COOPERATION WITH NATIONAL JUDGES AND PROSECUTORS
IN THE FIELD OF EU ENVIRONMENTAL LAW

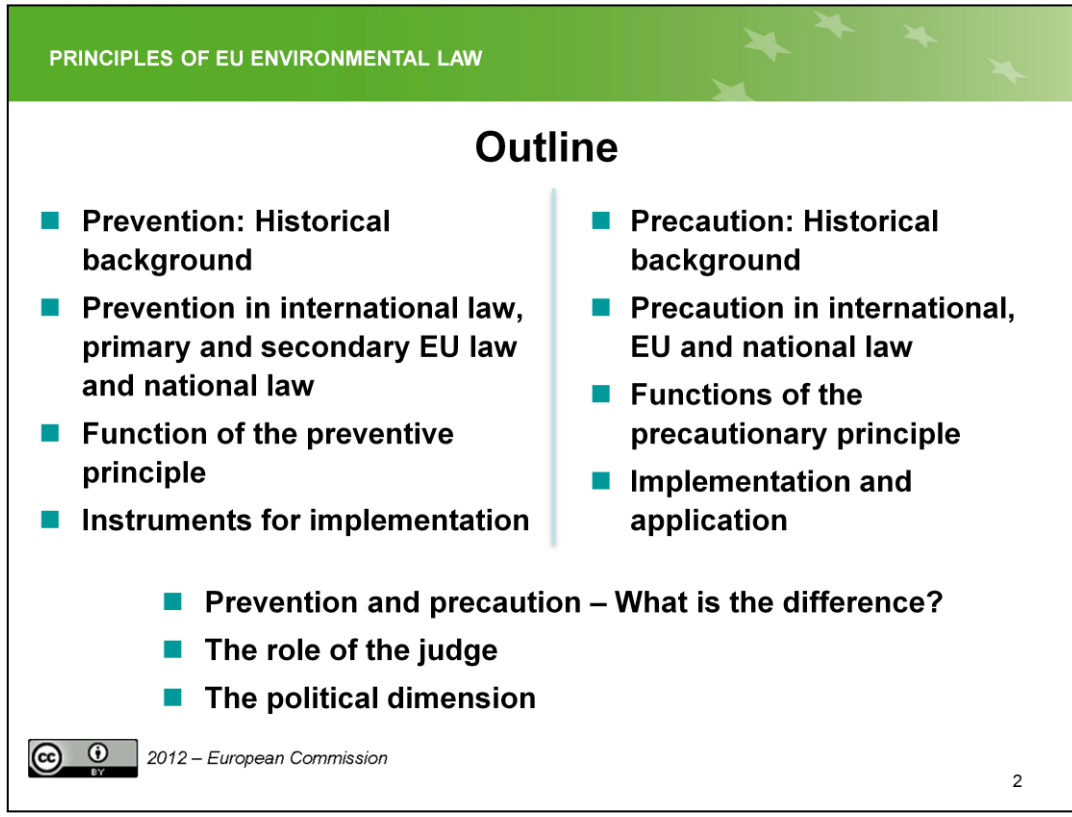
WORKSHOP ON EU LEGISLATION

PRINCIPLES OF EU ENVIRONMENTAL LAW

The Preventive and Precautionary Principle

Slide 1

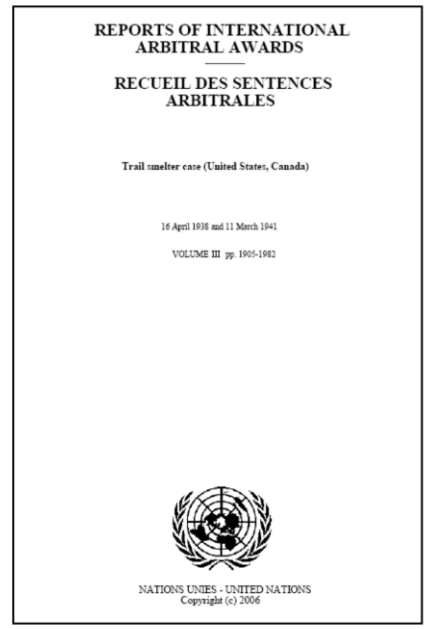
Presentation is on two other key principles of Environmental Law



Slide 2

The following presentation gives a general overview on the background, the functions and the implementation of the preventive and the precautionary principle in international, EU and national law. The difference between the two principles will also be explained.

Prevention: Historical background


REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Trail smelter case (United States, Canada)

16 April 1938 and 11 March 1941

VOLUME III pp. 1905-1982

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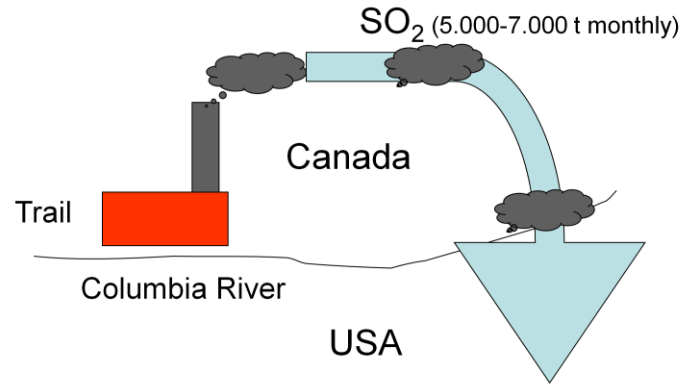
Slide 3

The “historical” case (“Trial smelter” – the name goes back to the village named “Trial” where the case took place), decided by the International (Arbitral) Court in 1941, can be considered as a first reference dealing with transboundary pollution.

Prevention: Historical background

The Trail Smelter case

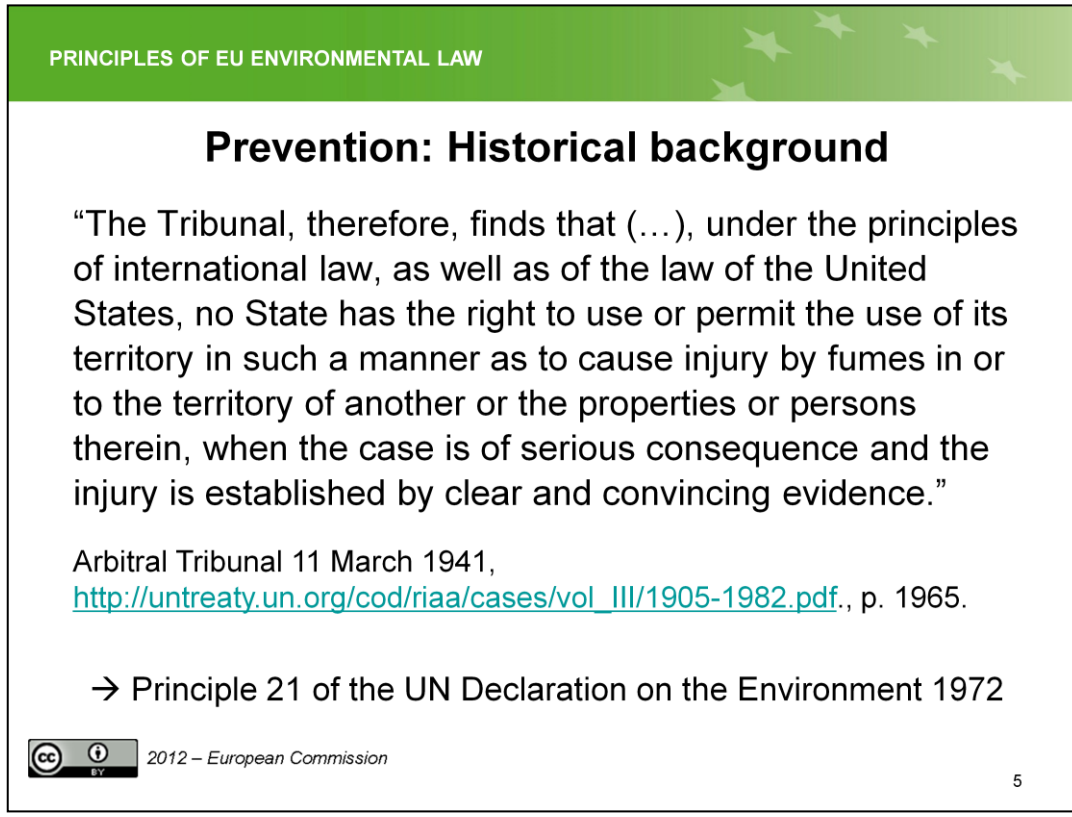


Damage to agriculture and forests

Loss of real estate value

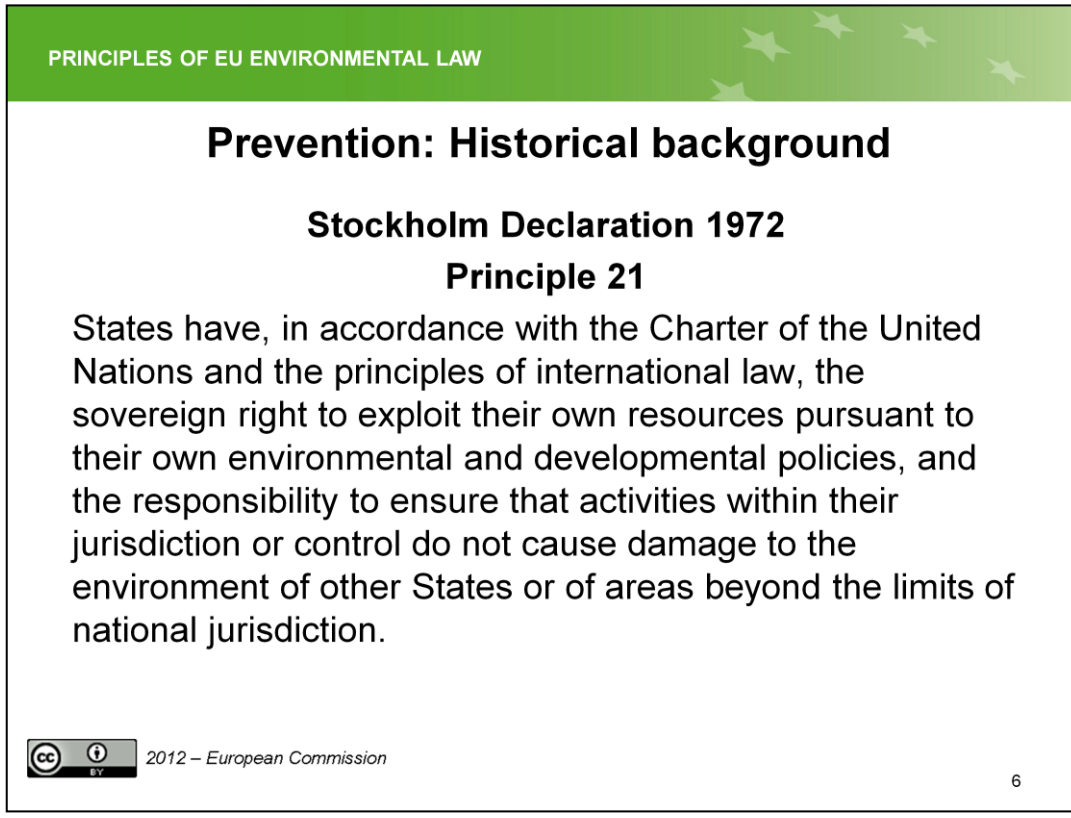
Slide 4

The slides summarizes the facts of the case. The village Trail is located in British Columbia, Canada, near the border to the United States, at the Columbia River. At this place a smelter is located where zinc and lead are smelted in large quantities since 1896. At the time when the decision was taken, about 5.000 to 7.000 tons of Sulphur dioxide were emitted monthly, causing serious damage to agriculture, forests and private property in the USA.



