Session 10: Sea level rise impacts on Baselines, Limits and Boundaries
Response Options: Work of the International Law Commission

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Sea Level Rise and the International Law Commission

Questions that need responses from international law:

1. International law basis to “maintain” existing baselines and maritime boundaries?
   - Not in the 1982 LOSC
   - Few agreements on record provide for “fixed” maritime baselines

2. Status of maritime boundary agreements under article 62 of VCLT? (Needs a clear and definitive meaning of VCLT article 62 that fundamental change of circumstances does not apply to maritime boundaries (or boundaries also means maritime boundaries)

3. What is the status of the maritime entitlements of islands that can no longer “sustain human habitation and an economic life of their own” (Article 121 (3))?
   - What happens to the maritime boundaries and entitlements?
Sea Level Rise and the International Law Commission

Responses/solutions to the gaps in international law require State action:

1. **Codification (amending existing instruments, adopting new ones)**
   - 1982 LOSC?
   - Advantages/Disadvantages
   - States: Do not alter the 1982 UNCLOS
   - Time-consuming and difficult

2. **Creating customary international law (State practice + opinion juris)**
   - General and consistent State practice + legal obligation (1969 ICJ North Sea cases)
   - Can be regional (eg. South Pacific Island States)
   - No time limit

3. **Interpretation of existing instruments**
   - Eg. Subsequent agreement and practice – Fundamental VCLOT article 31(3))
   - Article 62 of VCLOT and non-application of fundamental change of circumstances
   - Conference of the Parties decisions (but not found in UNCLOS)
International Law Commission: Mandate

1. ILC established in 1947 by the UN General Assembly to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification".

2. Statute of the International Law Commission

Article 1 1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.
Why should the International Law Commission undertake the topic of Sea Level Rise in Relation to International Law?

1. ILC is a subsidiary body of the UNGA
2. Long history of codification and progressive development of international law (eg. 1958 Geneva LOSC, VCLT etc)
3. ILC has a direct interactive relationship with States through the UN Sixth [Legal] Committee
4. The work of the Commission goes directly to the Sixth Committee and reviewed and commented by States, which are official statements
5. The ILC is considered an authoritative body and relied upon by international courts and tribunals, States, scholars and practitioners.
Sea Level Rise and the International Law Commission: Time Line

- **2017** Fifteen delegations in the Sixth Committee during the 72nd session of the U.N. General Assembly requested its inclusion in the work programme of the Commission (Indonesia, Micronesia, Peru, Romania, Tonga and the Pacific Small Island Developing States (Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu)

- **31 January 2018** Commission agreed to include the topic on the long-term programme of work of the Commission entitled “Legal implications of sea-level rise

- **2018** the International Law Commission agreed to place the topic of “Sea level rise in relation to international law” on its long term programme

- Resolution 73/265 of 22 December 2018, the General Assembly noted the inclusion of the topic in the long-term programme of work of the Commission

- **2018** Federated States of Micronesia proposal dated 31 January 2018 for inclusion of a topic on the long-term programme of work of the Commission entitled “Legal implications of sea-level rise

- **2019** the Commission decided to include the topic in its current programme of work and also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria

- Three issues to be covered (a) law of the sea; (b) statehood; and (c) protection of persons affected by sea-level rise.

- **2020**: First Issues Paper (Bogdan Aurescu and Nilufer Oral) examining law of the sea issue issued in June 2020
Sea Level Rise and the International Law Commission

Methodology and outcome

1. ...Study Group will perform “a mapping exercise of the legal questions raised by sea-level rise and its interrelated issues ... This effort could contribute to the endeavours of the international community to respond to these issues and to assist States in developing practicable solutions in order to respond effectively to the issues prompted by sea-level rise

2. Final outcome will be a final report of the Study Group, accompanied by a set of conclusions on its work. After the presentation of the final report, “it could be considered whether and how to pursue further the development of the topic or parts of it within the Commission or other [forums]”.
Issues to be addressed

I. Possible legal effects of sea-level rise on the baselines and outer limits of the maritime spaces that are measured from the baselines

II. Possible legal effects of sea-level rise on maritime delimitations

III. Possible legal effects of sea-level rise on islands insofar as their role in the construction of baselines and in maritime delimitations is concerned

IV. Possible legal effects of sea-level rise on the exercise of sovereign rights and jurisdiction of the coastal State and its nationals, as well as on the rights of third States and their nationals, in maritime spaces in which boundaries or baselines have been established
State practice: Request sent to States from the ILC

