, Giappichelli, 2009; Catherine E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals*, Cambridge, Cambridge University Press, 2011; Alexander Proelss, *Principles of EU Environmental Law: An Appraisal*, in Y. Nakanishi (ed.), *Contemporary Issues in environmental law. The EU and Japan*, Tokyo, Springer, 2016, 29 ff.

[23] Arie Trouwborst, *supra* note 22, 284.

[24] Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea*, in *The International Journal of Marine and Coastal Law*, 22:3, 2007, 369 ff., 375. Referring to a 'still evolving principle of environmental protection', James Crawford, *Brownlie's Principles of Public International Law*, Cambridge, Cambridge University Press, 2012, 357.

[25] Patricia Birne, Alan Boyle, Catherine Redgwell, *International Law and the Environment*, Oxford, OUP, 2009, 147. See also Daniel Bodansky, *The Art and Craft of International Environmental Law*, Cambridge, Harvard Univ. Press, 2010, 200: '[principles] articulate collective aspirations that play an important role over the longer term, framing both discussions about the development of international law and negotiations to develop more precise norms'.

serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[26]

The United Nations Convention on Biological Diversity, adopted in 1992, encapsulates the precautionary principle, without directly naming it, in its preamble: 'Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat'. Article 3(3) of the 1992 United Nations Framework Convention on Climate Change required States, among the principles, to 'take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'.

Similarly, in 2000, States parties to the Convention on Biological Diversity agreed on the Cartagena Protocol on Biosafety; according to its provisions, States can refuse imports of modified organisms where scientific certainty is lacking, in order to avoid or minimize their adverse effects. The precautionary principle was invoked before the International Court of Justice by Hungary in the *Gabcikovo-Nagymaros* case,[27] but not further discussed in the merits by judges. As far as the law of the sea is concerned, first the International Tribunal on the Law of the Sea (ITLOS), in its judgment on *Southern Bluefin Tuna*, posited that the parties should act 'with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of Southern Bluefin tuna'[28] and, some years later, in its Advisory Opinion, the Seabed Chamber of the same tribunal was more explicit in affirming that the precautionary approach was an obligation of States sponsoring activities in the Area.[29]

At the regional, European, level, the precautionary principle was first added in Art. 130 r, para. 2, of the EC Treaty with the Treaty of Maastricht, then defined by the CJEU as a 'fundamental principle of environmental law',[30] and eventually clearly enshrined in Art. 191 (2) TFEU:

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[26] Report of the UN Conference on Environment and Development, Rio de Janeiro [1992**]** A/CONF.151/26 (Vol. I).

[27] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* para. 97.

[28] *Southern Bluefin Tuna Cases, New Zealand and Australia v. Japan*, ITLOS order on provisional measures [1999] para. 77. See also Judge Treves, concurring opinion, para. 8: 'the Tribunal must assess the urgency of the prescription of its measures in light of prudence and caution. This approach, which may be called precautionary, is hinted at in the order […] it would seem to me that the requirement of urgency is satisfied only in the light of such precautionary approach'.

[29] Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) ITLOS [2011] paras. 125-135.

[30] Case C-121/07 *Commission v France* [2008] I-09159.

> ‘Community policy on the environment shall aim at high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle […]’.

Despite being only mentioned as an environmental law principle, the precautionary principle has a wider scope, as acknowledged by the European Commission in its 2000 Communication on the precautionary principle:

> ‘The precautionary principle is not defined in the Treaty, which prescribes it only once – to protect the environment. But *in practice* its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health* may be inconsistent with the high level of protection chosen for the Community’.[31]

Precaution is defined as a ‘risk management strategy’ applicable when ‘there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the available data preclude a detailed risk evaluation’.[32] The two interrelated aspects of the precautionary principle as identified by the Commission are the following: a. ‘the political decision to act or not to act as such, which is linked to the factors triggering recourse to the precautionary principle’; and b. in the affirmative, how to act, i.e. the measures resulting from application of the precautionary principle.[33] Following the definition of the Commission, the precautionary principle is relevant when there is a potential risk which cannot be fully demonstrated or quantified or whose effects cannot be determined. The application of the precautionary principle depends on the ‘identification of potentially negative effects’ and on the scientific evaluation of the potential adverse effects.[34] The European Environment Agency provided a working definition of precaution in its *Late Lessons from Early Warnings II - Science, Precaution and Innovation*:

> ‘The precautionary principle provides justification for public policy and other actions in situations of scientific complexity, uncertainty and ignorance, where there may be a need to act in order to avoid, or reduce, potentially serious or irreversible threats to health and/or the environment, using an appropriate

[31] Communication from the European Commission on the precautionary principle (COM*(*2000*)* 1 final.
[32] Communication of the Commission, 8.
[33] Communication of the Commission, 12.
[34] Communication of the Commission, 13.

strength of scientific evidence, and taking into account the pros and cons of action and inaction and their distribution'.[35]

Given the above, it is arguably dismissible the alleged interchangeability between the principles of precaution and the one of *in dubio pro natura*. The premise for the application of the precautionary principle is a situation of scientific incertitude and the need to avoid environmental degradation. This is not necessarily the case for the *in dubio pro natura* principle, which can be used even absent scientific incertitude and is not necessarily related to potential environmental degradation. It can be used as a means of interpretation of existing laws, whose application might be dubious in terms of impact on the environment, or as an instrument to solve conflicts of interests in favor of the protection of nature, or to shift the burden of proof in environmental disputes.

As Nicholas Robinson stated: 'when a matter may be unsure or the equities appear evenly balanced', *in dubio pro natura* compels 'a decision that best protects nature'.[36] For example, in litigation of environmental matters, it could be useful 'especially when harms are difficult to trace, caused by many parties or appearing only after a long period of latency'.[37] *Mutatis mutandis*, it can be contended that as much as the principle *in dubio pro reo* was meant to address cases in which 'the applicable laws or the relevant facts are unclear or ambiguous,' and to solve them 'in a manner favorable to the defendant,' the same can be said with regard to the *in dubio pro natura* principle. When the applicable law appears to be unclear or ambiguous with regard to the protection of the environment, the interpretation must lead, or the conflict of interests must be solved in a manner favorable, to the protection of the environment. Formulated in this way, the difference between the precautionary and the *in dubio pro natura* principles seems adamant. Going back to the previous paragraph, and in line with the jurisprudence of the Inter-American Court of Human Rights, the *in dubio pro natura* applies even absent a risk for human beings' health.

[35] *Late lessons from early warnings II: science, precaution and innovation* (EEA Report, 1/2013).
[36] Nicholas A. Robinson, *Fundamental Principles of Law for the Anthropocene?*, in *Envtl. Pol'y & L.*, 44, 2014, 16.
[37] Nicholas Bryner, *Applying the Principle In Dubio Pro Natura for Enforcement of Environmental Law*, in *Environmental Rule of Law: Trends from the Americas*, General Secretariat of the Organization of American States, Montego Bay, Jamaica, 2015, 169, at https://www.oas.org/en/sedi/dsd/environmentalruleoflaw_selectedessay_english.pdf.

IV. THE *IN DUBIO PRO NATURA* CRITERION IN NATIONAL LEGAL EXPERIENCES

In a comparative law perspective, this paragraph aims at differentiating two cases in which the *in dubio pro natura* criterion has been adopted: 1) as a synonym – or a variant – of the precautionary principle; 2) as an independent criterion. To this end, the argumentative pattern highlights the applications of this Latin brocardo at domestic level through some selected examples.

