

Is the Pacific Shaping the Future of Maritime Limits and Boundaries?

Introduction

On August 6, 2021, the Pacific Islands Forum (PIF) members published a "Declaration on preserving maritime zones in the face of climate change-related sea-level rise."¹ This is not the first time Pacific island states and territories² have explicitly supported the preservation of their maritime entitlements in the face of the effects of climate change. It is, however, the first regional statement entirely dedicated to this complex legal issue, and it provides a detailed commitment on interpretation and development of the law of the sea regarding sea-level rise. The International Law Commission (ILC) Study group on sea-level rise in relation to international law has already identified a body of state practice, and the PIF Declaration could constitute a significant element in the progressive recognition of a regional—or even general—customary rule on preservation of maritime zones. The PIF Declaration also highlights that Pacific island states and territories are not only at the frontline of climate change consequences, they are also actively contributing to the emergence of legal solutions. This *Insight* examines the context of this declaration and assesses the role it could play in the guarantee of states' jurisdictions on maritime spaces in the face of climate change.

The Effects of Sea Level Rise for Pacific States and Territories' Maritime Zones

Among all the challenges resulting from greenhouse gas emissions, the potential impact of sea level rise on maritime zones is of crucial importance. As widely documented and analyzed, the Law of Sea Convention (UNCLOS) does not address the effects it could have on baselines, outer limits and borders of maritime spaces under state jurisdiction, while rising ocean can cause the low-water mark to recede, and/or submerge all or part

of the base points used to draw straight baselines and archipelagic baselines. Some geographical features taken into account for delimitation negotiations and/or as special circumstances can also suffer substantial modification.³ Article 7.2 on permanent straight baselines for deltas and “other natural conditions” provoking highly unstable coastlines, and article 76 (§§ 8 and 9) on final outer limits of continental shelf are the only exceptions, but they are of no help to guaranty stability for other maritime limits.

For Pacific island states and territories, this is a security (including food security) and existential matter, which must be urgently addressed. Water levels are rising with more velocity and intensity in Oceania,⁴ where a majority of states cannot afford appropriate infrastructures aimed at mitigation—which is an imperfect option anyway. Maritime resources represent the main source of food and incomes in many of these countries, with no clear alternative.⁵ Moreover, the extent of maritime spaces involved is unique: Because of its geographical configuration, the region concentrates the majority of the largest exclusive economic zones (EEZs) of the world (more than 15 million square kilometers). As an example, Tuvalu’s EEZ represents more than 25,000 times its land area.⁶ Most critically, in the case of disappearance of low-lying states’ land mass, the preservation of maritime space would be a key aspect to the continuity of their statehood.

Because it raises complex and numerous legal questions, the impact of sea level rise on maritime limits and boundaries was officially listed on the ILC’s work program in 2020.⁷ It is no surprise that among the fifteen United Nations members having requested this inclusion during debates in the 6th Committee at the General Assembly in 2017, a majority are Pacific states⁸ and that they have been particularly active in Commission proceedings since then.

The Emergence of a Regional State Practice

Bolstered by numerous statements, the ILC Study group swiftly launched a search for a body of state practice which would give some indications on the development of international law regarding maritime zones and sea-level rise. ILC Members have also been explicitly asked to work “from the perspective of *lex ferenda*, not just *lex lata*.”⁹

Two types of actions can be identified in the Pacific in response to the threat represented by sea-level rise on maritime entitlements. The first one involves efforts made by states to define base points, baselines, and outer limits of their maritime spaces, particularly since the 2010 Framework for a Pacific Oceanscape initiative. These new points of reference have been deposited with the UN General Secretariat. Even though such deposits do not freeze the limits, they provide a certain stability, particularly since there

is no obligation in UNCLOS to update the straight baselines, nor is there even any obligation to publish coordinates on normal baselines. Concomitantly, a massive improvement to delimitation of shared boundaries was supported by the Pacific Island Maritime Boundaries Project.¹⁰

Second, different regional instruments have gradually pointed out the threat represented by sea level rise and the importance of guaranteeing the integrity of maritime boundaries for states and territories in the Pacific. Among them are the Samoa Pathway (2014), the Taputaputea Declaration from the Polynesian leaders (2015), the Delap Commitment (2018), and the PIF Secretariat communiqué of the 49th Pacific Islands Forum (2018) annexed to the Boe declaration.¹¹ The PIF Secretariat communiqué of the 50th Pacific Islands Forum of 2019 is even more specific, with leaders expressing their commitment “to a collective effort, including to develop international law” to ensure permanence of maritime boundaries.¹²

On the basis of these elements, the International Law Association (ILA) Committee on sea-level rise and international law recognized in 2018 the existence of

prima facie evidence of the development of a regional State practice in the Pacific islands – many of which are the most vulnerable to losses of territory and, consequently, baseline points from sea level rise. The Pacific island States would of course be among those “States whose interests are specially affected”, a significant attribute regarding the establishment of a general practice in the formation of a new rule of customary international law ... The emergence of a new customary rule will require a pattern of State practice, as well as *opinio juris*.¹³

