

The Ocean as Navigational Aid in the Era of Anthropogenic Climate Change:

The Use of the Law of the Sea by Pacific Small Island Developing States to Address Climate Change and Related Natural Phenomena

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13 March 2018

Outline

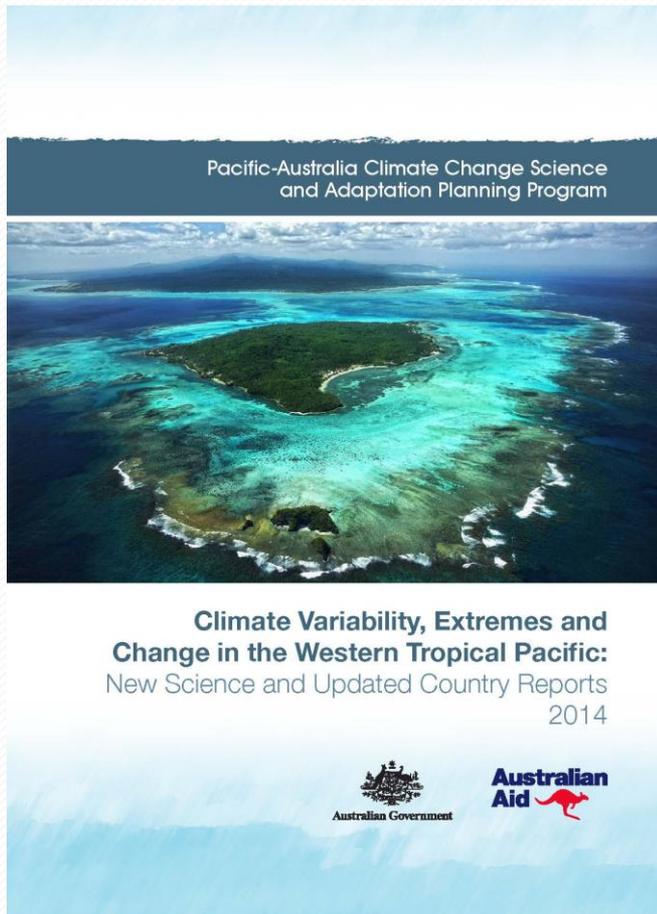
- Climate Change in the Pacific Small Island Developing States
 - Sea-surface temperature
 - Sea-level rise
 - Storms of greater intensities
 - Ocean acidification
 - Coral bleaching
 - Altered wave height, periodicity, directionality
- Pacific Small Island Developing States, Law of the Sea and Related Fields of International Law and Processes, and Climate Change
 - ILC topic proposal
 - UN Ocean Conference: Call to Action
 - Ocean Pathway in UNFCCC
 - IMO emissions reduction strategy
 - BBNJ negotiations
 - Global Pact for the Environment negotiations
 - Particular customary international law

Pacific Small Island Developing States (PSIDS)



- Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu
- Occasionally, Cook Islands and Niue

PSIDS Climate Change Projections



- Publication covers all PSIDS (including Cook Islands and Niue) plus East Timor/Timor-Leste
- Based on global climate models, scaled regionally, applied to each country covered by the report, and in alignment with projections under the Fifth Assessment Report of the Intergovernmental Panel on Climate Change

PSIDS Climate Change Projections

- Major regional climate change projections by PCCSPP 2014
 - Sea-surface temperature
 - 2.5- to 3-degree Celsius increase by 2090 under very high emissions scenario
 - Sea-level rise
 - 90 cm rise by 2090 under very high emissions scenario
 - Ocean acidification
 - Aragonite saturation state at 3.5 around 2030, barely adequate for healthy coral reef development; potentially below 3 by 2100
 - Coral bleaching
 - More frequent and longer-lasting
 - On average, with 2-degree Celsius Ocean warming, bleaching every six months and lasting about six to eight months by end of this century



PSIDS Climate Change Projections



- Major regional climate change projections by PCCSPP 2014
 - Cyclone/typhoon events
 - Less frequent but more severe
 - Cyclones Pam (2015) and Winston (2016) in the South Pacific and Supertyphoon Maysak (2015) in the North Pacific combined for 70 deaths and nearly US\$2 billion in damage; record-setting intensities
 - Altered wave height, periodicity, and directionality
 - Due to changes in wind patterns
 - Impacts for traditional instrument-free navigation in the Pacific