IV.1. THE *IN DUBIO PRO NATURA* CRITERION AS PRECAUTIONARY PRINCIPLE

As far as the chronological aspect is concerned, the *in dubio pro natura* criterion arose with a 1995 judgement issued by the Constitutional Chamber of the Supreme Court of Costa Rica. In arguing the meaning of the precautionary principle endorsed by the Rio Declaration on Environment and Development, the Costa Rican judges stated that 'in the protection of our natural resources, there must be a preventive attitude, i.e. if degradation and deterioration are to be minimized, precaution and prevention must be the dominant principles, which leads to the need to formulate the '*in dubio pro natura*' principle which, by analogy, can be inferred from other branches of law and which, as a whole, is consistent with nature'.[38] Scientific disciplines associate the concept with uncertainty, and such an approach seems to be equivalent to the precautionary principle.[39] The same approach can be traced back within the legislation. Indeed, Art. 11 of the Biodiversity Act no. 7788/98 establishes the criteria to be applied with regard to this law, while para. 2 provides for the 'Precautionary or *in dubio pro natura* criterion'.[40]

Other countries also adopt the Latin brocardo in their own legal systems via courts' rulings with the same meaning. In Colombia, a 2002 ruling of the Constitutional Court states that 'the precautionary principle must be followed, a principle that can be rendered by the

[38] Constitutional Chamber of the Supreme Court of Costa Rica, decision no. 05893, 27 october 1995, available at https://vlex.co.cr/vid/-497344562.

[39] See Paula Gamboa León, *La problemática definición del principio in dubio pro natura*, Tesis, Quito, Universidad San Francisco de Quito, 2018, 14 f., at http://repositorio.usfq.edu.ec/handle/23000/7794.

[40] The Biodiversity Act no. 7788, 30 april 1998, available at https://www.aya.go.cr/ASADAS/Leyes%20y%20reglamentos/LEY%20DE%20BIODIVERSIDAD.pdf.

expression '*in dubio pro ambiente*''.[41] Similar approaches can be found also in Kenya and Indonesia.[42]

Even some legal scholars rely on this concept, as in the cases of Dutch, Spanish and Slovenian studies.[43]

Currently, the application of the *in dubio pro natura* criterion seems to be more "relaxed" compared to the precautionary principle, indeed it can now be considered a variant of the better-known principle.

In Costa Rica, this theoretical shift has been evidenced by the 2017 judgement of the Constitutional Chamber of the Supreme Court. In the case under analysis, this concept refers to a criterion that drives the actions of public institutions. According to the Court's reasoning, the public administration 'must have the negative certainty that the environment will not be harmed under any circumstances, from which it follows that, if there is any doubt as to the existence of a risk, the administration has the obligation not to authorize or perform any actions, or to immediately cease any administrative activity causing the hazard'.[44]

Legal scholarship argues that the precautionary principle thus covers two dimensions: precaution has to be applied in those cases in which there is a risk of serious or irreversible damage to the environment; differently, the *in dubio pro natura* criterion refers to cases in which there is a "mere" risk of environmental damage, thus displaying its own features in reference to the public administration choices, to select those choices with a little impact on the environment.[45]

In the European Union, a similar interpretation of the precautionary principle, otherwise known as *in dubio pro natura*,[46] may be inferred from Art. 6(3) of the Habitats Directive. The Directive states that 'any plan or project […] likely to have a significant effect […] shall be

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[41] Costitutional Court of Colombia, decision no. C-339/02, 7 may 2002, available at https://www.corteconstitucional.gov.co/RELATORIA/2002/C-339-02.htm.

[42] Concerning Kenya, see the decision of the Environment and Land Court of Nairobi, in the case *Patrick Kamotho Githinji & 4 others v Resjos Enterprises Ltd & 4 others*, 2016, at http://kenyalaw.org/caselaw/cases/view/126272/index.php?id=3479. With reference to the case law of the Supreme Court of Indonesia, see Erica Pane, *Environmental Justice in Judge's Decision*, in *Journal of Critical Reviews*, 7/12, 2020, 4112 ff.

[43] Chris W. Backes, Jonathan M. Verschuuren, *The precautionary principle in international, European and Dutch wildlife law*, in *Colorado Journal of International Environmental Law and Policy*, 1, 1997, available at https://pure.uvt.nl/ws/portalfiles/portal/231035/envartcolo.html; María Jesús Montoro Chiner, *La tutela dell'ambiente in Spagna. Profili costituzionali e amministrativi*, in D. Amirante (ed.), *Diritto ambientale e Costituzione. Esperienze europee*, Milano, FrancoAngeli, 2000, 51 and 61; and also Tomaž Jančar, *In dubio pro natura*, in *Acrocephalus*, 28, 2007, 91 f.

[44] Constitutional Chamber of the Supreme Court of Costa Rica, decision no. 05994, 26 april 2017, available at https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-711352.

[45] See Alberto Olivares, Jairo Lucero, *Contenido y desarrollo del principio* in dubio pro natura*. Hacia la protección integral del medio ambiente*, in *Ius et Praxis*, 3, 2018, 631 f.

[46] See Chris W. Backes, Jonathan M. Verschuuren, *supra* note 42.

subject to appropriate assessment […]. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned […].'[47] This provision embodies a 'far-reaching form of the precautionary principle.' According to some legal scholars, leveraging on references to any form of doubt, the final decision requires the application of the *in dubio pro natura* principle, with the consequent duty of abandoning any project that fails to pass scrutiny.[48]

IV.2. THE *IN DUBIO PRO NATURA* AS AUTONOMOUS CRITERION

When the *in dubio pro natura* criterion is separated from the precautionary principle, it appears to be at the bottom of two practical aspects: 1) as a hermeneutic criterion guiding the judges and public administrators' reasonings when there is a lack of certainty in reference to the interpretation of the rules to be applied; 2) as a criterion for solving conflicts concerning the ascription of responsibilities between different levels of government.

In some cases, the autonomy of this criterion has been recognised in legislation, starting with the Bolivian experience. The General Regulation of the 1996 Forestry Act sets out the *in dubio pro bosque* principle within a far-reaching reform aiming to ensure the sustainable use of forests, which cover about half of the national territory.[49] During this period, the Bolivian government became concerned about the intensive exploitation of natural resources, adopting specific political and legislative measures to improve forest management.[50] The regulatory framework underlying the Forestry Act no. 1700 of 12 July 1996 and the subsequent implementing decrees provide for a classification of land into five categories, in reference to their characteristics and possible uses. The *in dubio pro bosque* principle, clearly diverse from the precautionary principle set out in Art. 9 of Law No. 1700,[51]

[47] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22/07/1992, 0007-0050.
[48] See Chris W. Backes, Jonathan M. Verschuuren, *supra* note 42. See below, § V, for some proposals to recognize the *in dubio pro natura* as autonomous criterion in the European context.
[49] The *Reglamento general de la Ley Forestal* was adopted with the supreme decree no. 24453, 21 december 1996, available at https://bolivia.infoleyes.com/articulo/46753.
[50] Arnoldo Contreras-Hermosilla, María Teresa Vargas Ríos, *Las dimensiones sociales, ambientales y económicas de las reformas a la política forestal de Bolivia*, Washington, DC Forest Trends, 2002, 3 f., available at https://www.cifor.org/publications/pdf_files/Books/BoliviaEspanol.pdf.
[51] Article 9 (Precautionary principle): 'When there are consistent indications that a practice or omission in forest management could generate serious or irreversible damage to the ecosystem or any of its elements, those responsible for forest management cannot fail to adopt precautionary measures tending to avoid or mitigate them, nor to exonerate themselves of responsibility, invoking the lack of full scientific certainty in this regard or

has been recognised in Art. 25 of the Regulation in a criterion to be applied when there is uncertainty over the classification of forest land, and for the resolution of cases decided by the Agri-Environmental Tribunal concerning its potential use.[52]

According to such interpretation and applications, the main scope of the principle might be addressed in critical terms. The main issue is whether there is uncertainty over the scope of the rules, and therefore of interpretation, or a substantive doubt over uncertainties in classification and possible land uses. In the light of a literal interpretation, the second option appears to be the most suitable one.