Slide 5

The core sentence of the decision taken by the Court is that there is a principle of international law, that there is state responsibility for environmental damage caused to other states, but under the condition of „serious consequences“ and „clear and convincing evidence“ → prevention.



Slide 6

The principle laid down by the Arbitral Tribunal in the Trial Smelter case is reproduced in Principle 21 of the Stockholm declaration …..

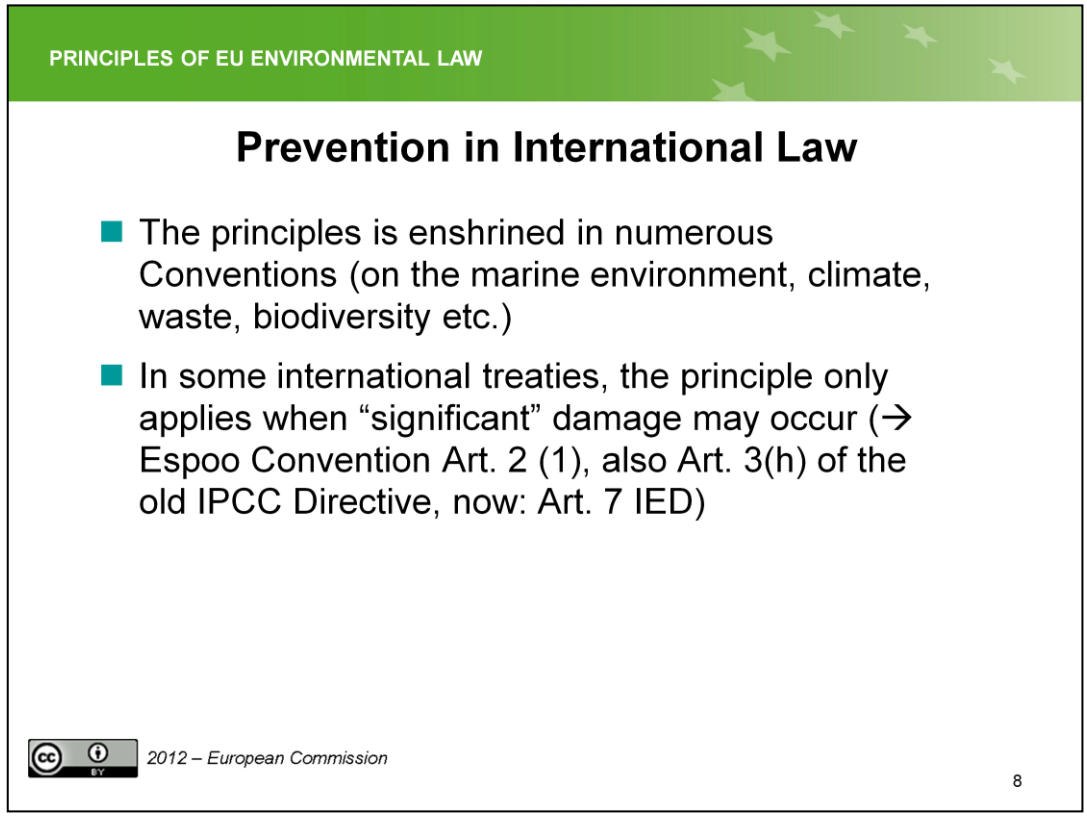
Prevention in International Law

Rio Declaration on Environment and Development

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

…. And literally adopted by principle 2 of the Rio Declaration



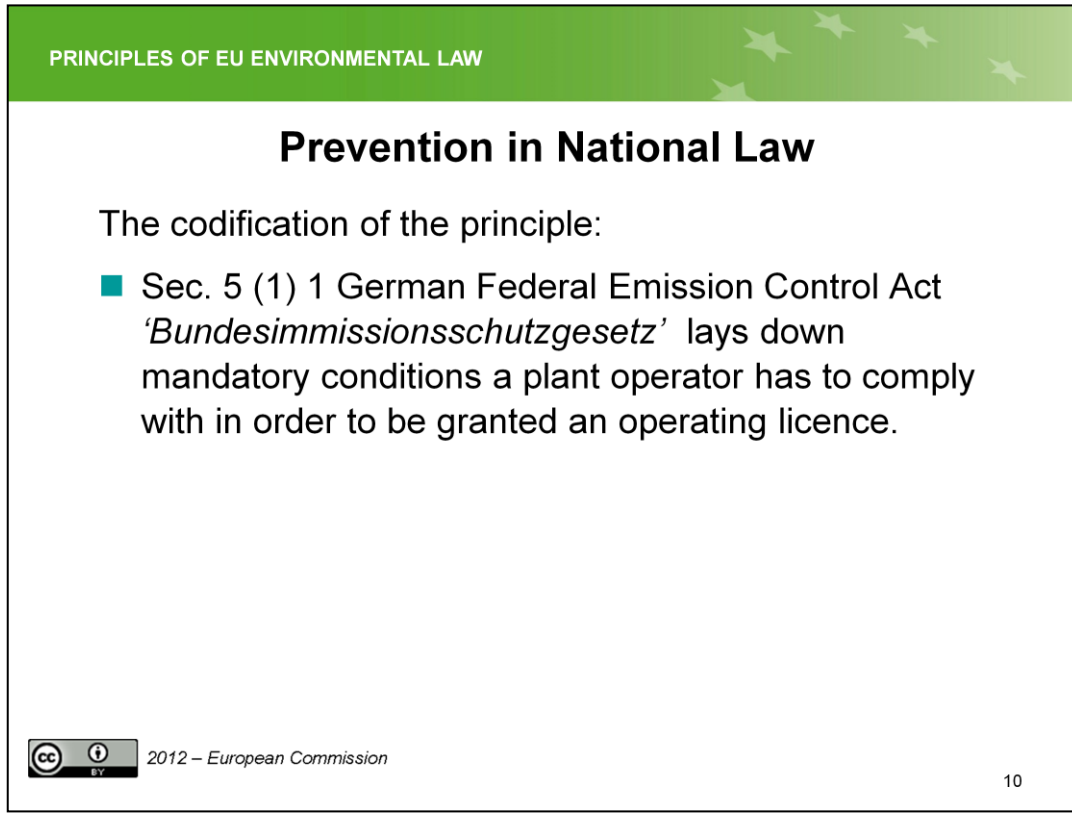
Slide 8

Prevention has since then been introduced in a number of international Conventions and also in EU law (we will talk about this later → other law); sometimes the application of the principle is restricted to cases where significant damage may occur.

Slide 9

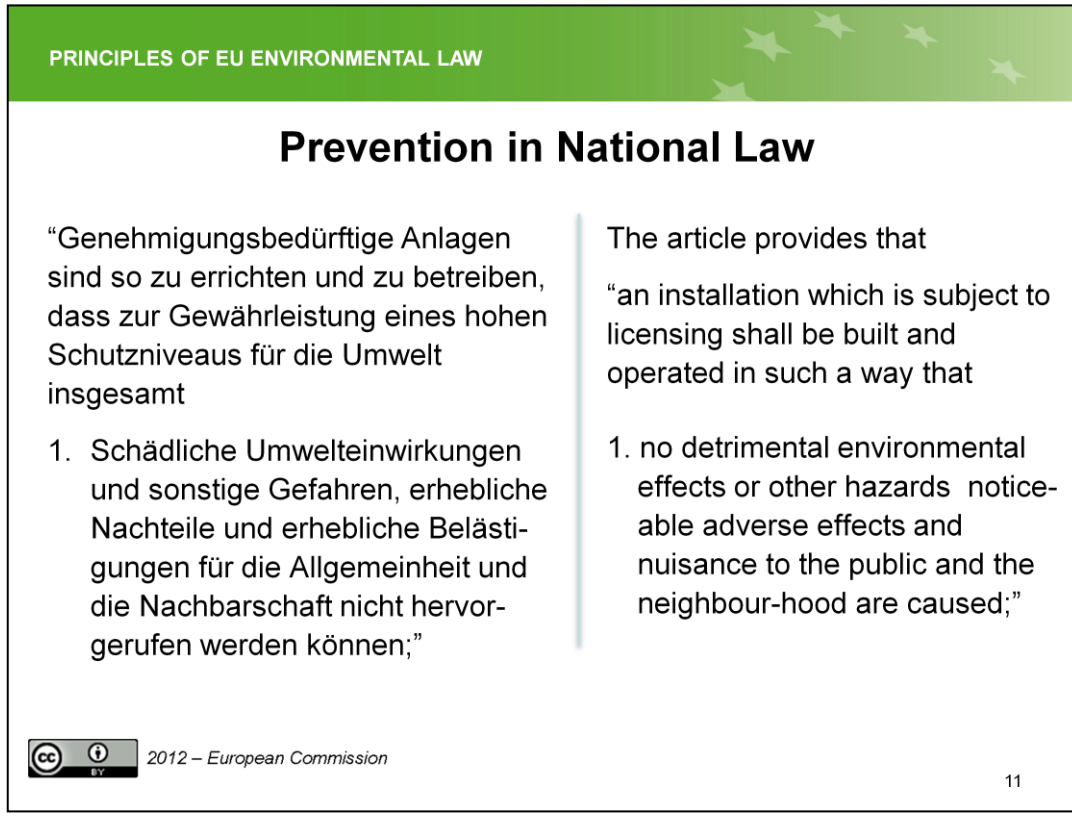
Art. 192 of the TFEU mentions the principles without defining though its modalities of application.

Numerous secondary legislation is based on the preventive approach, such as the Seveso Directive.



