

## Tribute to Ambassador Satya N. Nandan

*Myron H. Nordquist*

Satya Nandan was a close friend of me and my family for over four decades. He and I worked together for many years which included productive months at the Third United Nation's Convention on the Law of the Sea (UNCLOS) negotiations. Satya was a skilled diplomat who made many substantive contributions to the peaceful order of the oceans.<sup>1</sup> His contributions were comparable to just a few others such as Tommy Koh of Singapore, who was the President of the Law of the Sea Conference.

My remarks here refer to just one brief period of Satya's long life. The rationale for this approach is to offer one concrete example of many available to illustrate the seminal role he played in the Law of the Sea. The period selected hopefully provides a manageable focus suitable for an introduction and tribute to Satya. The events occurred during his activities in 1975 when Satya was Rapporteur of the Second Committee at the Third Conference in Geneva. And I personally was regularly involved with him in this period of the negotiations.

Satya was an extraordinary public servant for his native Fiji, the United Nations, the International Seabed Authority and UNCLOS viewed as a whole. His contributions need to be honored and preserved for humankind, not the least of which are for serious LOS scholars. My relationship with Satya started at the UN General Assembly in the early 1970s (shortly after the "Principles Resolution" was adopted) when Satya was a young diplomat from Fiji posted to its UN Mission in New York.

When the Conference officially started in 1973, Satya was elected as a representative of the Asian Regional Group to serve as Rapporteur of the Second Committee under a chairman selected by the Latin American Group. The Second Committee following the List of Subjects and Issues adopted for the Conference was assigned the most important substantive issues at UNCLOS. These included the territorial sea, innocent passage, international straits transit, archipelagic regime, exclusive economic zone (EEZ), fisheries, continental shelf, high seas, and regime of islands.

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<sup>1</sup> See M.W. Lodge and M.H. Nordquist (eds.), *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan*, (Leiden/Boston: Brill Nijhoff), 2014.

The focus of the limited scope of my remarks here is on the single article in the 1982 Convention pertaining to islands: Article 121. The substantive session of UNCLOS opened in Caracas in 1974 with well over 100 countries giving for the first time ever an outline of their general positions on the law of the sea. This opening stage was followed by States submitting literally hundreds of detailed proposals based on the list of subjects and issues assigned to the three Main Conference committees.

The Second Committee dealing with the traditional law of the sea had, of course, to deal with these hundreds of official proposals. Delegates faced a daunting task to reach a single text for a draft Convention that was considered necessary for presentation to the next Conference session planned for Geneva in 1976.

The only realistic way delegates found out of a political deadlock (and conference failure) in 1975 given the overwhelming number of competing State proposals was to adopt unique procedural rules for the UNCLOS negotiations. The delegations knew that they had to provide a “fair reading and review” procedure for each of the proposals submitted from many sovereign States. Moreover, the conference had to proceed on a “consensus” basis in its task of reaching an agreed draft text. Delegations resolved the problem of trying to produce a single negotiating text by bestowing an unprecedented procedural power on the “Chairmen” of the three main conference committees. Each chairman was personally mandated by the UNCLOS delegates to prepare the actual language for a draft convention text. The prepared text was then to be submitted to his full committee allowing all delegates to review it. Satya’s role in 1975 thereby immediately evolved into drafting the textual proposals for the Second Committee’s Chairman. This extraordinary step was accepted as the only practical way to obtain a single text for a convention at this stage of the negotiations. That is, a single draft text was seen in 1975 as critical for the success or failure of the Third Conference.

Here it is noteworthy that the draft submissions from the Second Committee to the Plenary Committee of the Conference were written in English, not Spanish, which was the native language of the Chairman. The reason is that Rapporteur Nandan and the few UN staff (most notably Gudmunder Eiriksson of Iceland) who did the actual drafting or research selection read and wrote in the English language. Further noteworthy for the limited focus of these remarks is that both Satya and Gudmunder were from island States. By their backgrounds they understood more than most delegates about the complexity posed by islands throughout the world and their controversial status, particularly with respect to disputed ownership of associated ocean entitlements. As noted, no records were kept of their drafting research or writing but hints

of influence emerged from informal working group meetings that were sometimes held on certain articles. These informal meetings in 1975 were open to all delegations but no definitive conclusions can be drawn from what was said there.