Commission appreciated receiving, by 31 December 2019, examples from States of their practice that could be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature. Such practice could, for example, relate to baselines and where applicable archipelagic baselines, closing lines, low-tide elevations, islands, artificial islands, land reclamation and other coastal fortification measures, limits of maritime zones, delimitation of maritime boundaries, and any other issues relevant to the subject. Relevant materials could include:

1. bilateral or multilateral treaties, in particular maritime boundary delimitation treaties;
2. national legislation or regulations, in particular any provisions related to the effects of sea-level rise on baselines and/or more generally on maritime zones;
3. declarations, statements or other communications in relation to treaties or State practice;
4. jurisprudence of national or international courts or tribunals and outcomes of other relevant processes for the settlement of disputes related to the law of the sea;
5. any observations in relation to sea-level rise in the context of the obligation of States parties under the United Nations Convention on the Law of the Sea to deposit charts and/or lists of geographical coordinates of points; and
6. any other relevant information, for example, statements made at international forums, as well as legal opinions, and studies.
State Practice Request from ILC

• Response from the Pacific Islands Forum States (PIFS) dated 30 December 2019

• PIF Member State Leaders in 2019 made commitments that included to develop international law to ensure the permanency of maritime boundaries and entitlements once established so as not to be challenged or reduced because of sea level rise and climate change

• PIF States take the view that regular review of baselines and charts under UNCLOS is not required (Article 5, 6,)

• Recent practice of PIF States in concluding maritime boundary agreements is the use of geographic coordinates to promote stability and certainty (instead of nautical charts)

• PIF Member States taking political and legislative steps to preserve existing maritime zone rights.
Sixth Committee Statements from ILC First Issues Paper (2020)

- **Australia** “recalling the efforts by Member States in the affected regions to “define base points, baselines and outer limits of their maritime zones, consistent with the United Nations Convention on the Law of the Sea” and “to resolve outstanding maritime delimitations and make extended continental shelf submissions”, underlined that States had thus sought “to maximize the stability and clarity that the Convention brought to oceans governance and maritime jurisdiction”.

- **China** mentioned the need for the Commission to maintain, to the extent possible, “the stability and predictability of the current legal regime and provide legal guidance for the international community to address sea-level rise appropriately”.

- **Greece** stressed that the outcome of the Commission’s work “should safeguard the entitlements to maritime zones, the stability of maritime boundaries and the stability of relevant treaties”.

- **Indonesia** recommended that the issue “be approached with caution because of its sensitivity, particularly in relation to the issues of borders and delimitation”.

- **New Zealand** - “the goal was to find a way, as quickly as possible, to provide certainty to vulnerable coastal States that they would not lose their rights over their marine resources and zones because of rising sea levels.”
Sixth Committee Statements from ILC First Issues Paper (2020)

• Jamaica expressed hope “that the Commission’s work on sea-level rise would spur the development of the international law on climate change in a manner that supported security and stability and protected the most vulnerable communities and States”.

• Greece stressed the “principle of stability of maritime boundaries which [could] not be affected by climate change and its effects “

• Thailand stressed that “existing entitlements should be upheld in order to maintain peace, stability and friendly relations among nations

• Permanent Court of Arbitration quoted recent relevant case law, the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India):

“maritime boundaries, just like land boundaries, must be”, in the words of the Tribunal, “stable and definitive to ensure a peaceful relationship between the States concerned in the long term”. Such stability was deemed all the more essential “when the exploration and exploitation of the resources of the continental shelf [were] at stake”. 
Some Preliminary Observations in the ILC First Issues Paper

1. UNCLOS does not indicate *expressis verbis* that new baselines must be drawn, recognized (in accordance with article 5) or notified (in accordance with article 16) by the coastal State when coastal conditions change.

2. The obligation under article 16 does not apply to normal baselines (article 5).

3. UNCLOS does not prohibit *expressis verbis* the preservation of baselines.

4. Sea-level rise cannot be invoked in accordance with article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as a fundamental change of circumstances for terminating or withdrawing from a treaty which established a maritime boundary, since maritime boundaries enjoy the same regime of stability as any other boundaries.

5. Submissions by Member States to the Commission in response to its request for State practice, and their statements before the Sixth Committee represent a form of State practice supporting the preservation of existing maritime delimitations, irrespective of the effects of sea-level rise.