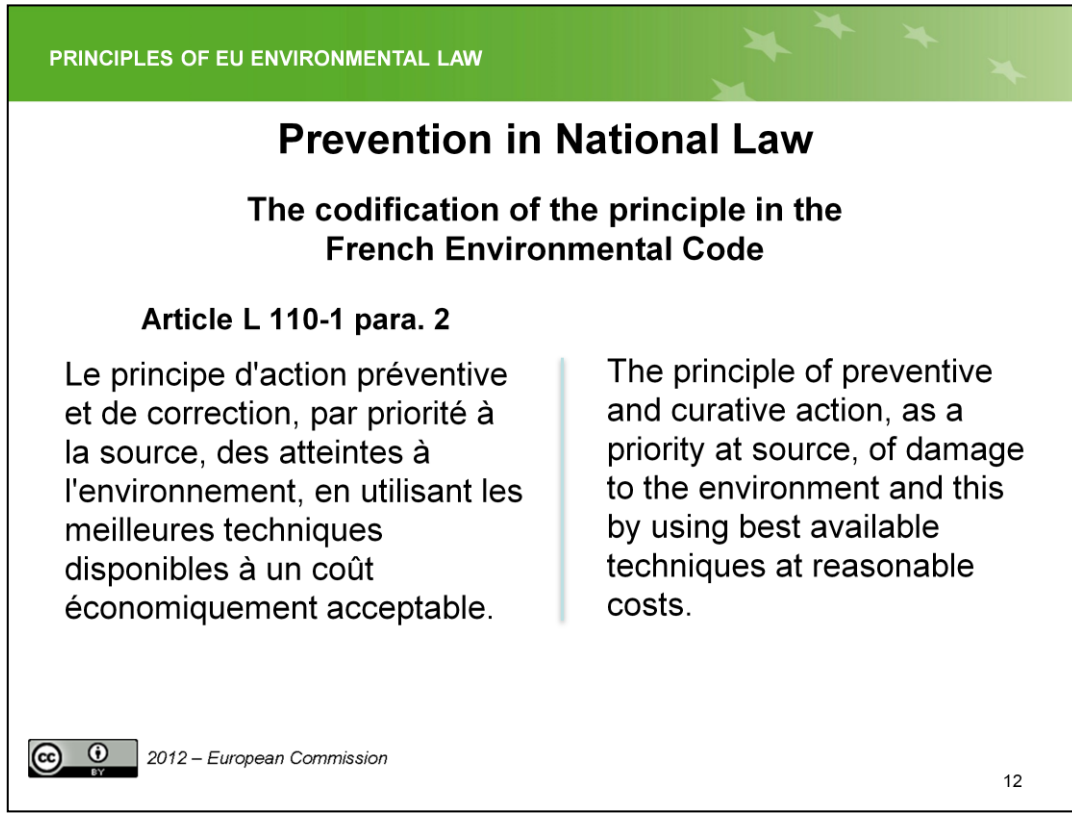
Slide 10

In Germany the preventive approach is laid down in pollution control law since 1974.



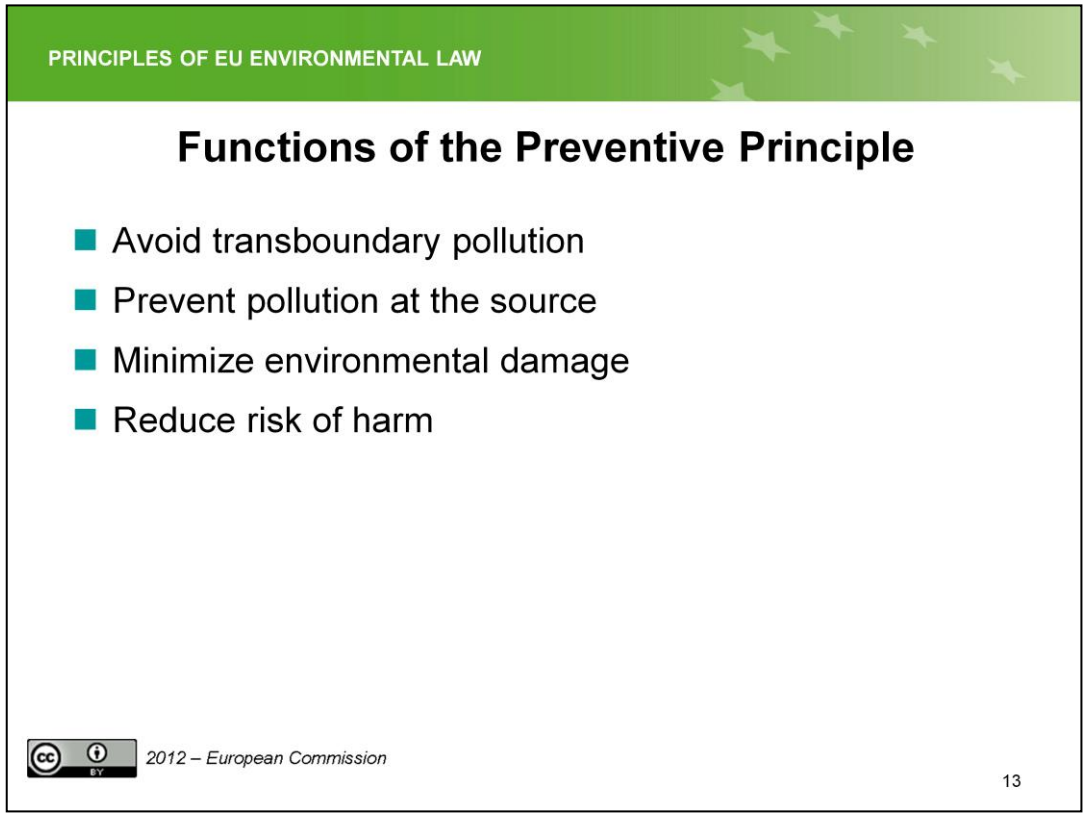
Slide 11

The plant operator has to proof, that his plant complies with all the relevant conditions to prevent negative effects and accidents. In the permitting procedure, the burden of proof lies with the plant operator.



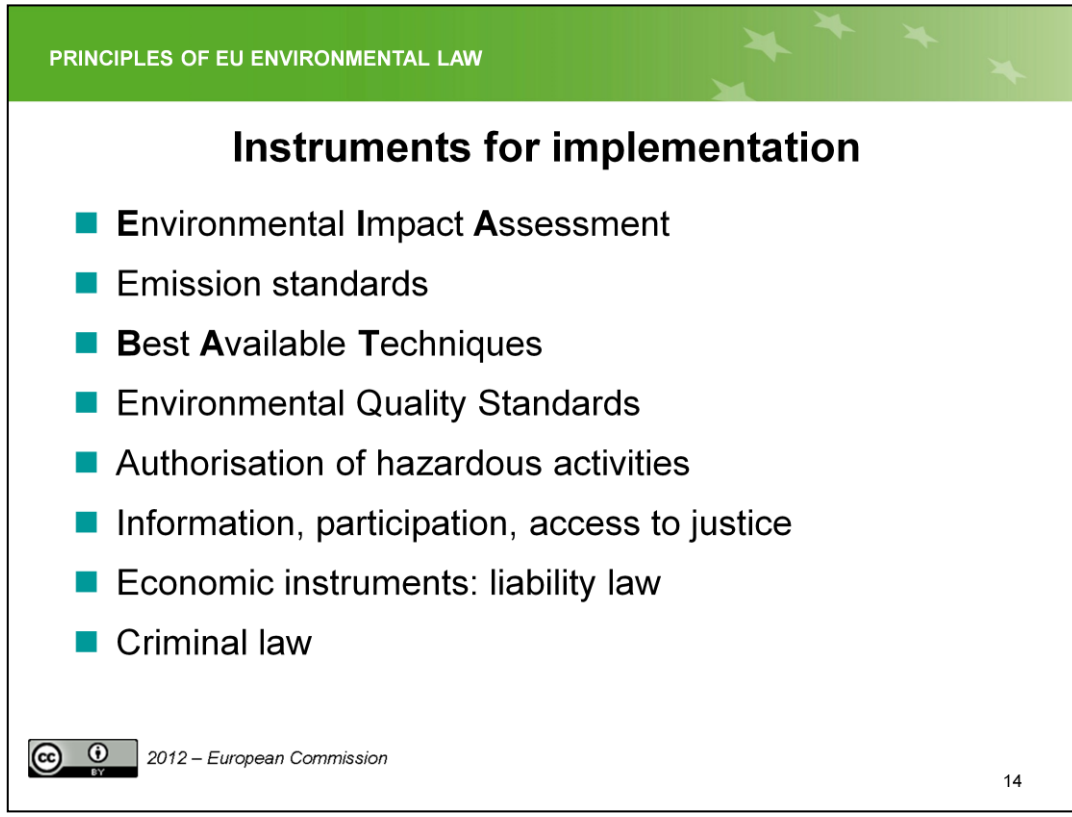
Slide 12

The principle is also enshrined in the French Environmental Code. Generally it seems, the the application of the Preventive principle is largely agreed in national environmental policy and law, nonetheless, its dimension may differ from one legal order to the other.



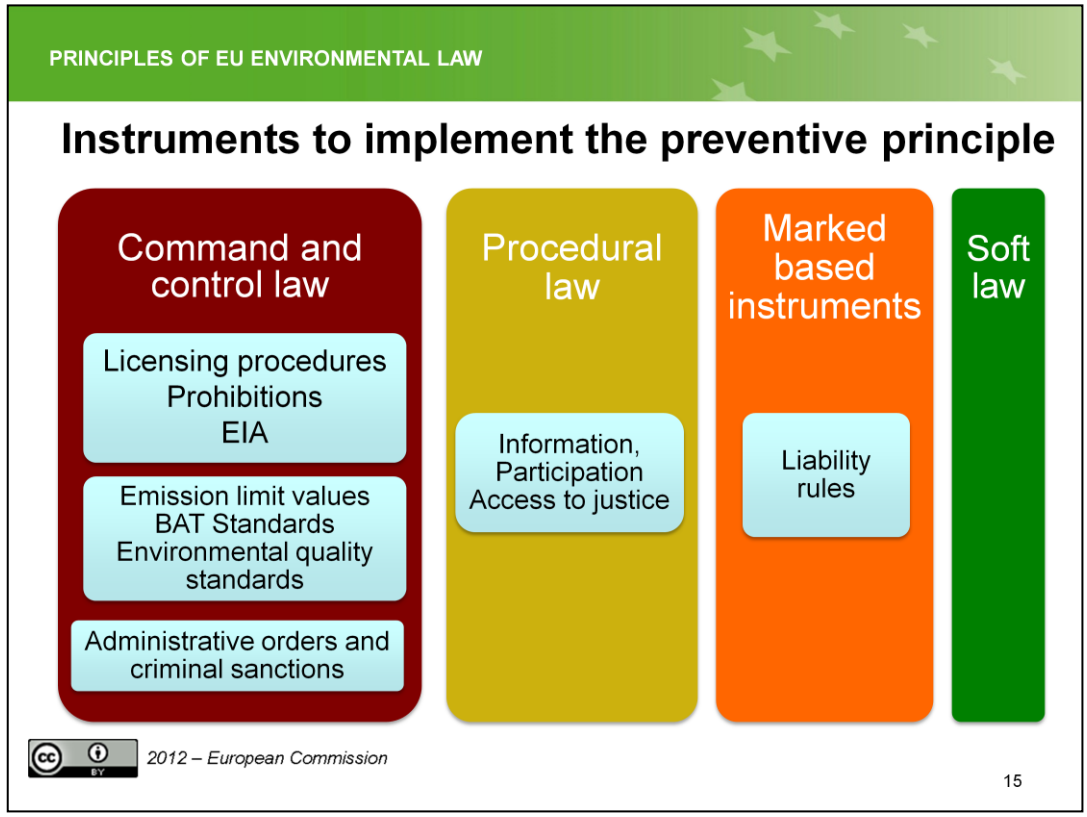
Slide 13

The main point is, that the preventive approach tries to anticipate possible (probable) negative effects and uses instruments to avoid that damage will occur. We may differentiate measures to prevent pollution/harm and to reduce/minimize the consequences if damage has nevertheless occurred.