One interesting aspect concerns the lack of even a single mention to the *in dubio pro natura* criterion within the 2009 Bolivian Constitution, the 2010 Law on the Rights of Mother Earth (*Ley de Derechos de la Madre Tierra*), the 2012 Framework Law of Mother Earth and Integral Development for Living Well (*Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien*). Furthermore, I would underline that such legislations clearly embrace the biocentric perspective in line with the constitutional paradigm of *vivir bien*.[53] The biocentric approach stems from the worldview of indigenous peoples, conceiving nature and human beings as a single entity. In legal terms, Art. 33 of the Constitution recognizes the rights ascribed to Mother Earth, i.e. the right to a healthy environment, which would pave the way for the legal recognition of nature by referring to 'other living beings' which are allowed to 'develop in a regular and permanent manner'.[54] The *in dubio pro natura* criterion should be a consequence of such an approach, as the Ecuadorian experience shows.

In Ecuador, the *in dubio pro natura* criterion has been included in the Constitution since 2008. During the drafting of the foundational text, round table (*Mesa*) no. 5, devoted to

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the absence of standards and not even the authorization granted by the competent authority'. The *Ley Forestal* is available at https://www.lexivox.org/norms/BO-L-1700.html.

[52] Specifically, Art. 25 of the Regulation states that: 'Land is classified according to its capacity for greater use and in accordance with the provisions of the regional planning regulations. For the purposes laid down in the final paragraph of Art. 12 of the [Forestry Law], the *in dubio pro bosque* principle is established, among others, for the following effects:
(a) provisional classification of forest land for protection, permanent forest production and the stop to exploitation, without necessarily being conditional on general studies of land use plans and their approval [...].
(b) For the resolution of conflicts over potential use arising during or after the classification procedure'.
The principle *in dubio pro bosque* is mentioned by the Agri-Environmental Tribunal in the decision no. 55/2013, available at https://www.tribunalagroambiental.bo/.

[53] On the Bolivian *vivir bien* and the Ecuadorian *buen vivir*, see Serena Baldin, *La tradizione giuridica contro-egemonica in Ecuador e Bolivia*, in *Boletín Mexicano de Derecho Comparado*, 143, 2015, 483ff.; Carolina Silva Portero, *¿Qué es el buen vivir?*, in R. Ávila Santamaría (ed.), *La Constitución del 2008 en el contexto andino. Análisis desde la doctrina y el derecho comparado*, Quito, Ministerio de Justicia y Derechos Humanos, 2008, 116 ff.; Silvia Bagni, *Dal* Welfare State *al* Caring State*?*, in Ead. (ed.), *Dallo Stato del bienestar allo Stato del buen vivir. Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, Filodiritto, 2013, 19 ff.

[54] See Eugenio Raúl Zaffaroni, *La Pachamama y el humano*, Buenos Aires, Ediciones Madres de Plaza de Mayo, 2012, 109 ff.

environmental resources and biodiversity, discussed environmental principles and the rights of nature (currently embraces within Articles 71 and 72 of the Constitution).[55]

On that venue, the framers referred to the *in dubio pro natura* criterion as a principle of prevalence in the event of uncertainty over the scope of environmental legislation.[56] The Constituent Assembly's reflections led to the consecration of the *in dubio pro natura* principle in Art. 395, paragraph 4, of the Constitution in the following terms:

> 'In the event of doubt about the scope of legal provisions for environmental issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail'.

Academic scholarship's views on this point are rather divergent. In Julio Marcelo Prieto Méndez's view, the provision contains a criterion to be adopted in uncertain cases, within which it is difficult to establish the prevailing rule in cases of conflict or in those case that cannot rely upon scientific certainty. Moving from the aforementioned assumptions, how does this criterion relate to the subsequent Art. 396 of the Constitution, providing for the precautionary principle?[57] In solving such a critical profile, Prieto Méndez argues that both are essential guidelines when there is scientific uncertainty and, specifically, precaution intervenes to avoid environmental damage.[58]

Viviana Morales Naranjo's view seems to recall the same lines: precaution and *in dubio pro natura* are different formulations of the same principle, having a two-fold features at the constitutional level. On the one hand, Article 395 of the Constitution concerns the scope of legal provisions on the environment, which, in doubtful cases, must be interpreted in the most favorable manner to protect nature. On the other hand, Article 396 of the Constitution

[55] On the different positions on the ecological issue during the Ecuadorian constitution-making process, see Eduardo Gudynas, *La ecología política del giro biocéntrico en la nueva Constitución de Ecuador*, in *Revista de Estudios Sociales* 32, 2009, 34 ff. In general, on the rights of nature, see Alberto Acosta, Esperanza Martínez (eds), *La naturaleza con derechos: de la filosofía a la política*, Quito, Ediciones Abya-Yala, 2011; Julio Marcelo Prieto Méndez, *Derechos de la naturaleza. Fundamento, contenido y exigibilidad jurisdiccional*, Quito, CEDEC, 2013; Michele Carducci, *Natura (diritti della)*, in *Digesto delle Discipline Pubblicistiche. Aggiornamento*, Milano, UTET, 2017, 486 ff.; Rodrigo Míguez Núñez, *Le avventure del soggetto. Contributo teorico-comparativo sulle nuove forma di soggettività giuridica*, Milano-Udine, Mimesis, 2018, 111 ff.

[56] See Paula Gamboa León, *Elementos necesarios para la correcta configuración del emergente principio* in dubio pro natura, in *USFQ Law Working Papers*, 3, 2021, 6.

[57] Article 396 of the Constitution sets out the precautionary principle and prevention principle as following: 'The State shall adopt timely policies and measures to avoid adverse environmental impacts where there is certainty about the damage. In case of doubt about the environmental impact stemming from a deed or omission, although there is no scientific evidence of the damage, the State shall adopt effective and timely measures of protection'.

[58] Julio Marcelo Prieto Méndez, *supra* note 55, 102 f.

demands the State to adopt effective and timely protection measures where there is uncertainty as to the environmental impact of any action or omission.[59]

These two theoretical positions appear to be part of the well-established Latin American view that conceives the *in dubio pro natura* criterion as an "derivative" of the precautionary principle.

For Alberto Olivares and Jairo Lucero, within the broader context of *buen vivir* and the rights of nature, the Latin brocardo refers to a general principle that serves as a hermeneutic criterion to be applied to private individuals and all public bodies.[60]

Differently, Paula Gamboa León describes the *in dubio pro natura* as a criterion for interpreting laws in a strict manner and to be used only in exceptional cases. The criterion is applied on the basis of four necessary conditions: i) uncertainty; ii) application to legal provisions, including legislation issued by the government; iii) application to environmental matters, including rules that go beyond the Environment Code, such as provisions of the Code of Criminal Procedure, impact environmental protection and the rights of nature; iv) application for the purposes of interpreting the basic or main scope of legal provisions.[61] It is an explanation that clearly separates the *in dubio pro natura* criterion from the precautionary principle by analogy with the *in dubio pro reo* one. However, this approach does not seem to take due account of the biocentric perspective that has become the constitutional paradigm within the legal system of Ecuador.