As a matter of traceable Conference history, the drafts submitted to the Chairman of the Second Committee by Satya Nandan were accepted, adopted by the Chairman, and forwarded to the Second Committee Plenary just as Satya had written them. Even more amazing is the fact that the Single Negotiating Text (SNT) from 1975 which became Article 121 in the Convention remained substantively unchanged from what Satya had drafted and handed to his Chairman in 1975. To make the point completely clear, Satya's language for Article 121 remained subsequently unchanged despite several detailed reviews of the exact language in full committee meetings from 1976 to 1982. His draft as submitted in 1975 is now the binding text in Article 121 of the 1982 Convention.

The Vienna Convention on the Law of Treaties provides customary international law rules for the interpretation of treaty text. The general rule there is found in article 31 which provides that the ordinary meaning is to be given to the terms of the treaty in their context. The sources of international law are listed in Article 38 of the Statute of the International Court of Justice (which is part of the UN Charter). Article 38(a)(1) expressly provides first for the application for international conventions for settling disputes. Judicial decisions and opinions of academic experts are expressly given a "subsidiary" role.

The point is that text accepted by sovereign State consent controls what is international law. In the case of the regime of islands, paragraph 1 of Article 121 reads: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."

This language selected for the SNT in 1975 originated in Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone which in turn was taken from slightly modified language drafted by the ILC in 1956 for the First Conference. Unlike the First Conference, the International Law Commission was not tasked to prepare draft treaty provisions for the Third Conference. The Third Conference negotiations could have saved a great deal of time, energy and angst had it started in 1974 with what was equivalent to an SNT for most articles. But we have what we have.

In any event the words "naturally formed" in Article 121 were not only familiar to most delegations but also part of the legal lexicon for many countries at the Third Conference. Satya wisely selected these exact words for his text and Second Chairman Galindo Pohl of El Salvador readily endorsed this in the text for the SNT draft of Article 121(1) in 1975.

The second paragraph of Article 121 just repeated the 1958 Convention's general concept that treated islands as having the same ocean space entitlements as "other land territory". The problem now, however, was that the new 200-mile EEZ and expanded continental margin claims at the Third Conference vastly increased the reach and expansion of island ocean entitlements. Most of this expansion was in the international area beyond national jurisdiction which had now been deemed the Common Heritage of Mankind. The landlocked/geographical group led in large part by Tommy Koh was a major political force in the negotiations by 1975. Satya obviously decided it was necessary to reduce the entitlement of islands to make the island regime more acceptable. Thus, the third paragraph came into being.

A new paragraph 3 exception for "rocks" was seen by Satya as necessary to reduce the impact of island entitlement. Rocks that could not "sustain human habitation or an economic life of their own" were to have no EEZ or continental shelf. Presumably, rocks under international law still would rate a territorial sea and contiguous zone.

The third paragraph of Article 121 thus contains a new rule of international law. Satya and his small group of fellow draftsmen in 1975 deftly employed the well-established drafting technique of "deliberate ambiguity" to encapsulate this new rule. By doing so, the draftsmen hoped that contending spokesmen on contested island regime issues would compromise sufficiently to accept the new rule in the UNCLOS in the context of the tide of political pressures to achieve a convention.

The 121(1) reference to a "naturally formed" area of land for an island definition unfortunately remained unclear. The main reason is that it is not obvious "when" the required natural formation must take place. Possibilities from the text could include when the 'big bang' created the universe, when the earth split apart (Siberia used to be connected to Alaska), when the continental masses drifted apart, when Captain Cook marked his charts, when a volcano erupted or even when a dispute settlement case required a determination.

All interested parties want to know what was intended in drafting the text of articles in a Convention. This is where the value of Satya's reflections come to the fore. He selected or drafted key text in the 1982 Convention on the Law of the Sea. For that reason, it was very fortunate that he was able to finalize his book *Reflections on the Making of the Modern Law of the Sea* before his untimely passing in 2020.<sup>2</sup> We therefore have a record of his remarkable

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2 S.N. Nandan with K.E. Dalaker, *Reflections on the Making of the Modern Law of the Sea* (Singapore: NUS Press), 2021.

personal contribution to world order in the oceans which cover over 70% of the earth's surface. Finally, we might remember that he made a special historical impact for the newly independent state of Fiji when he deposited in 1982 the first ratification of the United Nations Convention on the Law of the Sea. He was first in line even at the end.

My bet is that he is still smiling with satisfaction about that.