Slide 14

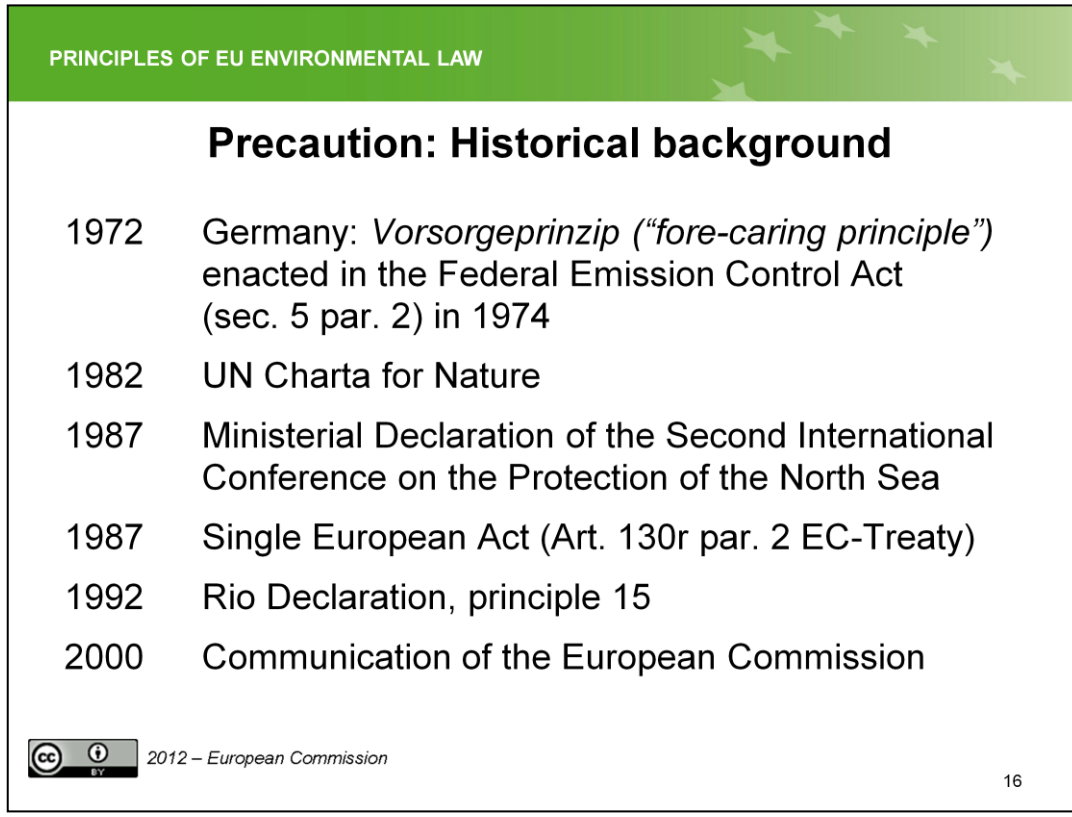
Basically, the instruments to implement the preventive principle do not differ so much from the instruments we already discussed to implement the PPP. But the main focus is of course on the instruments that prevent damage instead of curative measures. But even liability law has a preventive dimension, because the potential polluter will consider the economic loss when hold liable.



Slide 15

Who is addressee of the principle? Legislator in the first place, authorities and the courts in the second place.

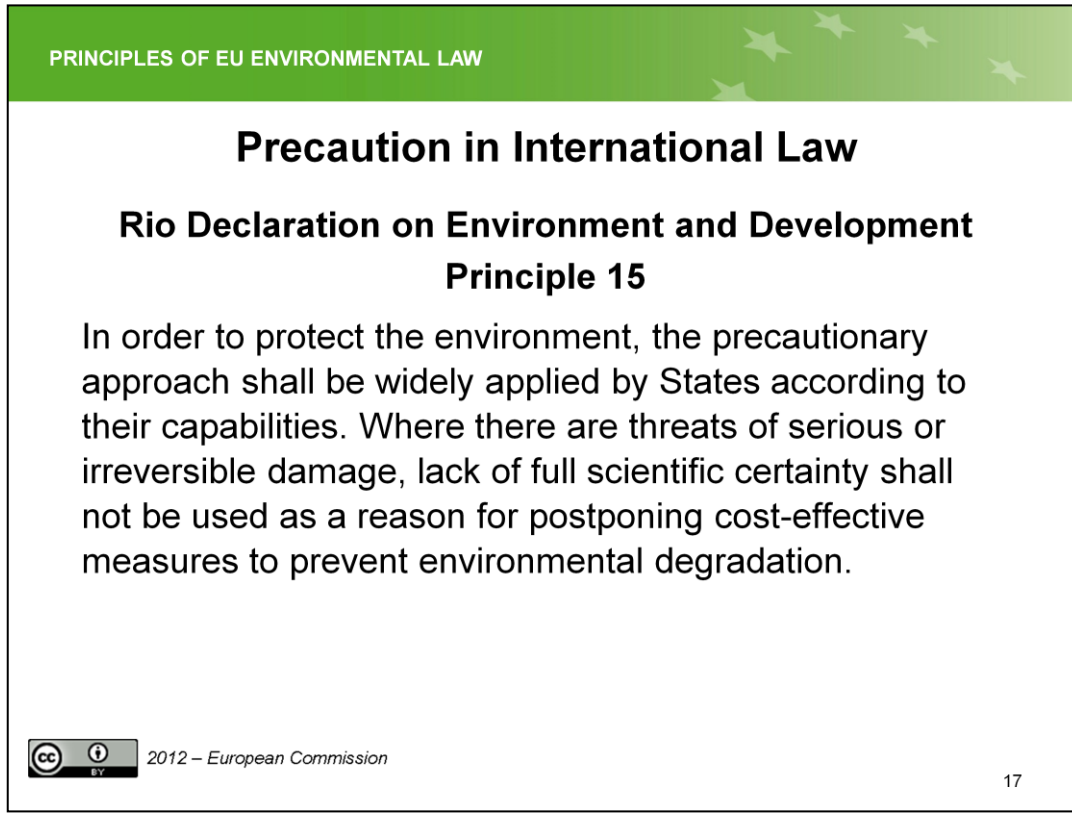
One may have different opinions on the appropriate instruments. In my opinion, still command and control law is the most important instrument to implement the Preventive approach. Secondly, what we call “procedural law” plays an important role (→ Arhus Convention), because the public and stakeholders are involved to enforce better compliance. Marked based instruments and voluntary approaches / agreements (soft law) may also contribute to successfully reduce environmental risks.



Slide 16

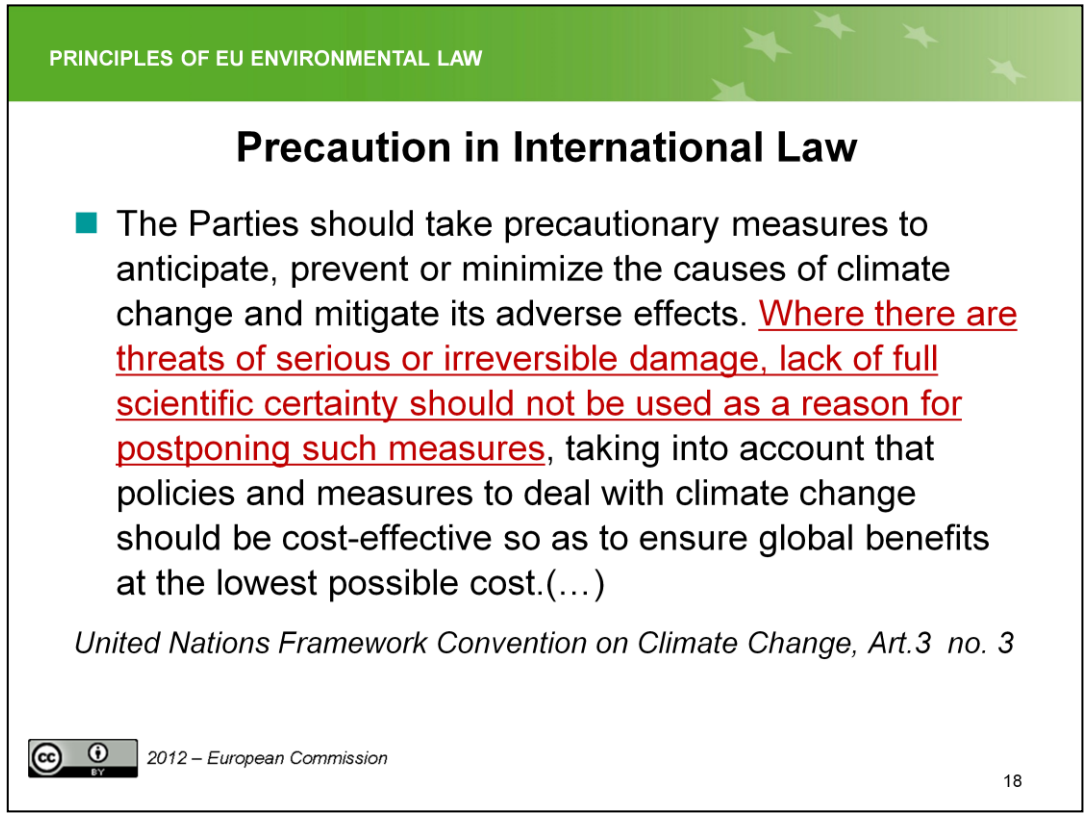
The second part of the presentation is dealing with the precautionary principle, certainly the most controversial one of the principles we are talking about.

The slide just illustrates some corner stones of the historical evolution of the principle. It is not necessary to go into detail here. On the international level, the Stockholm declaration 1972 did not yet mention the principle, but the Rio Declaration 1992 did. → See next slide.