For Michele Carducci, leveraging on the biocentric constitutionalism that inspires the Ecuadorian legal system, the *in dubio pro natura* identifies a saving clause in the application of the principle of conservation of ecosystems and not merely of precaution in terms of the human action within the ecosystem (for which the *in dubio pro securitate* postulate applies, i.e., priority to safety in cases of uncertainties). The two principles of managing human doubt – *pro natura* and *pro securitate* – are not coincidental: the first is biocentric, the second is anthropocentric. It follows that, while the *in dubio pro natura* principle adds to the latter by making it more attentive to the needs of nature, the *in dubio pro securitate* principle excludes the former by continuing to place economy above ecology. This clause, along with other provisions aimed at underlining the full respect for *Pacha Mama*, is an intrinsic feature of all decision-making processes in Ecuador.[62]

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[59] Viviana Morales Naranjo, *La protección ambiental en Ecuador y la incidencia de la constitucionalización de la naturaleza como sujeto de derechos*, in *federalismi.it*, 1, 2018, 10.
[60] Alberto Olivares, Jairo Lucero, *supra* note 45, 639.
[61] Paula Gamboa León, *supra* note 56, 16 ff.
[62] Michele Carducci, *supra* note 55, 517.

The judgement in the *Chevron* case, issued by the Ecuadorian Constitutional Court in June 2018, refers to Art. 395, para. 4, of the Constitution. Reading the judgement, we can clearly see what the judges considered to be the reasons behind the constitutional recognition of the *in dubio pro natura* criterion, acting in favor of Mother Earth. It is intended to consolidate the constitutional idea of *buen vivir* and to intervene regarding environmental pollution, which demands the adoption of urgent measures to prevent further damage in the future. However, the reference to the Latin brocardo is also a legal tool for the Court, with the aim of justifying the retroactivity of environmental legislation, even though this undermines the principle of legal certainty. The aforementioned approach is based on precise reason: if the court has doubts as to which rule to apply to the specific case, then it must follow the one that protects nature at the highest level, even if it was not in force at the material time.[63] This is the case of the legal battle of the multinational oil company Chevron against the ruling of Ecuador's National Court of Justice that, in the 2013 appeal, confirmed the fine of over $19 million as compensation for the ecological disaster caused for decades in a vast area of the Amazon rainforest.[64]

With the drafting of the new Environmental Code, in force since 2018, the Ecuadorian legislator has listed ten environmental principles and, on this occasion, has entitled para. 5 of Article 9 '*In dubio pro natura*'. This paragraph states that: 'When there is a lack of information, a legal vacuum or a contradiction between regulations, or when there is doubt as to the scope of the legal provisions on the environment, the one that is most favorable to the environment and nature shall apply. The same shall apply in the case of conflict between those provisions'.[65]

According to Paula Gamboa León, the argument can be criticized as it also incorporates the precautionary principle in the reference to lack of information, which may also include scientific information.[66] In my opinion, given that the precautionary principle is

[63] The decision states that 'according to this principle, when applying environmental regulations, judges must preferably choose the pro-nature interpretation or regulation as the result of the constitutional mandate [...]. If the legal practitioner or administrative authorities have doubts when applying the contents of an environmental regulation, they must prefer the one that protects nature the most, which is ultimately the substantial meaning of '*in dubio pro natura*''. See Constitutional Court of Ecuador, decision no. 230-18-SEP-CC, 27 june 2018, 107 f., available at https://portal.corteconstitucional.gob.ec/.

[64] A summary of the background and of the constitutional decision is available at https://www.csjn.gov.ar/dbre/verNoticia.do?idNoticia=3024. The multinational refused to pay and, a few months after the Constitutional Court rejected the petition filed by the oil giant, an international tribunal issued an award in favor of Chevron. Subsequent attempts by claimants to obtain compensation before foreign state courts were also unsuccessful.

[65] The *Código Orgánico del Ambiente* is available at http://www.ambiente.gob.ec/codigo-organico-del-ambiente-coa/.

[66] See Paula Gamboa León, *supra* note 56, 12 ff.

expressly mentioned in Article 9, para. 7, of the Environmental Code, the provision on the lack of information in Article 9, para. 5, should not be interpreted so broadly as to include scientific uncertainties. On the contrary, the provision would seem to show a trend in recognizing the *in dubio pro natura* as an independent principle, extending its scope well beyond scientific uncertainties in order to also solve legal issues and/or conflicts.

In 2021 the Ecuadorian Constitutional Court clarified that this principle must be applied also in the interpretation of the constitutional provisions.[67]

The scope of the application of the *in dubio pro natura* criterion is becoming wider in other countries.

In Brazil, at the beginning of the 21st century, the Latin brocardo started to be considered as both a hermeneutic criterion available to judges to interpret legislation in the most favorable way for the environment, and as an essential criterion in the distribution of powers between federal, state, and local authorities. In the latter case, any conflict in environmental matters between different levels of government is resolved either by applying the law or by recognizing the power of the body providing the greatest protection of nature.[68]

In Guatemala, the *in dubio pro natura* principle was included into the legal framework in 2013. Aiming to reduce vulnerability and ensure the mandatory changes required to offset the effects of climate change and reduce greenhouse gases, the Framework Law adopted by Legislative Decree no. 7 of 2013 sets out the guiding principles as per Article 6. The '*in dubio, pro natura*' criterion has been recognized in letter a) and it is conceived as a 'Principle of action for the benefit of the environment and nature that requires that when in doubt that an action or omission may affect the environment or natural resources, decisions taken must be in the sense of protecting them'.[69] Subsequently, letter b) is devoted to the precautionary principle.[70] From this drafting technique we can draw that the Guatemalan legislator has identified a distinct scope of application for these two criteria. It should be pointed out that the *in dubio pro natura* brocardo is not intended solely or exclusively as an interpretative criterion applicable in cases of legal uncertainty. Indeed, doubts refer to actions or omissions, i.e., either active or passive behavior. While omission may also be legislative,

[67] See Constitutional Court of Ecuador, decision no. 1149-19-JP, 10 november 2021, point 41, available at https://portal.corteconstitucional.gob.ec/.
[68] Alberto Olivares, Jairo Lucero, *supra* note 45, 632 ff.
[69] The *Ley Marco para Regular la Reducción de la Vulnerabilidad, la Adaptación Obligatoria Ante los Efectos del Cambio Climático y la Mitigación de Gases de Efecto Invernadero* is available at https://www.marn.gob.gt/Multimedios/2682.pdf.
[70] Article 6, letter b: 'Precaution: Precautionary measures will be taken to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there is a threat of serious or irreversible harm, one should not use the lack of complete scientific certainty as a reason for postponing such measures'.

resulting in a void in environmental legislation, the reference to action seems addressing those activities beyond normativity; otherwise, it would have been more appropriate to include the word ‘act’ rather than ‘action’.

In Colombia, the Latin brocardo appeared in a 2015 Constitutional Court judgement embracing a purely legal dimension, no longer limited to uncertainties arising from science, although there is a clear reference to the 2002 precedent (see above, § 4.1). For constitutional judges, the higher criterion of *in dubio pro ambiente* or *in dubio pro natura* applies in cases of tension between conflicting principles and rights. In these cases, ‘the authority must lean towards the interpretation that is most in keeping with the guarantee and enjoyment of a healthy environment, rather than one that suspends, limits or restricts it’.[71] In a judgement issued in 2019, the Court also extends these doubts to the political dimension: ‘If there is no clarity as to which regulation or policy is applicable to a specific situation, it is not acceptable to restrictively apply the one that is unfavorable to the environment. From the perspective of the 1991 Constituent Assembly, environmental protection is a constitutional imperative, which means that the interpretation, rule or policy that ensures a healthier environment must always prevail (*in dubio pro natura* or *pro ambiente* principle)’.[72]

In Costa Rica, within judgement no. 13347/ 2017 of the Constitutional Chamber of the Supreme Court, the Latin brocardo is conceived as an implementing criterion that all public authorities are obliged to comply with, as it ensures the highest protection of the environment and sustainable development.[73]

In Mexico, in a 2018 judgement, the Supreme Court of Justice enshrines the *in dubio pro natura* criterion as a guiding principle of the environment, along with the principles of precaution, non-regression and civic participation. The Supreme Court judges consider the reference to the Latin maxim as ‘not merely limited to the precautionary principle, i.e., not only applicable to scientific uncertainty, but as a general requirement for ensuring environmental justice, in the sense that in any conflict the interpretation that favors the preservation of the environment must always prevail’.[74] In the wake of this decision, a

[71] Constitutional Court of Colombia, decision no. C-449/15, 16 july 2015, available at https://www.corteconstitucional.gov.co/RELATORIA/2015/C-449-15.htm.

