Recent decisions rendered by international courts and tribunals have prompted new interest in the legal profile of the precautionary principle. Among these decisions is the order on provisional measures rendered by the International Tribunal for the Law of the Sea in the MOX Plant case and in particular the Separate Opinion of Judge Tom Mensah. It thus appears interesting to shed light on some of the legal contours of this principle. Its complex and composite nature still raises difficulties. Even if there are terminological variations — references are made to the notion of a norm, rule, approach, standard, principle and even philosophy — precaution has become a principle endowed with a certain legal quality. An essential question is that of its relationship to the international legal order and its constitutive norms.

Though it has found an initial anchor in international environmental law, the precautionary principle has started to permeate other fields of international law. The analysis of the place of the precautionary principle in the international legal order reveals that it is resistant to any premature attempts at rationalisation or definitive characterisation. The principle simultaneously shows a trend for legalisation through different instruments, favouring the determination of certain criteria (I), a multifaceted nature (II), an integrative nature (III) and it triggers new reflections on the notion of “social contract” (IV).

I. The Legalisation of Precaution

Precaution in substance invokes a number of criteria, which justify *ratione materiae* its application in given situations. These criteria endow it with a particular structure, an original basis compared to other principles or approaches of international law and, more especially, in international environmental law.

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One can identify four fundamental criteria. Bringing them together compels precaution *prima facie*. Attempts to fit them in a hierarchy show that three of these (risk, damage and scientific uncertainty) justify the application of precaution *a priori*, whereas the last criterion (capacities) intervenes *a posteriori* to objectively determine its applicability, permitting the passage from “application” to “applicability”, from “desirability” to “feasibility”. Indeed, the act of defining the criteria to which precaution refers clears the way for the difficult objectivation, and hence materialisation, of the aforementioned criteria.

1. The “Risk” Criterion

This is the fundamental nature of precaution. Precaution’s *raison d’être* originates in law’s aspiration to assess and manage risk in our societies. Risk is a more or less conceivable and contingent danger which can cause damage. It is therefore arbitrary in its essence. Volatility is its nature; its occurrence can be unforeseen, even unexpected. As long as there is any trace of doubt as to the occurrence of an event, there is risk. In an attempt to legally and precisely qualify the risks targeted by precaution, it is useful to recall the typology of risks compiled by Nicholas de Sadeleer, who was inspired by lessons drawn from German thought. According to him, there are three main categories of risks:

(a) “unacceptable” or “definite” risks, those for which the causal link between the event and the damage is scientifically proven, even if doubt remains as to the time it will take for damage to occur. These risks should be eliminated by the principle of prevention;

(b) “residual” risks, which human activity normally implies, and which must be tolerated (e.g., the risk implicit in driving a car or taking a plane). These risks do not need to be taken into account in the decision-making process. In order to avoid situations that would be absurd for human activity, residual risks, meaning “hypothetical risks resting on purely speculative considerations without any scientific foundation”, would have to be excluded from the precautionary principle’s range of application; and

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