Slide 17

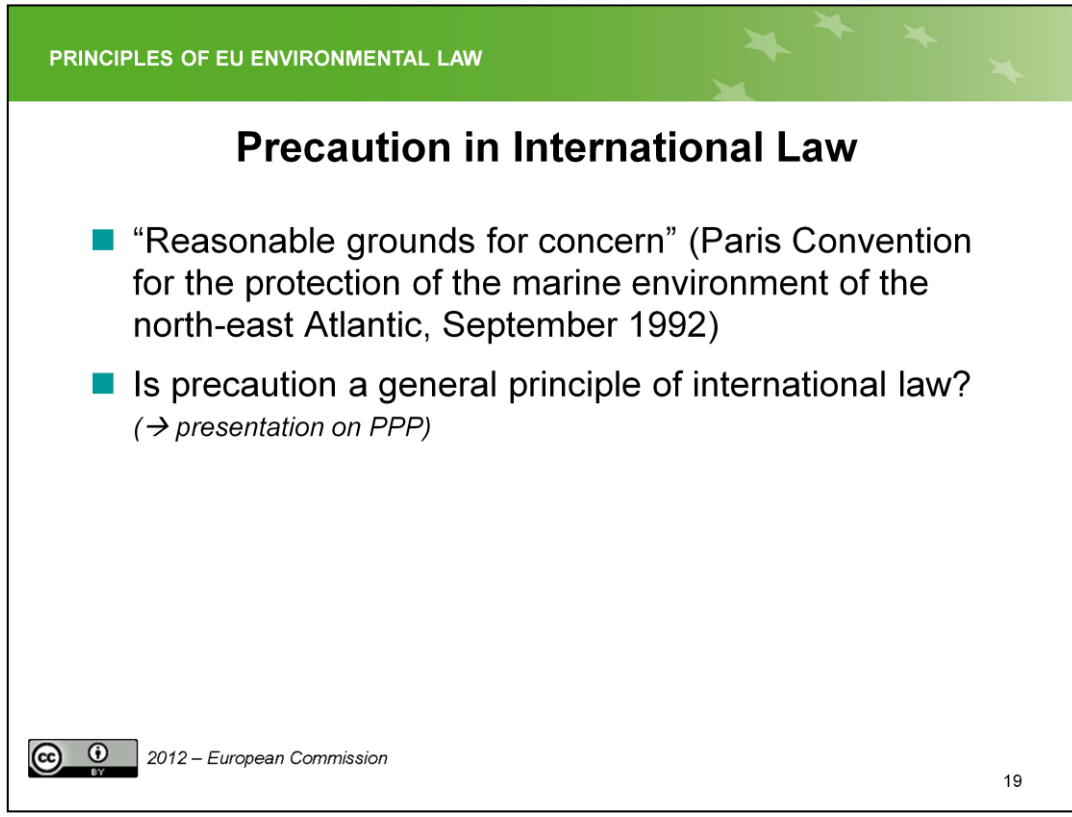
The Rio declaration tries to define the principle and describes its function.



Slide 18

The typical situation where the principle applies is, lack of full scientific certainty (= *scientific uncertainty*.).

The framework convention on climate change takes this up explicitly .



Slide 19

The wording may be different, like in the Paris Convention 1992, but usually the principle is limited in International law to situations where there is "Threat of serious damage" or "reasonable grounds for concern".

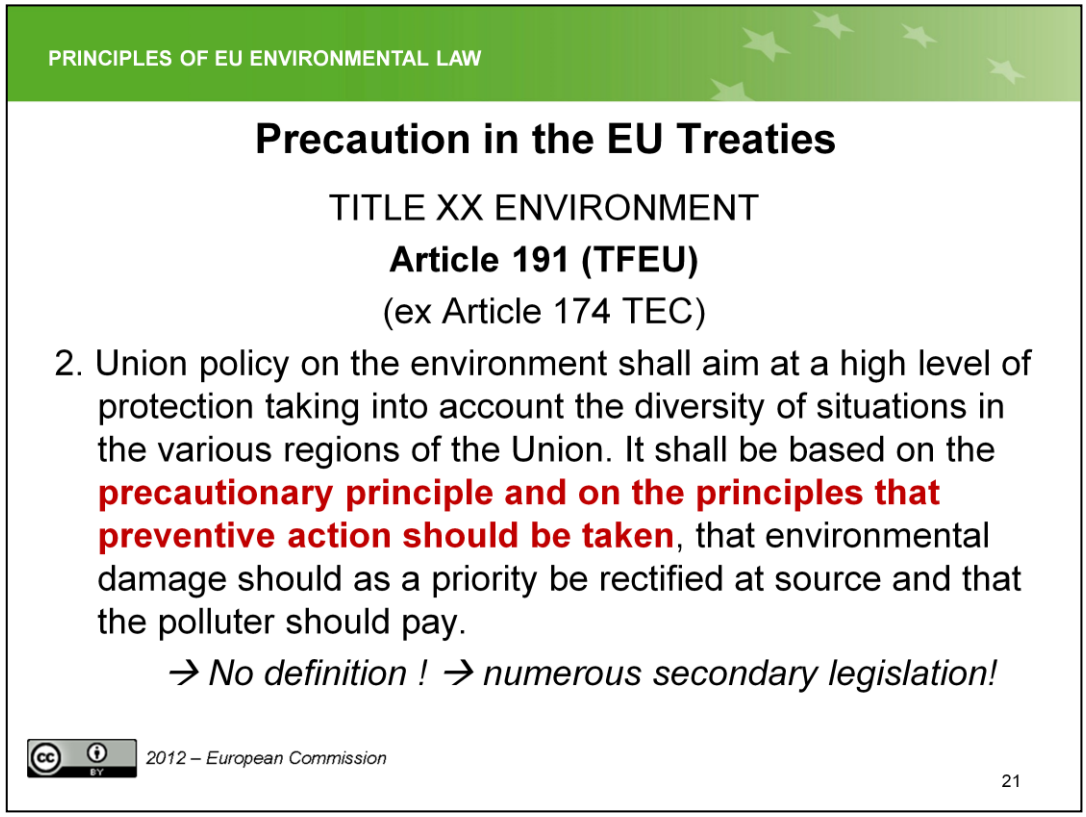
An interesting question is, if the precautionary principle is accepted already as a general principle of international law in terms of Art. 38 of the statute of the Court of La Hague or as customary international law.

Precaution in International Law

- *ITLOS opinion: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf*

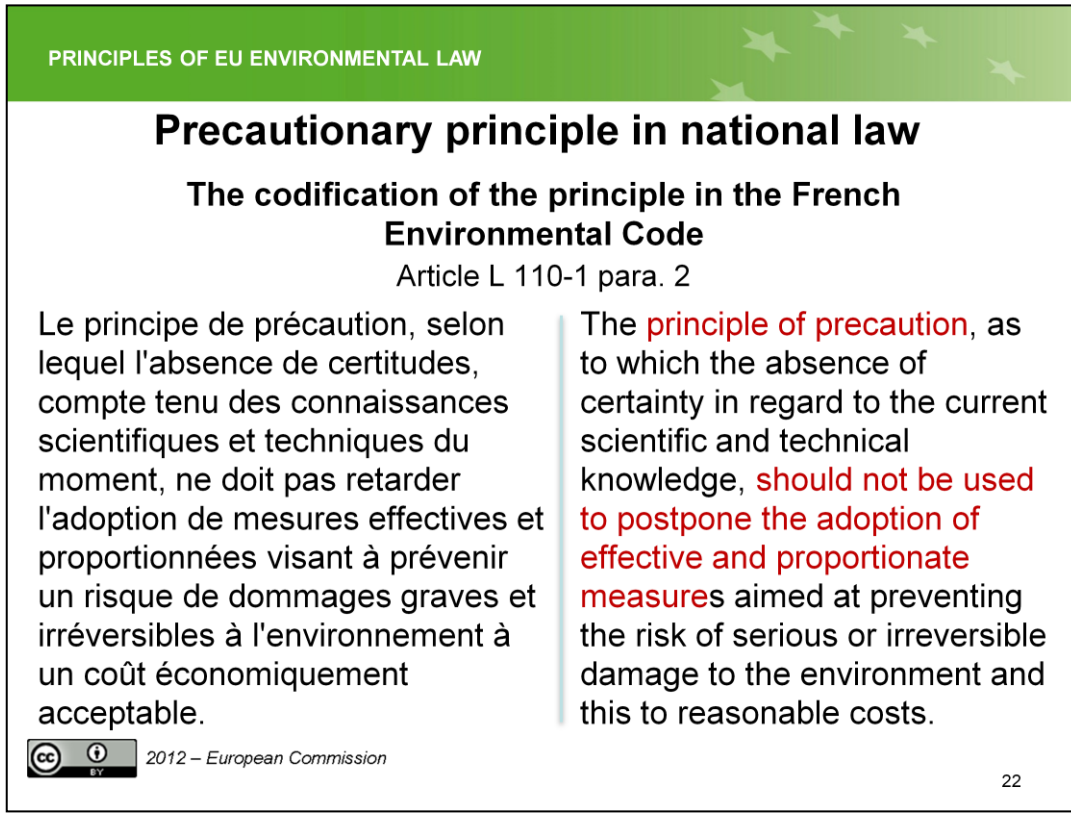
Slide 20

A major step in this direction is the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) of 1 February 2011 “RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA” . The Tribunal holds the precautionary principle could be considered today as “part of customary international law.” (page 41, para 135).



