

# Peaceful Order in the World's Oceans

*Essays in Honor of  
Satya N. Nandan*



*Edited by*  
Michael W. Lodge  
Myron H. Nordquist

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**Peaceful Order in the World's Oceans**

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# Introduction

No one has contributed more to stability and peaceful order in the world's oceans in the last four decades than Satya N. Nandan. His accomplishments are reflected throughout the contributions to this *liber amicorum*, a collection of essays in his honor gathered from his numerous eminent friends and colleagues from around the world. One of the notable characteristics of Satya is that his circle of friends and admirers extends throughout all political persuasions of the international community. This is not so remarkable in light of his diverse background and his choice of an international career.

Satya was born in Fiji in 1936. He was the youngest of ten children of his parents, Shiu Nandan and Rajkuar. His early education was in Suva, Fiji, and at age fifteen he was sent to Dunedin, New Zealand, to complete high school at John McGlashan College. Thereafter he studied economics and political science at the University of Wellington for two years before he was sent to London to pursue legal education at the University of London, eventually earning the degree of LLB (with Honours) in 1965. While waiting for admission to the University, Satya was admitted to Lincoln's Inn 1962 and began attending lectures conducted by the Council for Legal Education at the Inns of Court. He completed the course in 1964 and was called to the Bar as a Barrister-at-Law at Lincoln's Inn the same year. After completing his pupillage in Chambers in London, Satya returned to Fiji at the end of 1966 and began private practice by joining a law firm. In 1970, as Fiji was about to achieve its independence, the government of Fiji asked for Satya's assistance in establishing the Fiji Mission to the United Nations. Satya agreed to the request and came to New York on one year's leave. He was persuaded to stay on for another year and eventually he was prevailed upon to become a career diplomat.

In 1970, when the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (the Sea-Bed Committee) was enlarged to 91 members and mandated to prepare for the Third UN Conference on the Law of the Sea by 1973, Fiji became a member of the Committee. After three years the Committee could not even agree on a clean agenda for the Conference. Delegates kept repeating their well-known positions without engaging in negotiations to find solutions on the core issues. Satya found this frustrating and was determined to play a more active role at the Conference. At the 1973 organizing session of the Conference, Satya was elected the rapporteur of the Second Committee of the Conference which dealt with the core law of the sea issues. As will be seen throughout this volume, Satya played an active role in resolving many of those issues.



In 1982, after the adoption of the Convention, because of disagreement over the deep seabed mining provisions (Part XI), the international community was divided over the Convention. Other issues had surfaced, such as the location of the law of the sea secretariat office and the servicing of the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea and the future direction of the Convention. In 1983, the then Secretary-General of the United Nations, Javier Pérez de Cuéllar, invited Satya to join the Office of the Special Representative for Law of the Sea, eventually appointing him as the Under-Secretary-General for Ocean Affairs and the Law of the Sea and Special Representative of the Secretary-General for the Law of the Sea. Most of the issues relating to the Convention were resolved through Satya's consultations with delegations except for those relating to deep seabed mining which had to be deferred until all sides were ready to resolve the outstanding issues. Eventually, this too was resolved through the 1994 Implementing Agreement on Part XI, the negotiation for which was initiated by Satya under the auspices of Secretary-General Javier Pérez de Cuéllar.<sup>1</sup> In the meantime, Satya sought to strengthen support for the Convention by promoting signature of the Convention before the signature period expired, by encouraging States to ratify or accede to the Convention as well as by promoting uniform and consistent application of the provisions of the Convention in State practice by disseminating information on the evolving State practice based on the Convention.

In 1992 Satya returned to his government and was posted in New York. He continued his involvement with the law of the sea, first with the conclusion of the 1994 Agreement on the Implementation of Part XI, and then as Chairman of the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks which adopted the 1995 UN Fish Stocks Agreement. In 1996 Satya was elected to serve as the first Secretary-General of the International Seabed Authority. He was re-elected twice and retired in 2008. The Center for Oceans Law and Policy is proud to note that Satya in his retirement is the Center's first Distinguished Senior Fellow.