[72] Constitutional Court of Colombia, decision no. T-614/19, 16 december 2019, available at https://www.corteconstitucional.gov.co/relatoria/2019/T-614-19.htm.

[73] Constitutional Chamber of the Supreme Court of Costa Rica, decision no. 13347, 25 august 2017, available at https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-721055. See also Alberto Olivares and Jairo Lucero, *supra* note 45, 632.

[74] First Section of the Supreme Court of Justice of Mexico, decision no. 307/2016, 14 november 2018. A summary of this decision is available at https://www.scjn.gob.mx/derechos-

proposal to amend the General Law of Ecological Balance and Protection of the Environment to introduce the principles laid down by the Supreme Court was presented in parliament.[75]

In 2019, the Supreme Court of Justice of Argentina applied the *in dubio pro natura* and *in dubio pro aqua* criteria for the very first time, moving from the assumption that these two environmental principles belong to the legal system. With regard to the *pro natura* principle, according to the Court, 'in case of doubt, all proceedings before courts, administrative bodies and other decision-making bodies shall be resolved in such a way as to favor the protection and preservation of the environment, giving preference to the least harmful alternative'.

Regarding the *pro aqua* principle, for the Court, in uncertain cases, legal disputes concerning water should be resolved in a way that protects and preserves water resources and related ecosystems, and the laws to be applied should be interpreted in the light of the same principle. Most significantly, in accordance with the legal doctrine of *stare decisis*, this case is a binding precedent.[76] A few weeks after the judgement was published, the parliament has begun the process to amend Article 4 of the General Law on the Environment in order to incorporate these two principles, considered to be the new guidelines governing Argentina's environmental policy.[77]

V. THE CIRCULATION OF THE *IN DUBIO PRO NATURA* CRITERION

The aforementioned overview demonstrates the difficulties that legislators are dealing with, in order of regulating the *in dubio pro natura* criterion and clearly distinguishing its scope from the space reserved to the definition and the application of the precautionary principle.

According to some scholars, the *in dubio pro natura* criterion is complementary to the precautionary principle. Precautionary measures override an indicative criterion of human

humanos/sites/default/files/sentencias-emblematicas/resumen/2020-02/Resumen%20AR307-2016%20DGDH.pdf.

[75] See at http://sil.gobernacion.gob.mx/Archivos/Documentos/2019/10/asun_3924888_20191003_1567703893.pdf.

[76] Corte Suprema de Justicia de la Nación, case *Majul, Julio Jesús c/ Municipalidad de Pueblo General Belgrano y otros s/ acción de amparo ambiental*, CSJ 714/2016/RH1, 11 july 2019, available at https://cdh.defensoria.org.ar/wp-content/uploads/sites/3/2019/07/fallo-majul.pdf. For a comment of this decision, see Ananda María Lavayén, Juan Bautista López, *Los principios jurídicos* in dubio pro natura *e* in dubio pro aqua*. Su incorporación jurisprudencial al ordenamiento jurídico argentino*, in *Revista Justicia Ambiental*, 12, 2020, 361 ff.

[77] The proposal of amendment no. 4369-D-2019 is available at https://www.hcdn.gob.ar/proyectos/proyecto.jsp?exp=4369-D-2019.

action based on the awareness of the scientific uncertainty of the risks and on responsibility in managing the risks. This implies prudent conduct and thus the adoption of precautionary measures to prevent possible environmental degradation. To this end, the *in dubio pro natura* criterion offers a guide for solving legal uncertainties, facilitating the task of legal professionals in cases of ambiguity of the acts, thus ensuring the effective implementation of environmental rules. [78] Examples of such an approach are the *in dubio pro natura* references made by judges in interpreting constitutional and legislative provisions in order to make the rules more effective in favor of nature, and also in the evaluation of the evidence, in some cases even imposing a reversal of the burden of proof.[79] The criterion *in dubio pro natura* can also be invoked to solve doubts in administrative procedure and to set standards related to environmental impact assessment, to favor the "weaker subject", namely the nature.[80]

The Latin brocardo also falls within the debate on the principle of sustainable development and on the concept of environmental sustainability. In the first case, the *in dubio pro natura* criterion is considered suitable for rebalancing the relationship between environmental and economic interests in favor of ecosystems.[81] In the second case, from a stricter perspective, the expression refers to a hermeneutic criterion related to environmental responsibilities. Responsibilities are such as to imply the management of natural resources through practices leading to the renewal and the regeneration of those assets. This perspective is accepted in Bolivia, especially in reference to the management of forest resources within the sphere of the *in dubio pro bosque* criterion,[82] but it is well-suited to being extended to other countries.

Within such theoretical space, the efforts made by international non-governmental organizations and associations of judges and lawyers to disseminate this principle are extremely interesting and of great importance for strengthening environmental protection.

Reference has already been made (see above, § 1) to the 2016 IUCN *World Declaration on the Environmental Rule of Law*, which explicitly refers to the *in dubio pro*

[78] Nicholas Bryner, *supra* note 37, 168.
[79] For Brazil, see Carina Costa de Oliveira *et al*., *Os limites do princípio da precaução nas decisões judiciais brasileiras em matéria ambiental*, in *Revista Veredas do Direito*, 32, 2018, 340 ff.
[80] Natalia Greene, Gabriela Muñoz, *Los derechos de la naturaleza, son mis derechos. Manual para el tratamiento de los conflictors socioambientales bajo el nuevo marco de derechos constitucionales*, Quito, PPD, 2013, 36.
[81] Fernando León-Jiménez, *El pensamiento político verde*, in *Revista internacional de pensamiento político*, 6, 2011, 356; Alberto Olivares, Jairo Lucero, *supra* note 45, 627.
[82] The principles of the Bolivian forest certification system are available at http://usi.abt.gob.bo:82/Certificacion/index.php?pg=principio.

natura principle. The perspective of the *World Declaration* seems to have been embraced in Ecuador, in the Environment Code, as well as in Mexico, through the aforementioned judgement of the Supreme Court of Justice of Mexico issued in 2018.

It is a well-known fact that the fight against environmental degradation and loss of biodiversity is played out in courts. Therefore it is not surprising that judges and prosecutors around the world are seeking to disseminate environmental principles through soft law and compendia.