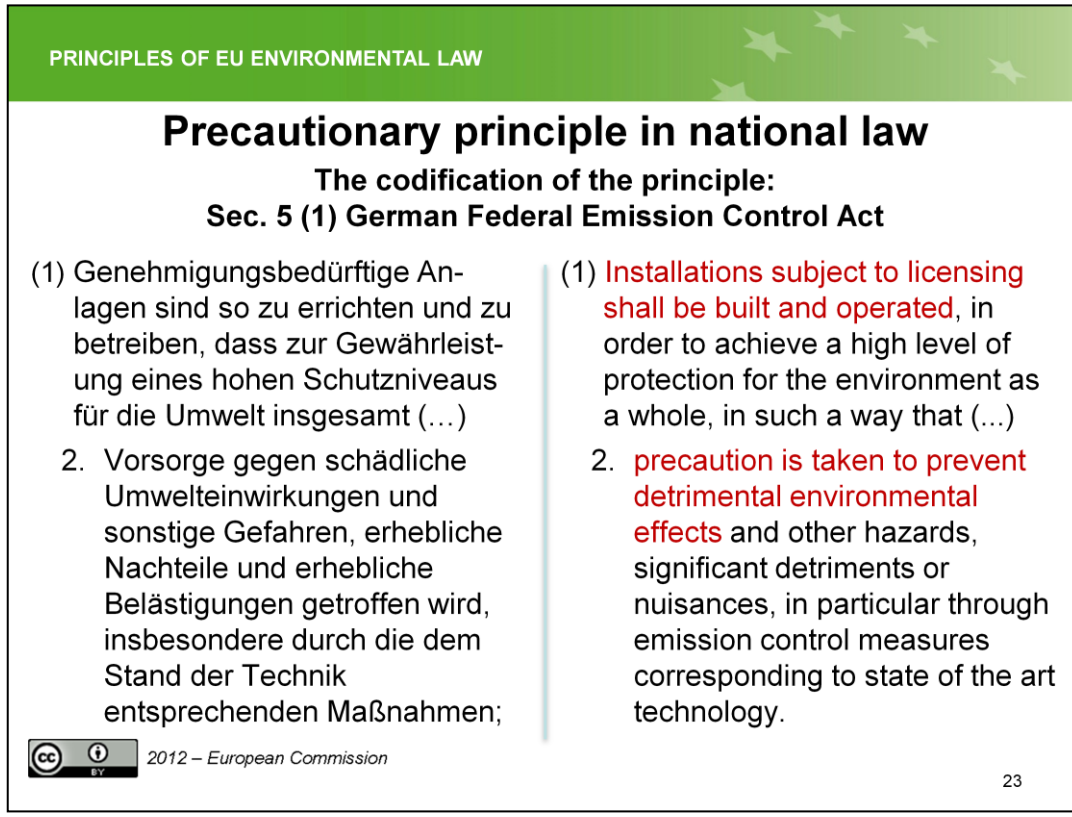
Slide 21

EU Law, Self explaining



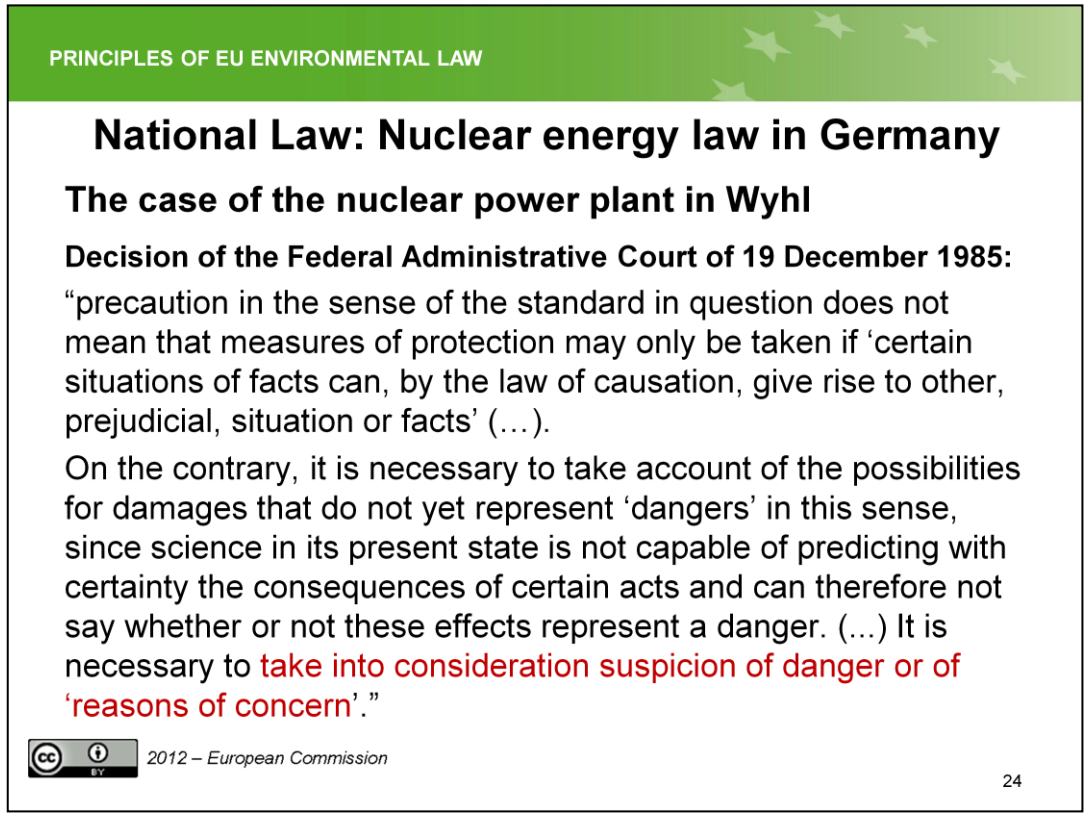
Slide 22

The principle in French law. Wording is very similar to the definition in international law (see Rio, and Climate Change convention).



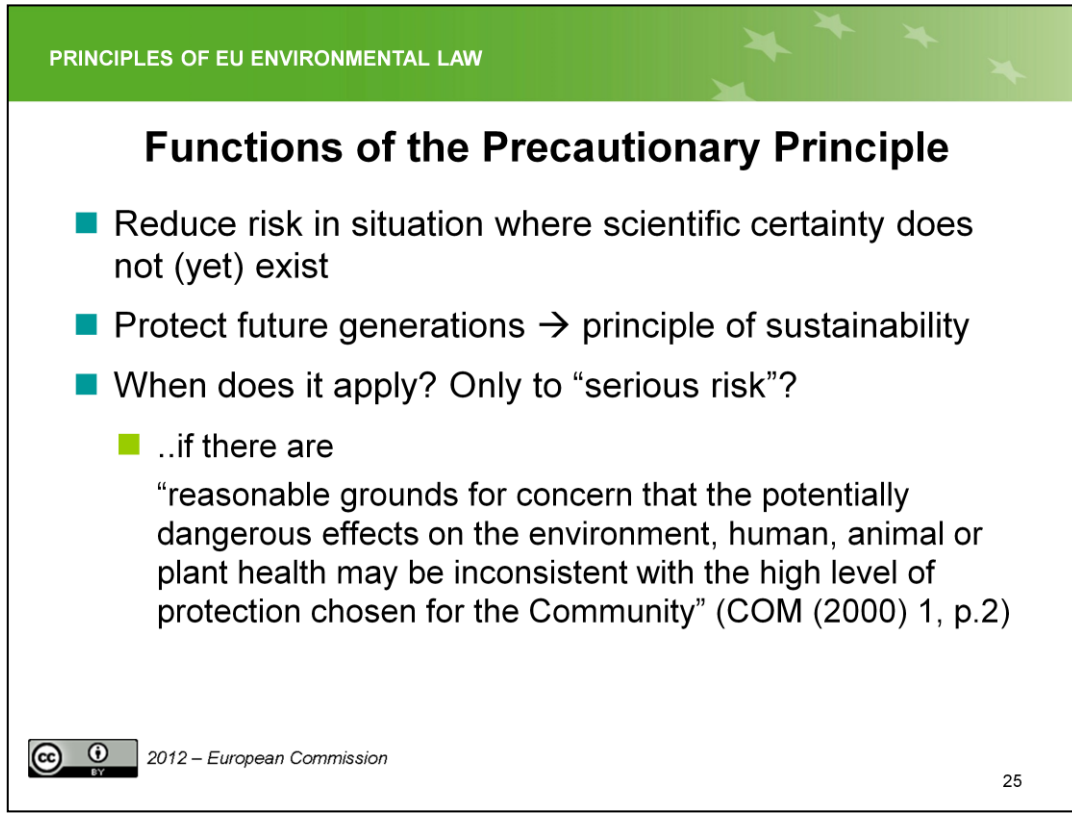
Slide 23

A bit different in German law. The precautionary approach has been implemented already in 1974 (!) in the federal emission control act (BImSchG). It is used to reduce risks further, even if preventive measures have already been taken.



Slide 24

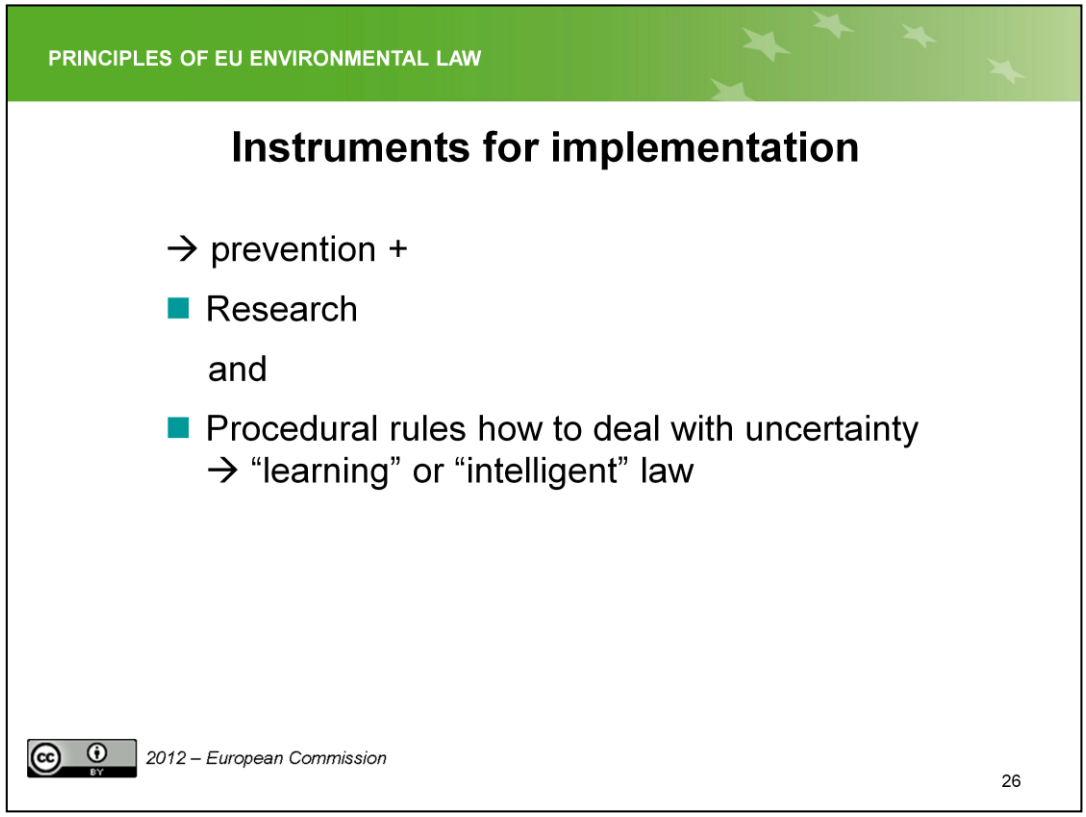
The slide shows the application of the principle in German nuclear energy law. In the Wyhl-case – the plant was never built for political reasons, although the Courts decided finally in favor of the plant operators - the Federal Administrative Court issued a fare reaching and still fundamental decision concerning risk-assessment before delivering a permit. Under the precautionary principle also hypothetical risks ("Besorgnispotentiale" in German) have to be considered. The relevant section in the German Nuclear Energy Act is interpreted by the Court as a law providing for preventive and for precautionary measures.



Slide 25

Generally, the function of the precautionary principle is very close to the function of the preventive principle. But it goes further in terms of risk-reduction, if knowledge is not sufficiently available.

It is a open question, if the precautionary approach should only apply to serious risks. I would argue more in line with the Commissions communication: If the chosen level of protection is at risk, precautionary measures should apply. The level of protection has do be decided by the relevant authorities/parliament and is ultimately a political question (we will come back to this point later).



Slide 26

Instrument → prevention.

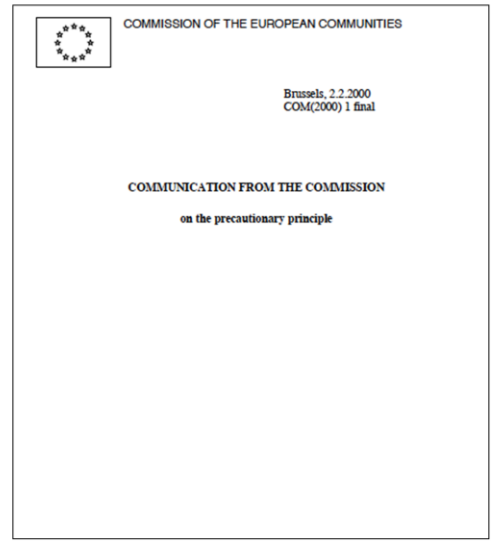
As the precautionary approach is typically determined by a situation of lack of scientific certainty, instruments which aim at improve scientific knowledge should be considered much more.

