Satya Nandan’s Contribution to the Development of the Precautionary Approach in International Law

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On 1 February, 2011, the Seabed Disputes Chamber unanimously adopted an historic Advisory Opinion on the ‘Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area’.1 This Opinion represented a lot of ‘firsts’. It was the first use of the advisory jurisdiction of the International Tribunal for the Law of the Sea (“ITLOS”); it was the first use of the Seabed Disputes Chamber; it was also the first time that the Tribunal had ever reached a unanimous ruling in a case referred to it.2 However, for our purposes its most important first was in relation to substantive environmental law: it was the first time that ITLOS recognized what it termed the ‘legal obligation’ to apply the precautionary approach as found in Principle 15 of the 1992 Rio Declaration.3 Precaution is already required by

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1 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of 1 February 2011, (ITLOS Seabed Disputes Chamber), at <http://www.itlos.org/> [hereinafter Advisory Opinion].

2 See David Freestone, 105 AJIL, 2011, 755–760. As I remark there, this reflects great credit on Chamber President Tullio Treves whose task it would have been to forge consensus.

3 “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. (For the documents adopted at UNCED see UN Doc. A/Conf.151/26 (vols. 1–V), 12 August, 1992, or Stanley Johnson, The Earth Summit, (Dordrecht, Martinus Nijhoff, 1992). Note the equivocal wording of Principle 15, requiring
the Polymetallic Nodules Regulations\textsuperscript{4} finalized in 2000 by the International Seabed Authority (ISA) during the time that Ambassador Satya Nandan was its Secretary-General, as well as in the subsequent ISA Polymetallic Sulphides Regulations.\textsuperscript{5} However the ITLOS Chamber looked much further than those regulations, seeing precaution as "an integral part of the due diligence of sponsoring states which is applicable even outside the scope of the regulations", requiring actions where scientific evidence is insufficient but "there are plausible indications of potential risk".\textsuperscript{6} It then went on to recognize the "trend" toward accepting the precautionary approach as part of customary international law,\textsuperscript{7} thereby contributing itself in a major way to the crystallization of this process.\textsuperscript{8} As I have written elsewhere, the emergence of the precautionary principle in international environmental policy and law was one of the most remarkable developments of the last quarter of the 20th century, and, arguably, one of the most significant in the emergence of the new discipline of

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\footnote{states only to introduce "cost effective measures… according to their capabilities". That wording was introduced, it is reported, by the United States at the 1992 Rio Conference.}
\footnote{Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. (Kingston, Jamaica, ISA, July 2000). Available at <http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf>. See Regulation 31(2) "In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration to such activities".}
\footnote{Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area. (Kingston, Jamaica, ISA, May 2010). Available at <http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf>. See regulation 33(2): "In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practices."}
\footnote{Advisory Opinion, para. 131.}
\footnote{Which it saw in the 2010 judgment of the International Court of Justice (ICJ) in \textit{Pulp Mills on the River Uruguay (Argentina v. Uruguay)}, para. 187 (ICJ, 20 April 2010), at <http://www.icj-cij.org/>.}
\footnote{Indeed, the Chamber quotes Article 194(2) of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 UNTS 397 [hereinafter LOSC] as another example of a similar obligation: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment…" Advisory Opinion, para. 113. Although not cited, this wording is derived from Principle 2 of the Rio Declaration, \textit{supra} note 22, and Principle 21 of the Stockholm Declaration on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14 & Corr.1 (15 June 1972), \textit{reprinted in} 11 ILM, 1972, 1416. It surely supports the fact that this approach represents customary law.}
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