The *in dubio pro aqua* principle has now been set forth in the *Brasília Declaration of Judges on Water Justice*, presented in March 2018 at the 8th World Water Forum in Brasília (Brazil). Principle no. 6 affirms that: 'Consistent with the principle *in dubio pro natura*, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems.'[83]

Immediately after being included in the *Brasília Declaration*, the *in dubio pro aqua* brocardo has been mentioned by the Argentine Supreme Court in 2019 (see above, § 4), which also adopted the IUCN *World Declaration*'s indications regarding the *in dubio pro natura* principle. In the same year, but on the other side of the globe, Principle 6 was cited in a decision of the Supreme Court of Pakistan.[84]

In 2018, the volume 'Environmental Legal Principles for an Ecologically Sustainable Development' was published. It is the result of the collaborative commitment in which the Environmental Commission of the Ibero-American Justice Summit, the Global Judicial Institute for the Environment, the IUCN World Commission on Environmental Law and the Goodwill Ambassadors of the Organization of American States have participated. This book is a compendium of 95 environmental principles collected in different jurisdictions around the world. The aim is to disseminate these principles among judges and other legal professionals so that they apply them in the environmental cases they deal with. Principle

[83] The *Brasília Declaration of Judges on Water Justice* is available at https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/wcel-important-documentation/brasilia-declaration-judges-water-justice.

[84] Supreme Court of Pakistan (Appellate Jurisdiction), case *D.G. Khan Cement Company Ltd. Vs Government of Punjab through its Chief Secretary, Lahore, etc.*, C.P.1290-L/2019, available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210415_13410_judgment.pdf.

57 is entitled '*Principio in dubio pro natura*' and is a transposition of Principle 5 of the IUCN *World Declaration*.[85]

Finally, in 2020, the International Bar Association published the report entitled *Model Statute Articles for Proceedings Challenging Government Failure to Act on Climate Change*. This is a kind of guide aiming to clarify certain jurisprudence issues in the context of climate change actions against governments and to support judges dealing with environmental cases. Art. 2 is entitled 'Applicability and Interpretation'. Para. 3 of Art. 2 sets out the *in dubio pro clima* criterion in the following terms: 'In cases of doubt as to the interpretation of any Act or legal instrument, the Court or Tribunal shall prefer the interpretation most favourable to protecting the environment from any likely adverse effects and adverse effects of climate change'.[86]

In the European context, several steps have been made to provide for legal recognition of the *in dubio pro natura* and *in dubio pro clima* criteria. In particular, scholarly debates regarding the establishment of specific rights for nature in the European Union consider the aforementioned criteria as foundational elements for a proper legal framework.[87] Moreover, the Council of Europe is currently debating whether the European Convention on Human Rights should provide references to the right to a healthy environment; in doing so, a proposal explicitly mentions the *in dubio pro natura* among other environmental principles.[88]

The global trend is thus marked by the activity of organizations and associations aiming to foster the use of environmental principles. Certainly, a strong impetus in that direction with regard to the *in dubio pro natura* criterion would be assured by its recognition as a general principle of international law.

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[85] The book is available at http://www.cumbrejudicial.org/images/imagenes/Principios_Jur%C3%ADdicos_Medioambientales_para_un_Desarrollo_Ecol%C3%B3gicamente_Sustentable.pdf.

[86] The *Model Statute Articles for Proceedings Challenging Government Failure to Act on Climate Change* is included in IBA, *Model Statute Articles for Proceedings Challenging Government Failure to Act on Climate Change. An International Bar Association Climate Change Justice and Human Rights Task Force Report*, 2020, available at https://www.ibanet.org/Climate-Change-Model-Statute.

[87] See Michele Carducci *et al*., *Towards an EU Charter of the Fundamental Rights of Nature*, Brussels, European Economic and Social Committee, 2020, 115.

[88] See Article 4 of the Draft Resolution, in the Report *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, Doc. 15367, 13 September 2021, at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=29409&lang=en.

VI. THE LEGAL NATURE OF THE *IN DUBIO PRO NATURA* PRINCIPLE: A PARTICULAR CUSTOM OR A GENERAL PRINCIPLE OF INTERNATIONAL (ENVIRONMENTAL) LAW?

Having analysed the practice in Latin American countries, the article will now discuss whether the principle might be considered either as a regional or particular custom or as a general principle of international (environmental) law.

VI.1. AN INCHOATE REGIONAL OR A CONSOLIDATED PARTICULAR CUSTOM?

Given the presence, even in constitutions, of the *in dubio pro natura* principle in some Latin American countries, one can ask whether it might have consolidated into a regional custom. A regional/local/special/particular[89] custom consolidates when the two elements of international customs are present, namely a consistent practice (in the case of regional custom, of a specific area or region of the world), and *opinio juris*, meaning that the States contributing to the practice believe that they are complying with a legal obligation.[90]

The rule is purely local, limited to a specific area, in the sense that 'it could not successfully be asserted in favour of, or against, States outside the region.'[91] Examples are the *uti possidetis* principle, according to which the newly independent States keep the territorial borders determined by the colonial power, and the practice of diplomatic asylum in Latin America.[92] The latter was invoked by Colombia in front of the International Court of Justice to justify the political asylum granted to Haya della Torre, a Peruvian national.[93] In that case, the Hague Court did not support the existence of a custom in the specific case, most importantly because Peru objected to its formation, but did not exclude that this kind of custom could consolidate either.[94]

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[89] These expressions have been adopted to identify a custom that has developed among a small number of States. The International Law Commission favored the expression 'particular'. We will use here, for the purposes explained in this paragraph, both the adjectives 'regional' and 'particular'.

[90] Khagani Guliyev, *Local Custom in International Law*, in *International Community Law Review*, 19:1, 2017, 47-67.

[91] Anthea Roberts, Sandesh Sivakumarani, *The theory and reality of the sources of international law*, in M.D. Evans (ed.), *International Law*, Oxford, OUP, 2018, 97. See also, *inter alia*, Gérard Cohen-Jonathan, *La coutume locale*, in *Annuaire Français de droit international*, 7, 1961, 119-140: '*la coutume locale est une coutume qui ne lie qu'un nombre restreint d'États*'; Anthony D'Amato, *The Concept of Special Custom in International Law*, in *American Journal of International Law*, 63, 1969, 211-223.

[92] It started as a general principle of law, *Frontier Dispute, Burkina Faso v. Mali* [1986] ICJ Reports 554, para. 23.

[93] *Asylum, Colombia v Peru* [1950] ICJ Report 266.

[94] Dominique Carreau, Fabrizio Marrella, *Diritto internazionale*, Milano, Giuffrè, 2018, 259.

According to the International Court of Justice, a local custom can also consolidate with the practice of two States only.[95] Compared to the general custom, the practice must not only be followed by the generality of the States, but by all of them; therefore unanimity is necessary for the purposes of a local custom.[96] Studying customary law, the International Law Commission defined particular customary law at Conclusion 16 of its final *Draft Conclusions on identification of customary international law*:

> '1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States. 2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.'[97]

General practice, according to Conclusion 8, must be 'sufficiently widespread and representative, as well as consistent.' Despite the emphasis on generality, the commentary focuses on the participation of 'all the States among which the rule in question applies'; in the words of the Commission: 'Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.'[98]

Let us now shift to the *in dubio pro natura* principle: would it be possible to argue that it can be considered as a regional custom among the States that have contributed to its formation? For the time being, the practice refers to the jurisprudence of the courts of some countries, namely, as we have seen, Ecuador, Costa Rica, Mexico and Brazil. Nonetheless, as it was argued, rights of nature, widely recognized in Latin American countries, should 'logically compel the application of *in dubio pro natura* in order to protect the rights of nature in the same manner as the rights of other recognized persons.'[99] This Article contends that, in light of the definition of particular custom elaborated by the International Law Commission,

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[95] Right of passage over Indian Territory, *Portugal v India* [1960] ICJ Reports 6, 39: 'The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States'.

[96] Khagani Guliyev, *supra* note 89, 52. Unanimity was proposed by Sir Michael Wood, ILC Special Rapporteur, in Third Report on Identification of Customary International Law, A/CN.4/682 [2015] 58.