The ILC study group on sea-level rise went even further in its first issues paper, by attesting to the existence of a practice in the Pacific and South-East Asia for the preservation of baseline and outer limits which meets the requirements for the material element of a customary rule.¹⁴ The same conclusion was reached for maritime delimitations and boundaries.¹⁵ Although it was considered early to recognize the existence of an *opinio juris*, “the general reliance of the conduct,” on the basis of “legal stability and security” was considered a “indication in that sense.”¹⁶

The 2021 PIF Declaration Contribution

The recent PIF Declaration on Preserving Maritime Zones in the face of climate change-related sea-level rise is not just another iteration of existing regional statements. Its main originality is to be entirely dedicated to the topic as well as to provide a clarification of the

legal grounds for the above-mentioned Pacific practice. In its preamble, the text stresses the importance of the principles of stability, security, certainty, predictability, equity, fairness, and justice, as well as the obligation to interpret the text in good faith (UNCLOS Article 300). It also addresses the question of the UNCLOS drafters' intention, considering that "the convention was premised on the basis that, in the determination of maritime zones, coastlines and maritime features were generally considered to be stable," and that small Pacific island developing states have developed their governance policy on the premise of their stability. Leaders explicitly declare their intention "... once having, in accordance with the Convention, established and notified [their] maritime zones to the Secretary-General of the United Nations, ... to maintain these zones without reduction, notwithstanding climate change-related sea-level rise," without any review or updating.

Because such a declaration on preservation of maritime entitlements is presented as supported both by the general principles underpinning the convention and by its dispositions, it could be an important element for the recognition of a regional customary law. It details how the Pacific practice is "undertaken with a sense of legal right or obligation."¹⁷ While that is not sufficient evidence *per se*, it could be an important element to assess the existence of *opinio juris*.

Conclusion

The 2021 Declaration will certainly play an important role in the development of law of the sea regarding maritime zones and sea-level rise. The recognition of a state practice, and its possible crystallization into a customary rule at a regional or even general level—an option left open by the ILC—still leaves a number of legal questions to be addressed, such as the precise conditions for the limits and boundaries to be considered established, or the possibility of further changes.¹⁸ Some answers may emerge from future state communications to the Commission. Despite all the remaining difficulties, the Pacific leaders' effort is certainly contributing to shaping the future of maritime limits and boundaries, showing that, as the Pacific Climate Warriors group puts it, Oceanian islanders are "not drowning," they are "fighting." Even though it went through a major crisis in 2020 when Micronesian states announced their withdrawal from the organization after a contested leadership roll-out, the PIF is still a major framework for cooperation in the Pacific.

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¹ See <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>. The PIF members are Australia, the Cook Islands, the Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Tokelau is an associated member.

² To the members of the PIF and associated members already mentioned, American Samoa, Guam, Mariana Islands, Pitcairn, and Wallis-et-Futuna can be added to the list of “Pacific states and territories.”

³ See Davor Vidas, David Freestone & Jane McAdam, *International Law and Sea Level Rise: The New ILA Committee*, 21 ILSA J. INT’L & COMP. L 397, 403 et seq. (2015).

⁴ “For example, in the western Pacific Ocean, rates were about three times greater than the global mean value of about 3 mm per year from 1993 to 2012,” IPCC Reports AR/5, 2013, p. 1148.

⁵ See presentation of SIDS by the Office of High Representative for Least Developed Countries, <https://www.un.org/ohrrls/content/about-small-island-developing-states>.

⁶ 756313 km² for 30 km² of land area, source: fao.org.

⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, ¶ 369.

⁸ The 15 states are: Indonesia, Marshall Islands, on the behalf of the Pacific small islands developing States (i.e., Fiji, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu), Micronesia (Federated States of), Peru, Romania, and Tonga. *Sea-level rise in relation to international law*, First issues paper by Bogdan Aureescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law (Feb. 28, 2020), A/CN.4/740, note 5. Four states were against: Cyprus, Slovakia, Techeque Republic, Greece.

⁹ Issues Paper, *id.* ¶ 14.

¹⁰ The project is supported by Australia and the SPC. Today 35 of the 48 shared boundaries of Oceania are delimited. For an actual status on Pacific maritime boundaries and presentation of the project, see <https://www.spc.int/updates/blog/2020/09/the-status-of-pacific-regional-maritime-boundaries-as-of-july-2020>.

¹¹ For references of these texts, see A/CN.4/740, notes 220-224.

¹² Doc. PIFS(19)14, §26, <https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>; The Final Declaration of the 5th France-Oceania Summit (July 2020) also insists on the importance of interpreting UNCLOS under principles of stability, security, certainty and predictability: <https://www.forumsec.org/2021/07/20/final-declaration-of-the-5th-france-oceania-summit-19-july-2021/>.

¹³ Sydney Report of the Committee on International Law and Sea-Level Rise (2018), p. 18.

¹⁴ Issues Paper, *supra* note 8, ¶ 104, (g)-(i).

¹⁵ *Id.* ¶ 141.

¹⁶ *Id.* ¶¶ 104(i), 141(i).

¹⁷ ILC Report, *supra* note 7, Part V, Conclusion 9.

¹⁸ See, e.g., Vincent P. Cogliati-Bantz, *Sea-Level Rise and Coastal States’ Maritime Entitlements: A Cautious Approach*, 7 J. TERRITORIAL & MAR. STUD. 95 (2020).