The editors are pleased to present this collection of essays dedicated to Satya N. Nandan. The opening tribute to Satya in the first part of this book is by one of his closest personal friends, Tommy Koh, who was the President of the Third United Nations Conference on the Law of the Sea at its conclusion in 1982. No one is better qualified to comment on both Satya's personal qualities as well as upon his extraordinary achievements. Tommy's tribute is

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1 See introduction to *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 6, (The Hague/London/New York: Martinus Nijhoff Publishers, 2002).

followed by the reflections of a lifelong friend and colleague of Satya, Hasjim Djalal of Indonesia. Hasjim was an influential leader throughout the negotiations at the Third Conference and he worked hand in glove with Satya, especially on achieving agreement on the regime for archipelagic States that was so important to both Indonesia and Fiji. The third contribution in this part is from Shunmugam Jayakumar who reminisces about their personal relationship and their experiences in the UNCLOS negotiations. Because of his close friends there, Satya considered Singapore his second home where Jaya was Deputy Prime Minister. He gives a touching first-hand account of why they had so much personal as well as professional contact. Mary Beth West is a former United States Ambassador for ocean affairs in the Department of State who worked closely with Satya on the law of the sea negotiations as well as on fisheries agreements in the western and central Pacific. The editors would be remiss not to note in this regard that both John R. Stevenson and Elliott L. Richardson, who led the United States delegations to the Third Conference, held Satya in the highest regard.<sup>2</sup>

Turning to the second part of this *liber amicorum*—the United Nations Convention of the Law of the Sea—the first essay by Gudmundur Eiriksson reveals for the first time intimate disclosures by an ultimate insider on the seminal role played by Satya in drafting the bulk of the Informal Single Negotiating Text (ISNT) for the Third Conference in 1975 that was subsequently embodied almost wholesale into the final Convention text. Gudmundur was a key associate of Satya while serving on the staff of the United Nations Secretariat. He played an indispensable role in research and the early drafting efforts. Gudmundur is uniquely qualified to provide details on the text prepared predominantly by Satya. The second author in this part is David H. Anderson, who comments on Satya's valuable contributions towards the modernization of the law of the sea. David was also a representative of the United Kingdom which was a joint sponsor with Fiji of the critical proposal on straits used for international navigation. For this essay, David concentrates on the work that he and Satya did while members of the Second Committee's working group on baselines. The next contributor, Andrew J. Jacovides, was an active participant as Head of the Cypriot Delegation to UNCLOS III, where he shared a friendship with Satya from the early 1970s. As can be readily appreciated given the island nations each represented, Andrew and Satya closely monitored the negotiations and drafting of the provisions in the Convention relating to islands. An additional paper by Tommy Koh rounds out the second part of this book. Tommy, in his usual direct style, provides a succinct review of the progress,

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2 See Tommy Koh, "A Tribute to Satya Nandan" in this volume.

practice and problems of UNCLOS in Asia. Tommy's paper contains some very useful advice on problems in the region.

The paths of Moritaki ("Mori") Hayashi and Satya crossed when Mori was posted to the Permanent Mission of Japan to the United Nations and Satya was Under-Secretary-General and Special Representative of the Secretary-General for the Law of the Sea. Subsequently, Mori joined the UN Secretariat and worked with Satya, including on fisheries issues. Mori's contribution to this *liber amicorum* for Satya is a review of the important legislative history of the Basic Act on Ocean Policy adopted by Japan in 2007. The essay which follows is co-authored by one of the editors, Myron H. Nordquist, and Aimee Fausser, who first collaborated on the research and writing of the essay in 2011 when Aimee was Myron's research assistant at the University of Virginia School of Law. The topic is focused on the lessons learned for offshore drilling on the outer continental shelf in the wake of the *Deepwater Horizon* oil spill. The following contribution by Tomas H. Heidar is based on his experience making full settlements with Iceland's neighbours with respect to their overlapping claims to the continental shelf beyond 200 nautical miles. He thus shares a common interest with Satya by establishing State practice in implementing the Convention. Tomas' essay discusses in detail the work done in this regard. Next, Ronán Long's topic is on factors influencing the "inexorable" rise of UNCLOS within the European legal order. Ronán, as well as Satya, sees increasing legal guidance emanating from the Convention with respect to the management of fisheries, climate change and new activities in the offshore renewable energy sector, to name a few. Liesbeth Lijnzaad, who is currently the Legal Adviser, Netherlands Ministry of Foreign Affairs, had worked closely with Satya during the formative years of the International Seabed Authority. She takes on the specific aspect of the European Union's declarations of competence with respect to the major law of the sea instruments, and their external aspects. She points out that the division of competence within the European Union is a dynamic process and advises that declarations of competence made under the Convention, or the Fish Stocks Agreement, ought to be reconsidered if only to better present the distribution of competence to the outside world. In the next essay, Budislav Vukas of Croatia, a former Judge on the International Tribunal for the Law of Sea, traces the State practice of law of the sea through a long tradition of Croatian legal scholars. He concludes that with Croatia's recent entry into the European Union new influences of both leaders and experts will relate to future decisions dealing with the law of the sea.