[97] Draft Conclusions on identification of customary international law [2018] adopted by the International Law Commission at its seventieth session and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65). The report was published in *Yearbook of the International Law Commission*, 2018, vol. II, Part Two.

[98] Draft conclusions on identification of customary international law, with commentaries [2018] 156, published in *Yearbook of the International Law Commission*, 2018, vol. II, Part Two.

[99] Nicholas Bryner, *supra* note 37, 168.

in dubio pro natura is an inchoate regional custom, and that its affirmation stems from the increasing affirmation of the rights of the nature, which has proved particularly significant in Latin American countries. It has also consolidated into a particular custom between the countries that have recognized this principle in their jurisprudence. As stressed by the International Law Commission indeed, there is no reason why particular customary law 'could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.'[100] In practical terms, it would mean for example that, in the relations between the States that have endorsed this principle, the *in dubio pro natura* principle might informthe interpretation of existing international treaties or the negotiation of new ones.

VI.2. A GENERAL PRINCIPLE OF INTERNATIONAL (AND NOT ONLY ENVIRONMENTAL) LAW?

After delving into the potential nature of the principle as a particular custom, this article will now contend *de jure condendo* that *in dubio pro natura* might be considered as a general principle of international environmental law and a general principle of international law.

As it is known, general principles are mentioned in Article 38 of the Statute of the International Court of Justice, which lists among the sources of international law 'the general principles of law recognized by civilized nations.' It is not the purpose here to review the enormous amount of literature on the topic,[101] but to start from the most recent developments regarding the sources of international law, to search for a legal reasoning in

[100] A/73/10, 155.

[101] See, for example, Gerald Fitzmaurice, *The General Principles of International Law. Considerations from the Standpoint of the Rule of Law*, in *Recueil des Cours de l'Académie de La Haye*, 1957, II; Robert Y. Jennings, *General Course on Principles of International Law*, in *Recueil des Cours de l'Académie de La Haye*, 121, 1967-II, 323; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications, 1987 (1953); Geza Herczegh, *General Principles of Law and the International Legal Order*, Budapest, Akadémiai Kiadó, 1969; Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in F. Kalshoven (ed.), *Essays on the Development of the International Legal Order. In Memory of Haro F. Van Panhuys*, Alphen aan den Rijn, Kluwer Academic Publishers, 1980, 53-76; Béla Vitányi, *Les principes généraux du droit (tendances doctrinales)*, in *Revue générale de droit international public*, 86, 1982, 48-116; M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, in *Michigan Journal of International Law*, 11, 1990, 768; Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden-Boston, Martinus Nijhoff, 2008; Giorgio Gaja, *General Principles of Law*, in *Max Planck Encyclopedia of Public International Law*, 2013, http://opil.ouplaw.com; Laura Pineschi, *I principi del diritto internazionale dell'ambiente: dal divieto di inquinamento transfrontaliero alla tutela dell'ambiente come* common concern, in R. Ferrara, M.A. Sandulli (eds), *Trattato di diritto dell'ambiente*, Milano, Giuffrè, 2014, 93-152; Elena Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept*, in L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, Cham, Springer, 2015, 125.

favor of the main argument. General principles of international law have been studied by several scholars, without much of an agreement on their nature. Wolfrum identified several purposes of the general principles, such as systemizing legal norms – using the category of umbrella principles – serving as a 'tool for interpretation' and 'in progressive development of international law'.[102] According to Pineschi, general principles identify rules that have not yet consolidated as binding at the international level, but express fundamental values or objectives for the international community, aimed at addressing the behavior of States both as 'inspirational instruments for treaty and customary law' and as 'interpretative instruments' of existing rules.[103] The International Law Commission, after the conclusion of the works on the issue of customary law, chose general principles of law as topic of its future analysis.[104] Despite being a work in progress, not yet concluded, the initial analysis of the Special Rapporteur Marcelo Vázquez-Bermúdez is noteworthy and offers a solid legal background to be applied to the principle under analysis here. In his first report of 2019, Vázquez-Bermúdez focused on two categories, which in his opinion 'appear to be supported by practice and widely accepted by scholars,'[105] namely general principles of law derived from national legal systems and general principles of law formed within the international legal system. As for the former, it is well acknowledged that these principles are common to a majority of national legal systems, and they must be 'transposed' to the international legal one.[106] How these principles can be assessed to have become part of the international legal system has been the object of the second report by the Special Rapporteur: there needs to be a 'sufficient commonality across national legal systems,'[107] and the ascertainment of the transposition of the common principle to the international legal system.[108] The latter occurs under two circumstances: the compatibility of the principle with fundamental principles of international law; and the existence of the adequate conditions for its application in the international legal system.[109]

[102] Rüdiger Wolfrum, *General Principles of Law*, in *Max Planck Encyclopedia of International Law*, 2010, 7, 8 and 20.
[103] Alessandro Fodella, Laura Pineschi, *supra* note 22.
[104] See at https://legal.un.org/ilc/guide/1_15.shtml.
[105] First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur A/CN.4/732 [2019] para. 189.
[106] Ibidem, para. 225. International status of South-West Africa, Advisory Opinion [1950] ICJ Reports 128, Separate Opinion of Judge McNair, 148: 'International law has recruited and continues to recruit many of its rules and institutions from private systems of law'.
[107] A/CN.4/732 [2019] para. 65.
[108] Ibidem, para. 72.
[109] Ibidem, 74.

With regard to the *in dubio pro natura* principle, the sufficient commonality cannot be demonstrated, therefore the second requirement of its transposition at the international level is worthless, though the principle might be said to play 'a constructive role at the international level,'[110]

Let us move to the second category, which was not *per se* excluded from the scope of Article 38:[111] general principles of law formed within the international legal system. Divergent opinions emerged within the International Law Commission on this specific matter, though.[112] If, on the one hand, many members generally supported the idea of principles originating within the international legal system, on the other hand, other experts expressed concerns on several aspects, including the 'apparent insufficient or inconclusive practice' regarding this category of general principles of law; the possible overlapping with the concept of customary international law; and the danger of loose criteria for their identification.[113] According to the Special Rapporteur, the identification of general principles formed with the international legal system comes from their wide recognition in treaties and other international instruments; the fact that they underly general rules of conventional or customary law; their being inherent in the basic features and fundamental requirements of the international legal system.[114] With regard to the latter two factors, the methodology is deductive.

For the *in dubio pro natura* principle, for example, it would mean that it can be deduced from other existing norms, which might be either the precautionary principle or the right to a healthy environment.

As for the former, it might be the easier option, because, despite its dubious nature according to international legal scholarship, it is very well consolidated as procedure followed when there is scientific uncertainty on the possible risks on human health, animals, plant and the environment. As we said, however, the *in dubio pro natura* principle does not necessarily require scientific incertitude.

The second option is more complicated for the opposed reason, namely for the difficulty in ascertaining the legal nature of the (human) right to a healthy environment. The consolidation of a right to a healthy environment in international customary law can be

[110] Application of the Interim Accord of 13 September 1995*, the former Yugoslav Republic of Macedonia v Greece* [2011] ICJ Reports 695, Separate Opinion of Judge Simma.
[111] A/CN.4/732 [2019] para. 232.
[112] As well as in legal scholarship. See, in that respect, Carpanelli, *supra* note 100, 127.
[113] Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur A/CN.4/741 [2020] para. 114.
[114] Ibidem, para. 119.

considered to be achieved.. In his 2019 report, the Special Rapporteur on Human Rights and the Environment acknowledged that the right to a healthy environment is already recognized by a majority of States in their constitutions, legislations and various regional treaties to which they are parties. He also recognized that, in spite of this, 'the right to a healthy environment has not yet been recognized as such at the global level',[115] and elaborated States' obligations with regard to a specific aspect of this right, namely the right to breathe clean air. The recognition at the international level came in 2021 and 2022, with two historic resolutions: the first by the Human Rights Council[116] and the second one by the UN General Assembly[117] which called upon States, international organisations, and business enterprises to scale up efforts to ensure a healthy environment for all.