Also the law should be construed in such a way that new knowledge could be easily introduced even after a decision has been taken (“reflexives Recht”). GMO law is a good example with limited permits (10 years for the market-permit), monitoring obligations etc.

Application of the precautionary principle

- Proportionality
- Non-discrimination
- Consistency
- Examination of the benefits and costs of action or lack of action
- Examination of scientific developments

(COM(2000) 1 final p. 17)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.2.2000
COM(2000) 1 final

COMMUNICATION FROM THE COMMISSION

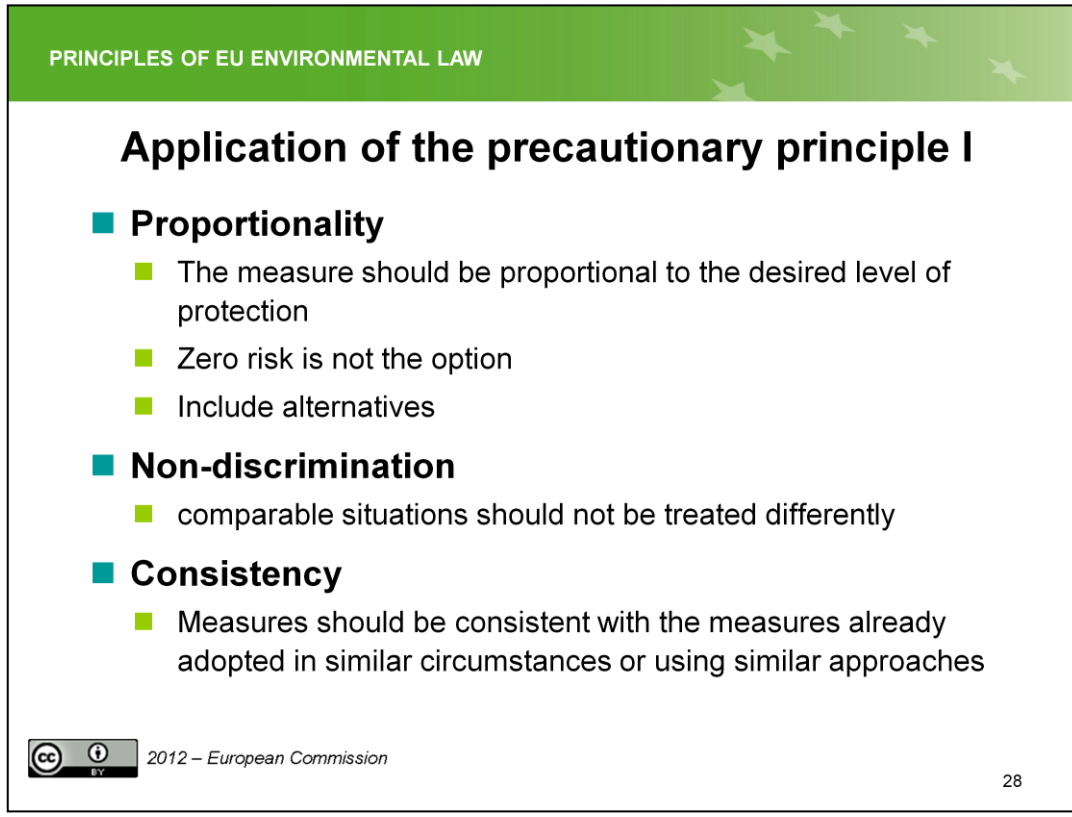
on the precautionary principle

Slide 27

The Commission published a Communication on the Precautionary principle in 2000.

The communication mentions some essential points for the application of the principle.

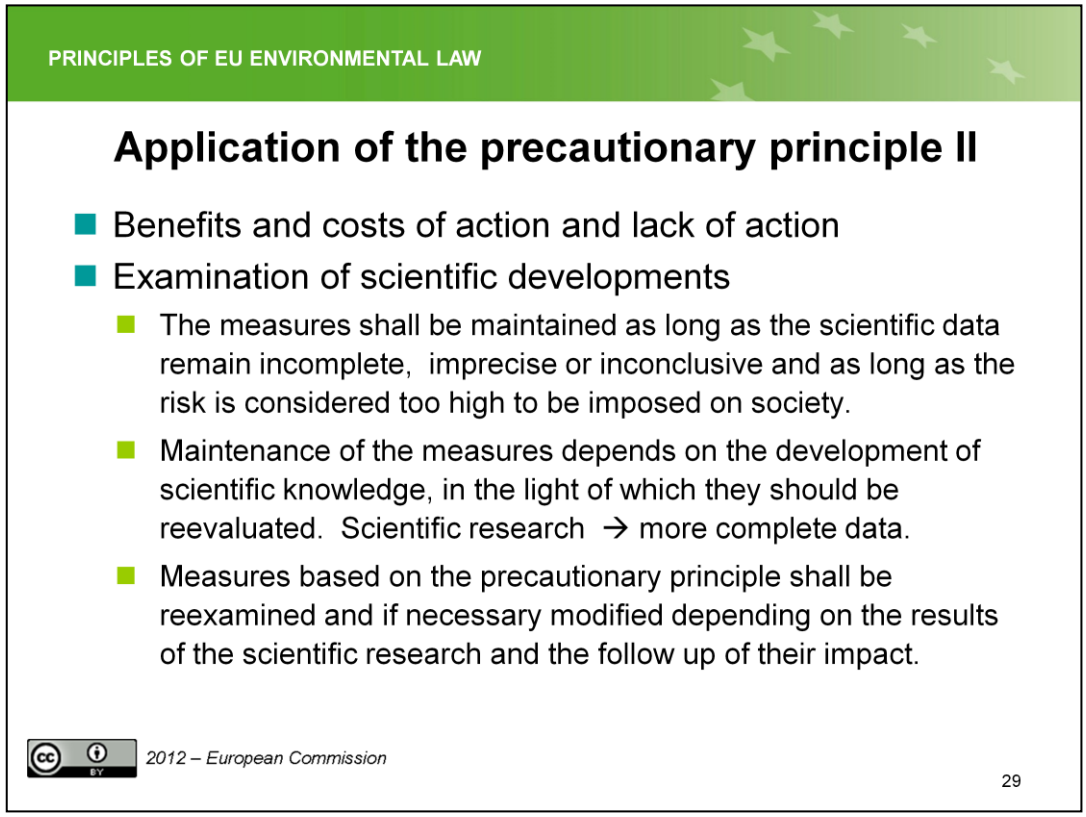
The next two slides make some concretization of these points, but this could be also left aside, if there is a time problem! Participants can read the Communication on their own!



Slide 28

Conditions for the application of the precautionary principle.

Again (as on PPP) proportionality is a MUST.



Slide 29

Conditions on its application II

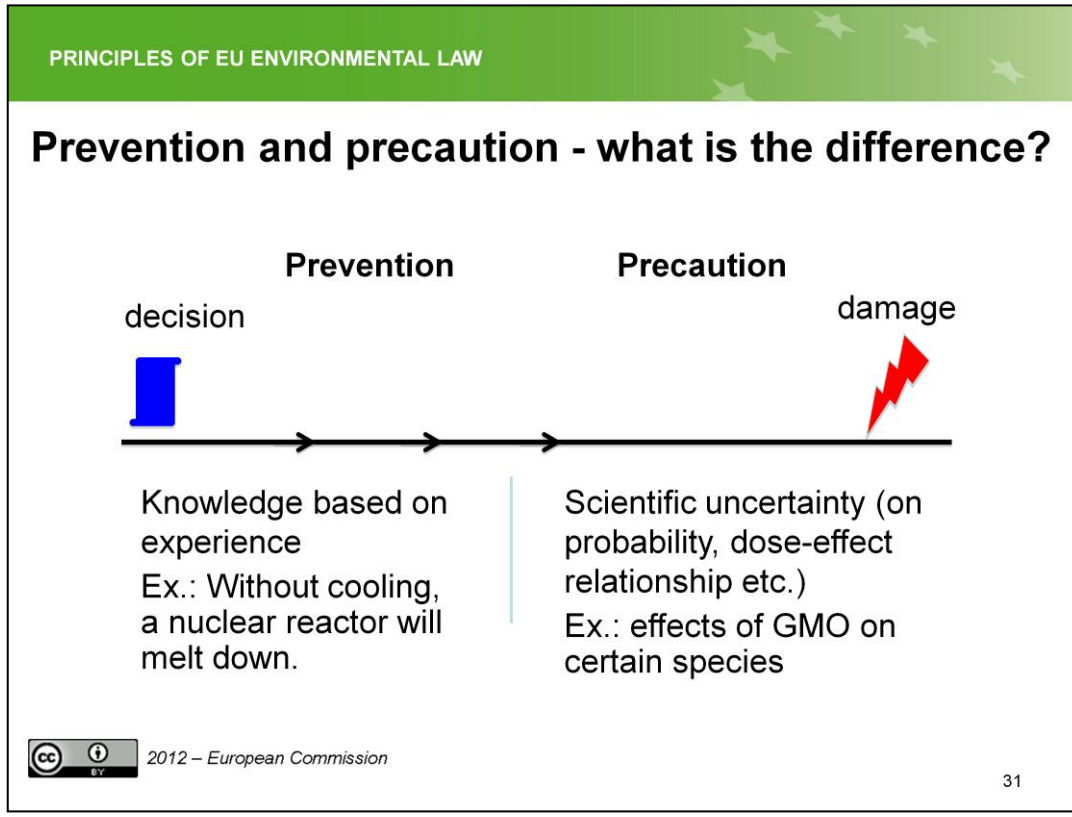
Bear in mind that scientific development influences potential application of the principle (→ re-examination and modification of measures taken)

Prevention and precaution - what is the difference?