The final author in this part of this book focused on the Law of the Sea Convention is John E. Noyes, a Professor of Law at California Western School of Law. John is a great admirer of Satya after they worked together while Satya

was a General Editor for and John was a principal contributor to Volume III of the *Virginia Commentary (the United Nations Convention on the Law of the Sea 1982: A Commentary)*. John considers the *Virginia Commentary* a “monumental accomplishment” and he correctly notes that Satya urged initiation of the project in 1976 due to the absence of any official *travaux préparatoires* for the upcoming Convention.<sup>3</sup> Satya, along with the indomitable Shabtai Rosenne, served as General Editors throughout the project which was accomplished at the Center for Oceans Law and Policy in Charlottesville, Virginia, over several decades. John’s essay provides an overview of the *Commentary*, highlighting its unique and important role in furthering understanding of the international law-making process. John concludes with a discussion of how the *Commentary* has contributed to treaty interpretation.

The third part of this volume deals, all too briefly, with what many would regard to be Satya’s most significant contribution to the practice of the international law of the sea since the adoption of the Convention in 1982. This is the establishment of the International Seabed Authority. As has been recounted elsewhere, notably in Volume VI of the *Virginia Commentary*, Satya was instrumental in resolving the outstanding issues with respect to Part XI of the Convention that had prevented its entry into force between 1982 and 1994. He did this through a series of informal consultations convened in New York under the auspices of the then Secretary-General of the United Nations, Javier Pérez de Cuéllar. Those consultations resulted in the Agreement of 1994 which significantly modified the application of the provisions of Part XI of the Convention in a way that was acceptable to all those States that had previously found themselves unable to ratify or accede to the Convention. This included the United States, which had been one of the most vocal opponents of Part XI and the seabed mining regime. It was to Satya’s great credit that when the Part XI Agreement was adopted by the General Assembly of the United Nations on 27 July 1994 the United States was not only a co-sponsor of the draft resolution proposing adoption of the Agreement but also that the then Permanent Representative of the United States to the United Nations, Ambassador Madeleine Albright, delivered an unequivocal statement on behalf of the Clinton administration to the effect that the Implementation Agreement had removed the remaining obstacles to widespread acceptance of the Law of the Sea Convention. It has continued to be a matter of great personal regret to Satya that, despite strong support from successive administrations, achieving advice and consent in the United States Senate has not yet been possible. He

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3 See the Foreword to *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 1, (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1985).

retains the belief that the Convention is good for the United States and that the presence of the United States as a State Party to the Convention and as a full member of the institutions created by the Convention, including the International Seabed Authority, can only serve to strengthen the Convention and promote the rule of law in the oceans.

Satya served as the first Secretary-General of the new International Seabed Authority from 1996 to 2008. When he assumed office in 1996 he faced a formidable task. Despite the success of the 1994 Agreement in securing virtually universal acceptance of the Convention, there was still the prevailing belief that deep seabed mining was unlikely to happen in the foreseeable future and that the new institution would not have much to do. As one delegate from a Western European State remarked to one of the co-editors, the International Seabed Authority was regarded as the price for achieving a universal Convention and not really as a serious institution. The emphasis in those early years was very much on the two principles embodied in the 1994 Agreement of 'cost effectiveness' and the 'evolutionary approach', which were otherwise, in the co-editor's view, a synonym for starving the new organization of financial resources.

Satya immediately understood that his function as the first Secretary-General would be to build confidence in the new organization through an approach based on the establishment of rules, regulations and procedures. Everything had to be done on the basis of transparency and through an incremental approach to providing member States with relevant and valuable information. Only then would member States begin to trust the institution and appreciate its central role in the overall legal regime for the oceans. He also understood that, despite the skepticism surrounding the new organization, it was important for the Convention as a whole that it be seen to succeed. Satya's approach was always to build for the future; on the basis that the foundations must be soundly cemented in place now, even though they might not be tested for the next 10 or 15 years. One of his seminal achievements in this regard was the adoption in 2000 of the first set of regulations for prospecting and exploration for polymetallic nodules in the Area. The contribution of these regulations to the progressive development of international environmental law is described in the essay by Rüdiger Wolfrum, a judge and former president of the International Tribunal For the Law of the Sea, who explains how the regulations of the Authority have contributed to better management of common heritage resources through the application of scientific knowledge. The subsequent essay, by Gwenaëlle Le Gurun, a legal officer in the secretariat of the Authority, focuses on the way in which the evolutionary approach has informed the development of the Authority over the first 20 years of its existence.