If it is true, on the one hand, that States have proved to be extremely reluctant in accepting international legal obligations in the field of climate change measures, on the other hand courts and national parliaments, urged by civil society, have marked significant steps forward.[118] As stressed by the Special Rapporteur Boyd, 'the loss of global biodiversity is having and will continue to have devastating effects on a wide range of human rights for decades to come […] we can simply not enjoy our basic human rights to life, health, food and safe water without a healthy environment'.[119] The apparent inherent anthropocentric nature of the human right to a healthy environment can be overcome by a trend in the jurisprudence that follows the lines of the Inter-American Court of Human Rights jurisprudence we have mentioned above, considering the wellbeing of nature not as functional to the wellbeing of humans but independent.

An even more decisive ecocentric move would be to derive the *in dubio pro natura* principle from the rights of nature, which are present in some national constitutions of Latin American countries. Their nature is however flawed. Michele Carducci posited that legal scholarship should open to the concept of 'rights of nature' in order not to be tempted to

[115] It is possible to find reference to the right to a healthy environment in the 1972 Stockholm Declaration, in the African Charter of human and peoples' rights (Article 24, right to a satisfactory environment), in Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, Article 11: right to live in a healthy environment), and in the Convention on Access to information, public information, public participation in decision-making and access to justice in environmental matters (preamble, right to a "healthy environment").

[116] Resolution No. 48/13 of 8 October 2021. The resolution was adopted with 43 votes in favour and 4 abstentions.

[117] Resolution No. A/76/L.75 of 26 July 2022. The resolution was adopted with 161 votes in favour and 8 abstentions.

[118] Sara De Vido, *A Quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer*, in *Jus Cogens*, 3:2, 2020, 105. See, for example, the *Urgenda* case. Hague Court of Appeal, Hof's Gravenhage, 9 Oktober 2018, AB 2018, 417, m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda), in *Harvard Law Review*, 2019, 2090 ff.

[119] See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24738&LangID=E.

compare human balances on one hand, and ecological balances on the other, and to 'overcome "systemic blindness" which are no longer sustainable by the entire human species'.[120] We definitely agree with this position, though the trend at the international level has just started to mark its way.

The third category identified by the Special Rapporteur of the International Law Commission is particularly fascinating, because it detects those general principles that are inherent in the basic features and fundamental requirements of the international legal system. The methodology for identification is also deductive. In this sense, the general principle would be 'a creation of the community of nations.'[121] It must be deemed to be a necessary consequence of some requirements of the international system, and differentiates from a customary rule, because it is does not need the respect of the elements of practice and *opinio juris*, but requires 'recognition' by the community of nations as key factor.[122] This article contends that, despite this outcome being desirable, the affirmation of the *in dubio pro natura* principle as a general principle recognized as inherent in the basic features of the international legal system would require a change in approach to international law, moving from a strict anthropocentric view to a more ecocentric one.[123]

Even though it can be argued that the *in dubio pro natura* principle is not a general principle of international law, one might refer to it as a general principle of environmental law.[124] A 'passionate defence' of general principles of international environmental law was presented by the International Court of Justice Judge Cançado Trindade in his separate opinion to the *Pulp Mills* case.[125] He argued that principles such as the prevention and the precautionary ones constitute 'formal sources of international law under Article 38 (1) (c) ICJ Statute', representing a 'universal juridical conscience,'[126] without looking into the presence of the principle in different legal systems around the world. In this sense, the *in dubio pro natura* principle might well amount to a general principle of environmental law. The position of this judge was not mirrored however in the final judgment of the International Court of Justice. Bodansky emphasized a lot the role of general principles in international environmental law, even more than international customs, contending that they 'must be

[120] Michele Carducci, *supra* note 55, 521.
[121] A/CN.4/741 [2020] para. 146.
[122] Ibidem, para. 151.
[123] Sara De Vido, *supra* note 118.
[124] On general principles, see, for example, Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi, Jan Wouters (eds), *General Principles and the Coherence of International Law*, The Hague, Brill, 2019.
[125] Jutta Brunnée, International Climate Change Law, Oxford, OUP, 2017, 974; case concerning Pulp Mills on the River Uruguay, *Argentina v Uruguay* [2010] ICJ Reports 14.
[126] Cançado Trindade, separate opinion, para. 17, 19.

justified on content-based rather than source-based grounds'.[127] As a consequence, States and international tribunals apply general principles 'not because [they] emanate from a valid source, but because they believe the principles are substantively correct'.[128] As it has happened for the *in dubio pro natura* principle, national courts have applied the principle because they considered it to be relevant in the cases, mainly environmental ones, under their analysis.

VII. CONCLUDING REMARKS

The importance of a principles-based approach to the environmental field is constantly emphasized, as this can establish hermeneutic guidelines useful for both legislators and legal practitioners called upon to apply the legislation in this area, and thus for identifying uniform criteria for solving the cases submitted to them, thus facilitating their task.[129] Within domestic legal systems, the *in dubio pro natura* criterion works as hermeneutic – thus interpretative – means for public authorities, as well as for courts and tribunals. Furthermore, it might offer key reasons to solve issues and clashes amongst legislative powers (i.e. centre/state relations in federal systems). In a comparative legal perspective, promoting the *in dubio pro natura* principle as an independent criterion, and possibly constitutionalizing it together with other principles of fundamental importance, such as those of prevention, precaution, and non-regression, would help to guide all legislation – not merely environmental legislation – in favor of the nature.

The diffusion of the principle *in dubio pro natura* as an autonomous criterion can be seen as a signal of the transformation of environmental law into ecological law. Ecological law is emerging as a field of law underpinned by a new holistic cosmovision, according to which human beings are an inherent part of the ecosystems in which they are placed.[130] The consolidation of ecological law requires a reinterpretation of constitutional, legal, doctrinal and judicial formants in the light of the holistic thinking. This is a Copernican

[127] Daniel Bodansky, Ellen Hey, Jutta Brunné (eds), *The Oxford Handbook on International Environmental Law*, Oxford, OUP, 2010, 201.
[128] Ibid.
[129] See Domenico Amirante, *Ambiente e princìpi costituzionali nel diritto comparato*, in Id. (ed.), *Diritto ambientale e Costituzione. Esperienze europee*, Milano, FrancoAngeli, II ed., 2003, 18.
[130] See Massimiliano Montini, *The transformation of environmental law into ecological law*, in Kirsten Anker *et al*. (eds), *From Environmental to Ecological Law*, Routledge, 2021, 11. For other environmental principles underpinning ecological law, see Serena Baldin, *La sostenibilità ecologica e i principi eco-giuridici per la salvaguardia del sistema Terra*, in *Rivista di Diritti Comparati*, 3, 2022, 239 ff.

revolution for most countries in the world, but Ecuador and other legal orders show that it is possible to take steps in this direction.

Moreover, the analysis conducted in these pages leads to the argument that the *in dubio pro natura* principle might be considered as a general principle of international law, according to the recent analysis by the International Law Commission and using the methodology of deduction, *de jure condendo*, relying on the gradual consolidation of a (human and non-human) right to a healthy environment as customary international law. If we limit our scope to international environmental law – and endorsing the progressive perspective by Bodansky and Judge Cançado Trindade – it would be possible to contend that, even without the presence of the principle in the generality of legal systems, the *in dubio pro natura* principle is making its way among the principles of international environmental law.