PSIDS Proposal for new ILC topic

“We take note of paragraph 33 of the Commission’s Report, which expressly welcomes any proposals that States may wish to make concerning possible additional topics for inclusion in the ILC Long-Term Programme of Work. As the Report reminds us, ‘the Commission should not restrict itself to traditional topics’; it should also consider topics that reflect **‘pressing concerns of the international community as a whole.’**”

“The legal implications of sea-level rise is such a topic. It is important to consider, for example, **the effect on territorial integrity which shifting baselines as a result of sea level rise may cause.** Addressing this concern is not just ‘urgent,’ it is long overdue.

“The Pacific SIDS, request and urge the ILC to include legal implications of sea-level rise as a topic of its Long-Term Programme of Work as soon as possible, including consideration of **questions which may be unique to atoll nations and other low-lying small island developing states.** The ILC may also wish to consider other, more informal formats or input, including academic discussions, and consider how best to move forward in unpacking these complex and difficult issues.

“In considering this topic, special consideration should be given to **persons and groups particularly vulnerable to climate change, including indigenous peoples and local communities.**”

-- H.E. Amatlain E. Kabua, Permanent Representative of the Republic of the Marshall Islands to the United Nations, on behalf of the Pacific Small Island Developing States (72nd UN General Assembly, 22nd meeting of the Sixth Committee, 26 October 2017)



FSM Proposal for new ILC topic

- Builds on PSIDS proposal regarding topic on legal implications of sea-level rise, via formal national communication to the ILC
- “**Non-exhaustive series of key questions of international law raised by the phenomenon of sea-level rise.** Those questions—given their breadth and complexity and challenging nature—could serve as justifications for the Commission’s inclusion of the topic of legal implications of sea-level rise in the Commission’s long-term programme of work”
- 1) Implications for the establishment, retention, and utilization of **maritime zones**, particularly under the law of the sea
 - Ambulatory or static baselines? Status of islands? Maritime delimitation?
- 2) Implications for **Statehood**
 - Partial or complete loss of territory = loss of Statehood? State responsibility?
- 3) Implications for **human rights**
 - Right to sustenance, shelter, cultural activities, religious rites, healthy environment?
- 4) Implications for **human migration**
 - Status(es) of displaced persons? Internally vs. externally displaced? State responsibility?

UN Ocean Conference



THE
**OCEAN
CONFERENCE**
UNITED NATIONS, NEW YORK, 5-9 JUNE 2017



“We are particularly alarmed by the adverse impacts of climate change on the ocean, including the rise in ocean temperatures, ocean and coastal acidification, deoxygenation, sea-level rise, the decrease in polar ice coverage, coastal erosion and extreme weather events. We acknowledge the need to address the adverse impacts that impair the crucial ability of the ocean to act as climate regulator, source of marine biodiversity, and as key provider of food and nutrition, tourism and ecosystem services, and as an engine for sustainable economic development and growth. We recognise, in this regard, the particular importance of the Paris Agreement adopted under the UN Framework Convention on Climate Change.”

-- Para. 4, Call to Action

Ocean Pathway in UNFCCC



A STRATEGY FOR THE OCEAN INTO COP₂₃ – TOWARDS AN OCEAN INCLUSIVE UNFCCC PROCESS

- A COP₂₃ Presidency ocean initiative, the Ocean Pathway embodies the important relationship between the Ocean and Climate Change. The Pathway:
 - Affirms the **Call for Action** from the UN Ocean Conference,
 - Flags the possibility of a **UNFCCC agenda item** (or, a series of consultations led by steering committee, with final decision by 2nd UN Ocean Conference) and ensures the insertion of the **Ocean into NDCs**,
 - Enhances the opportunity to **support ocean health and maintain critical ocean ecosystems** from current and emerging climate change funding under the UNFCCC,
 - Supports existing priorities that affect and are impacted by ocean and climate including: sustainable transport, cities and human settlements, population displacement and migration, coastal infrastructure, **marine ecosystem services, ocean food security and ocean energy**,
 - Strengthens mobilization and cooperation of the Parties for the **conservation and enhancement of the resilience of ocean under the UNFCCC**, and links existing ocean activities and partnerships through the introduction of the Oceans Pathway Partnership.