In this regard it is worth mentioning that Satya has always been a passionate believer in the importance of good scientific advice in developing and informing policy. To this end he realized early on that the most important service the International Seabed Authority could perform in the period before deep seabed mining commenced in earnest was to promote and encourage marine scientific research in accordance with the provisions of the Convention and to disseminate the results of such research, particularly for the benefit of the developing countries who would not otherwise have access to such science. He also at an early stage reached out to the scientific community engaged in research on the deep seabed in order to obtain first-hand information from independent sources to facilitate the development of an appropriate regulatory regime for mining. The third essay in this part of the book, by J. Ashley Roach, presents an analysis of the provisions of the Convention relating to marine scientific research in the Area, including a discussion of some of the apparent inconsistencies in the legal provisions. Ash nevertheless concludes that the Authority, under the able leadership of Satya Nandan, has so far faithfully executed the duties assigned to it by the Convention and the 1994 Agreement as far as marine scientific research is concerned. This not only validates the pragmatic approach taken by Satya, but also demonstrates how he won the trust of member States by consistently acting within, but never exceeding, the mandate of the Authority under the Convention and the 1994 Agreement. It is perhaps a testament to the firm foundations laid by Satya that the Authority receives more than 95 per cent of its assessed contributions from its member States.

The final essay in this part, by Michael W. Lodge, currently the Deputy to the Secretary-General and Legal Counsel for the Authority, takes a broad brush approach to the way in which the principle of the common heritage of mankind has been implemented by the Authority. Whilst noting that much has been achieved in terms of establishing a sound legal regime, he concludes that the acid test remains whether real economic benefits will flow to developing countries, as envisaged by the founders of the Convention.

The Agreement of 1995 on the implementation of the provisions of the Convention relating to straddling fish stocks and highly migratory fish stocks was without doubt one of the milestones in international law in the 30 years since the Convention was adopted in 1982. Satya Nandan served as chairman of the United Nations conference that resulted in this agreement and thus played a pivotal and fitting role in completing the second of the major pieces of unfinished business left over from 1982. In reaching the decision at the Rio Earth Summit of 1992 to convene an international conference on high seas fisheries, the international community was merely recognizing a fact which

Satya, as well as many other colleagues from the Third Conference, well knew, which was that the high seas fisheries provisions of the Convention were not only incomplete, but had also proved inadequate to prevent the widespread decimation of straddling and highly migratory fish stocks around the world.

The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks—to give it its official and unwieldy title—was adopted to a resounding standing ovation on 4 August 1995 in New York. Much of the credit for this extraordinary achievement must go to Satya. Through a combination of his unique negotiating style, outlined by several commentators in the present volume, and his considerable drafting ability, he was able in the space of less than three years to forge consensus between widely diverging interests. Moreover, Satya was able to produce a blueprint for the management of international fisheries which is unlikely to be replaced in the foreseeable future. The Agreement is regarded as the definitive framework for international cooperation in the conservation and management of high seas fisheries resources. As of January 2014 it has been ratified by 81 States, including nearly all the major fishing nations. Experts agree that it is the model for regional cooperation in fisheries management throughout the world.

Of course, the 1995 Agreement was not negotiated and adopted in isolation. Many other efforts were being made around the globe to deal with the pressing problems affecting high seas fisheries. These included the oceans chapter in Agenda 21, adopted by the Rio Earth Summit, as well as the FAO Code of Conduct for Responsible Fisheries, which was a product stemming from an international conference held at Cancun, Mexico, by the FAO in 1992. The contribution to the present volume by Tullio Treves describes the way in which the soft law of the Code of Conduct not only supports the binding treaty law of the Convention and the 1995 Agreement, but has also led to the further development of international law through the elaboration of technical guidelines on various issues of concern.

The 1995 Agreement broke new ground in two ways. First, it gave effect to the precautionary approach in a novel yet concrete manner by defining, in an annex to the Agreement, how States, acting through regional fisheries organizations, should define and apply precautionary reference points in managing straddling and highly migratory fish stocks.<sup>4</sup> Second, it overturned nearly

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4 There is a story behind Annex II to the Fish Stocks Agreement which has not been revealed until now, but which one of the co-editors can now reveal for the first time. The initial draft of the annex was prepared during the second session of the Conference in July 1993 by a group of

400 years of international law by establishing a regime for boarding and inspection of fishing vessels on the high seas by States members of regional fisheries management organizations. The impact of the first of these aspects of the Agreement is discussed in the article by David Freestone on Satya Nandan's contribution to the development of the precautionary approach in international law. David's article not only touches on the 1995 Agreement but also discusses how the concepts contained in the 1995 Agreement have been further developed through the regulations of the International Seabed Authority and recognized in the 2011 Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Satya's achievement in this regard has long-term, precedent-setting consequences in the progressive development of international law.