Prevention	Precaution
Knowledge based Risk can be calculated	Uncertainty Risk cannot be calculated
Danger	Risk
Occurrence of damage is probable if no measure is taken	Occurrence of damage is uncertain and cannot be predicted clearly
Regulatory framework defines substantial criteria (e.g. emissions thresholds)	Regulation through procedural requirements
Definition of acceptable risk is primarily science based	Social acceptance of the risk is considered

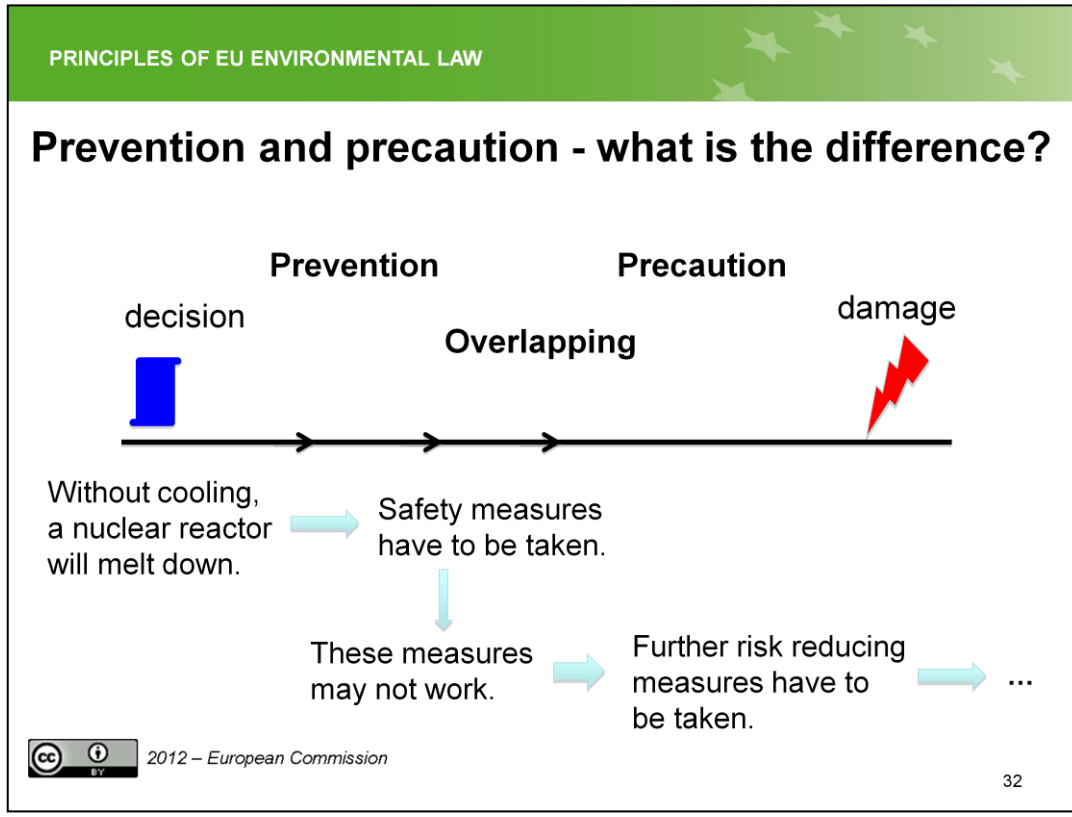
Slide 30

The main difference between prevention and precaution is that the calculation of the risk is much more difficult in the precautionary situation because of the lack of scientific knowledge. As a consequence, it is also more difficult to define regulatory standards (possible is, of course, Minimization clauses etc.).



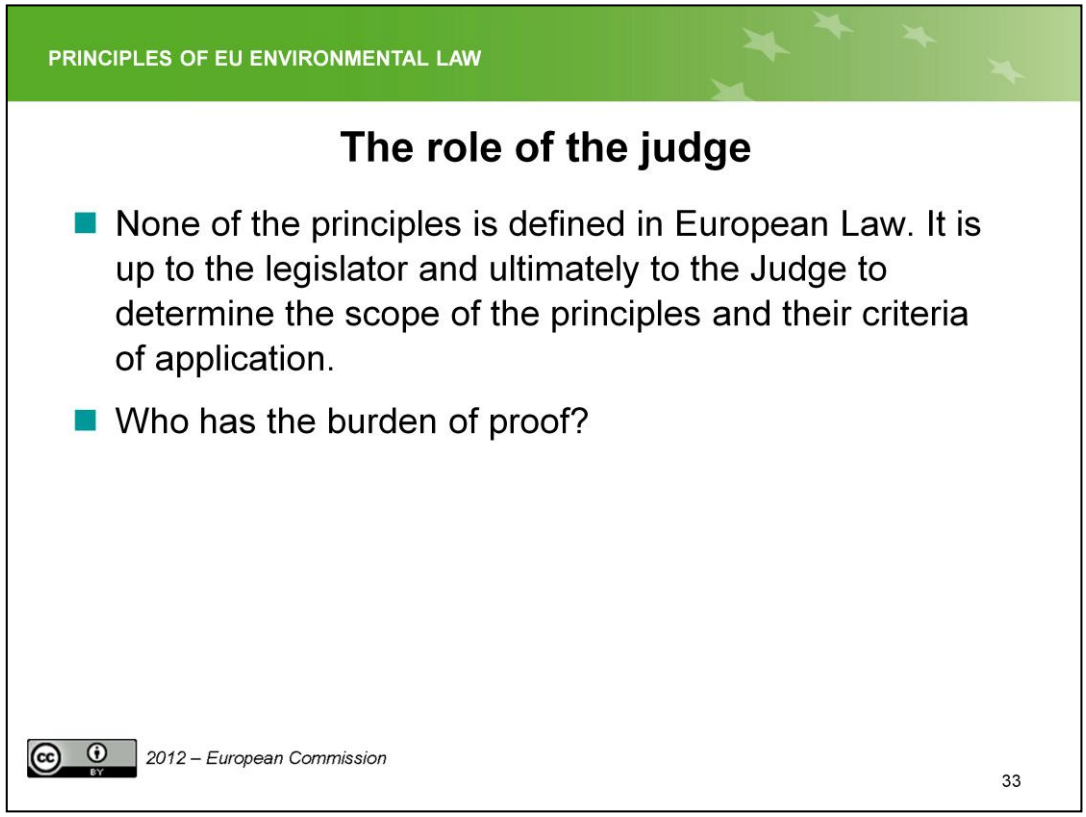
Slide 31

The slide shows the different situation when taking a decision (for instance as a competent authority). If there is scientific uncertainty, it is difficult to predict if damage will occur or not. Precautionary measures could nevertheless been taken. If there is knowledge based evidence, a measure must be taken under the preventive approach.



Slide 32

The slide shows the overlapping between the preventive and the precautionary principle. Even if the risk is known and preventive measures are taken, further measures might be necessary to reduce the probability of the risk if important damage may occur. These further risk reducing measures may be justified under the precautionary approach.

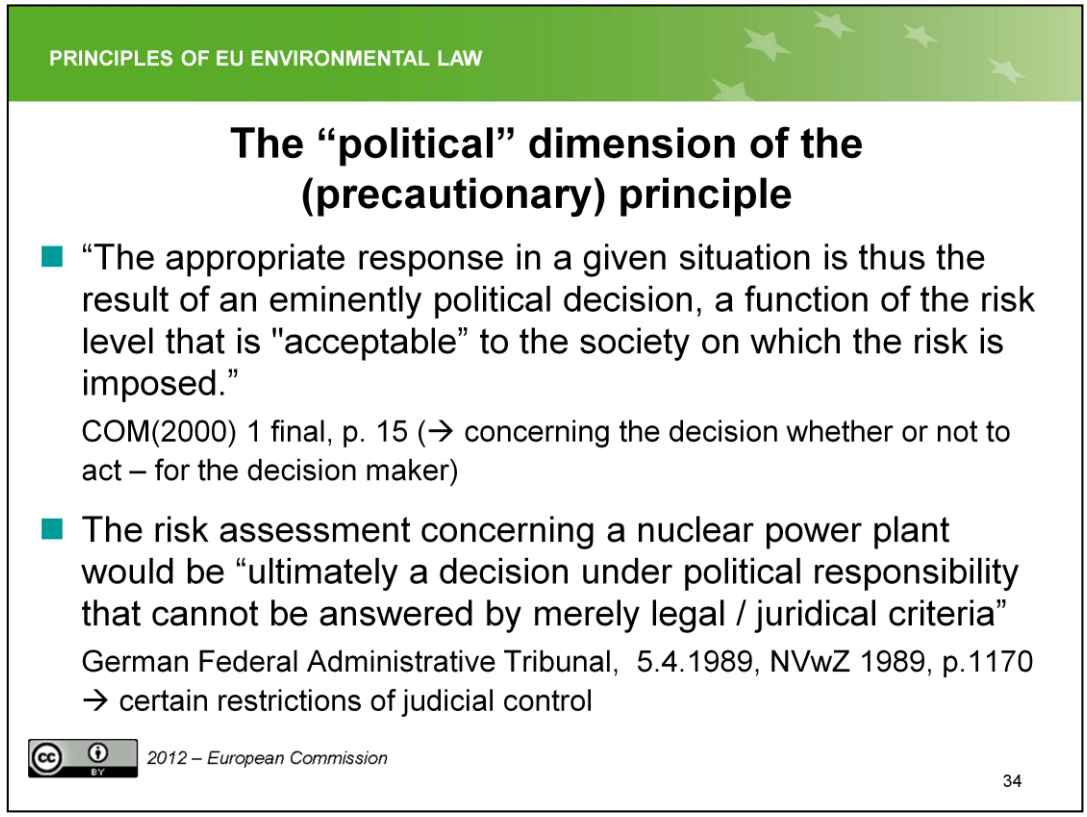


Slide 33

As the principles are – in particular the precautionary principle– only vaguely defined or concretized in European law, the judge ultimately has to decide on the application of the principle.

In particular the question arise, who has the burden of proof.

We may differentiate two situations in the application of the principle: The "licensing situation" and the "control" situation: If a dangerous activity need a license, the operator has to show, that all preventive and precautionary measures have been taken. If the authority controls an existing operation, and wants the operator to take further measures after the operation had been licensed, it is with the authority to justify the necessity of the measure.



Slide 34

It seems to be clear, that ultimately there is a political dimension of the principle. The Commission explains this very well.

It is interesting to note, that also the Courts seem to be aware of this. The German Federal Administrative Tribunal accepted a decision of the lower Court of Münster, that argued in this way. The procedural situation in this case was, that a neighbour complaint after the accident in Chernobyl and requested to shut down the nuclear power plant of Würgassen. The competent authority decided not to shut down the plant as there would be no “danger” to the public or the neighbourhood. The problem in such cases is, that the power plant may still comply with the standards originally requested, but that meanwhile these standards have evolved. There are no general binding rules about the acceptability of the “delta” between the originally requested state of the Art and the today existing state of the art.

More information

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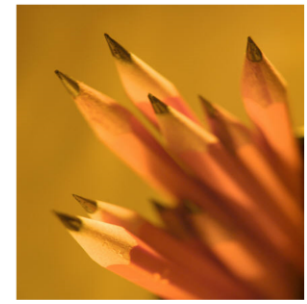
Epiney, Astrid (2006), Environmental Principles, in: Macrory (ed.), Reflections on 30 years of EU Environmental Law, Groningen: Europa Law Publishing.

Roller, Gerhard (2002), Environmental Law Principles in the Jurisprudence of German Administrative Courts, in: M. Sheridan/L. Lavrysen (eds.), Environmental Law Principles in Practice, Bruylant, Brussels 2002, p. 157.

COM(2000) 1, Communication from the Commission on the precautionary principle



Slide 35

Useful literature sources (English literature only)