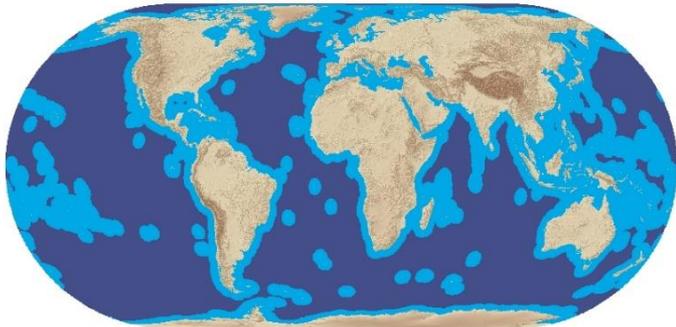
IMO emissions reduction strategy



- Article 197, UNCLOS: “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or **through competent international organizations**, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the **protection and preservation of the marine environment**, taking into account characteristic regional features.”
- Shipping projected to contribute to **nearly 20 percent of global GHG emissions by 2050**; not directly covered by the Paris Agreement
- **High Ambition Coalition for Shipping**
 - Marshall Islands, Tuvalu, Kiribati, Germany, the Netherlands, Belgium, France, Sweden, Denmark, and Antigua and Barbuda (as of May 2017)
- Draft/initial “**Comprehensive IMO strategy on reduction of GHG emissions from ships**” – due for adoption at 72nd session of the IMO Marine Environment Protection Committee (9-13 April 2018), with final version to be adopted by 2023.
 - Slow ship speeds? Carbon emissions trading?

BBNJ negotiations

WORLD OCEANS



71%
of Earth is covered
by ocean

64%
of the ocean is
considered the
high seas /
international waters

45%
of the Earth's
surface is covered
by the high seas

● Jurisdictional waters
● High seas

Source:
National Geographic
<http://theterramapproject.org>

- New international legally binding instrument **under UNCLOS** to regulate the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction
- PSIDS Submission: “[T]his new instrument could provide agreed general biodiversity protection guidelines or methodology to **take into account the impact on fish stocks of emerging issues such as the adverse impacts of climate change, pollution, or ocean acidification.**”
- PSIDS Submission on area-based management tools, including MPAs: “An MPA based on best available scientific information, and implement the ecosystem, precautionary and integrated approaches. It needs to take into account, therefore, all activities that can have an impact on the ecosystem considered, as well as the need to **plan for the adverse effects of climate change and ocean acidification on ocean resilience.**”



Global Pact for the Environment



- An international instrument—ideally a legally binding treaty—that reflects and enshrines **fundamental principles of international environmental law** (e.g., no-harm rule, precaution, polluter-pays, international cooperation, public access to information) as well as engages in the **progressive development** of certain concepts (e.g., resilience, non-regression)
- Preliminary draft produced by a Group of Experts for the Pact in June 2017, composed of distinguished international law scholars and practitioners
- Publicly endorsed and championed by the French Government
- Preamble: “**Affirming the need to adopt a common position and principles that will inspire and guide the efforts of all to protect and preserve the environment**”
 - Harmonize climate change law and law of the sea?
- **Fiji as part of Group of Friends** that produced initial draft of procedural resolution for **OEWG** at the UN

Particular customary international law



INTERNATIONAL LAW COMMISSION

- **ILC Draft Conclusion 16: Particular customary international law** [adopted by ILC on first reading in June 2016]
 - 1. A rule of particular customary international law, **whether regional, local or other**, is a rule of customary international law that applies only among a limited number of States.
 - 2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a **general practice among the States** concerned that is accepted by them as law (*opinio juris*).
- **Traditional and historical knowledge and practices** among Pacific countries and territories (i.e., PSIDS-plus) with respect to the Ocean: Particular CIL?
 - The Ocean as *marae*: various Polynesian cultures
 - Ocean fauna and megafauna as cultural/religious totems, ancestral spirits
 - The Ocean as requiring **heightened legal recognition and protection**
 - Cook Islands's Marae Moana (Ocean sanctuary), Palau Marine Sanctuary, Micronesian Shark Sanctuaries (Palau, FSM, RMI), etc.
 - Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture: **Model Law** for use by PSIDS

Thank You!