The third contribution in this part is written by a participant in the Fish Stocks conference, Ichiro Nomura, of Japan. Nomura-san served as the lead negotiator for Japan throughout the conference which, given Japan's leading position as a distant water fishing nation, meant that he was one of the most important players in the conference. As such, he worked closely with Satya, often in the context of trying to find a compromise on very difficult issues for Japan. After the conference Ichiro Nomura became Assistant Director-General of the Fisheries and Aquaculture Department of FAO, dealing with the complex institutional and policy issues relating to the management of international fisheries. His contribution to this volume focuses on the challenges to achieving sustainable fisheries at the global scale in light of the changes in governance and institutions since the adoption of the 1995 Agreement.

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fisheries scientists from the South Pacific as a contribution to be submitted to the conference on behalf of the South Pacific Forum Fisheries Agency. It so happened that, at that morning's coordination meeting of the South Pacific group, hosted every day at the Permanent Mission of New Zealand, Satya had been invited to speak to the group about his expectations for the session. He happened to notice the draft document that had been prepared by the group of scientists and immediately decided to appropriate it and add it to the first negotiating text issued by the Chairman at the end of the second session (A/CONF.164/13, Annex I). Of course, the text of the annex was much changed thereafter through negotiation, but, as Satya observed to the co-editor, the effect of including this substantive technical annex as part of the negotiating text at that stage was very important to the dynamic of the Conference. In particular it made many of those delegations that felt that the Conference would produce little more than general principles and vague political statements realise that, on the contrary, the Conference would have a substantive technical outcome and that delegations would need to come to the next session prepared to discuss substantive matters. This is a very good example of the effective and, indeed, extraordinary negotiating techniques used by Satya N. Nandan.



Up to this point the contributions in this volume have focused on Satya's contribution on the global stage. The final three essays focus on his true passion, which is his love for and commitment to the development of his region of the Pacific Islands. Fittingly, the first of these essays is written by Transform Aqorau, who was a young postgraduate lawyer at the time the Fish Stocks conference started, but has now become a leader in the Pacific Islands as well as one of its most respected legal scholars. Transform's essay traces the evolution of the fisheries aspirations of Pacific Island countries since the 1970s and expresses sentiments with which Satya would wholeheartedly agree. In particular, Transform refers in his essay to a seminal paper prepared by Fiji in 1976 which highlighted the need for coordination and regional cooperation in the management of the marine environment and its resources. This led to the establishment of the South Pacific Forum Fisheries Agency as a regional institution to coordinate fisheries management. What is not generally well-known is that the prime mover behind that 1976 proposal was none other than Satya N. Nandan himself. It is one thing to have a vision for the future, but another to have the patience, long-term commitment, and opportunity to see that vision realized over a period of more than 30 years.

The second essay in this group of essays is by Quentin Hanich and Martin Tsamenyi. They discuss the progress that has been made in the implementation of conservation and management measures for tuna in the Western and Central Pacific following the adoption in 2000 of the Honolulu Convention (the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean). That Convention was the first treaty to be negotiated to implement fully the provisions of the 1995 UN Fish Stocks Agreement. It was negotiated between 1997 and 2000 under the chairmanship of Satya N. Nandan. Immediately after the adoption of the 1995 Agreement, Satya was invited by the Pacific Islands Forum to chair a multilateral conference including both coastal States and States fishing in the region to explore the implications of the 1995 Agreement for the region as a whole. He immediately recognized that this was the long-awaited opportunity to put in place the multilateral cooperative arrangements that had been foreseen in 1976. He threw himself into three years of intense negotiation over seven sessions convened in locations as diverse as Majuro in the Marshall Islands, Fiji, Tokyo and, of course, Honolulu. In fact, for those three years, Honolulu and the Ala Moana Hotel became almost the second home for Satya and Michael Lodge, one of the co-editors, who had the privilege of working closely with Satya throughout the conference. The essay by Hanich and Tsamenyi demonstrates not only how the fisheries commission established as a result of the Honolulu Convention has evolved into a fully functional regional institution,