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Precaution in International Law: Reflection on its Composite Nature

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Book Chapter in: Tafsir Malick Ndiaye, “**Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah**” (Leiden: M. Nijhoff © 2007), p. 21-34

“**The precautionary principle triggers new reflections on the "social contract"**. It proves that all attempts of social constructivism (that is, of management of society according to a final and pre-ordained plan) is destined to failure, or at least to serious questioning: **Precaution** brings with it a new trend: that of complexity, and therefore the questioning of all absolute assumptions which have long been the foundations of modern society. It **takes place within a post-modern context, and is the bearer of several "disturbances" in the legal order. The first is the remodeling of the interaction between law and science.** The relativity of the Cartesian dogma due to the appearance of new problems and challenges for the whole of humanity leads to a new mode of handling scientific expertise by law. Indirectly, it also leads to a rebalancing of the interaction between legal politics and science. **Precaution speaks of a bond profoundly upset: science would be sought for the suspicions and doubts it raises rather than for the knowledge it offers.**⁴⁴ **This is not a dilution of the role of science, but a repositioning of it.** Indeed, the precautionary principle creates another mode of interaction between normative processes and scientific expertise. The latter favours a new approach to law tending towards normative processes that are consolidated and renewed by the results obtained through scientific expertise on an ongoing basis. **This expertise calls for a constant adaptation of decision-making processes.**

The second is **the remodeling of the interaction between law and economics, linked to the cost that precaution could entail for a particular society. Precautionary measures could initiate a social psychosis which would kill initiative and innovation.**

Societies cannot allow such vagaries. **To rebalance the interaction between law**

and economy the precautionary principle must be considered as a substantive element of "sustainable development". In this perspective its objective is not to ruin economic activity but **to emphasise the necessity of convening today's requirements in terms of environmental protection**. As an element of sustainable development, the precautionary principle must strive for a "durable better-being of humanity" , " in all its interpretations, not just its economic interpretation.

The precautionary principle also requires one to rethink the interaction between law and effectiveness. In other words, one must redefine effective mechanisms to implement and underwrite this new body of law whose essence is "soft ". The aim is to avoid veering into the arbitrary or excessive use of discretionary power in the application of the principle. **Courts and tribunals are therefore asked to play a role in shaping the contours of the precautionary principle**. There is a need to arbitrate between contradictory interests, and a third party such as a court or a tribunal. through the objectivisation of the content of the precautionary principle, can contribute to this important task." (pp. 33-34)