

ENVIRONMENTAL DISPUTE RESOLUTION AND SMALL STATES

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**SETTING THE SCENE
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Themes:

- what are the disputes requiring resolution?
- by what means can they be resolved?
- what is the role of Small States in such process?

Prime Minister of Samoa the Hon Tuilaepa Sailele:

We all know the problem, we all know the causes, we all know the solutions. All that is left would be some political courage, some political guts to get out and tell the people of your country, 'Do this, this, this, or there is ... certainty of disaster.'¹

Albert Einstein

Imagination is more important than knowledge. For knowledge is limited to all we now know and understand, while imagination embraces the entire world, and all there ever will be to know and understand.²

¹ *The Guardian* 31 August 2018

² 1929 October 26, *The Saturday Evening Post*, "What Life Means to Einstein: An Interview by George Sylvester Viereck", Start Page 17, Quote Page 117, Column 1, Saturday Evening Post Society, Indianapolis, Indiana.

- The Netherlands: the Government's appeal in the *Urgenda* case has been argued before the Court of Appeal which will deliver judgment on 19 October³
- The United Kingdom: the Supreme Court has made mandatory orders against the Government and the trial judge has contemplated granting the plaintiffs continuing leave to apply to him if there is evidence of non-compliance;⁴

³ <https://www.climateliabilitynews.org/2018/05/30/urgenda-climate-ruling-netherlands/>

⁴ Lord Carnwath "Climate Justice and the Global Pact" 26 February 2018 p7

- The USA
 - on 30 July the Supreme Court declined to stop proceedings in *Juliana v United States of America*⁵ due to commence on 29 October;
 - in *Clean Air Council v United States of America*⁶ plaintiffs seek declaratory relief pursuant to the US Constitution's Fifth Amendment protection of life and liberty, customary international law and international human rights law to set aside the "Rollbacks" of environmental protection;
- The European Court of Justice: on 13 August accepted a claim against the EU for "climatic inaction";⁷

⁵ 9th Cir No. 17-71692 7 March 2018

⁶ United States District Court for the Eastern District of Pennsylvania Case 2:17-cv-04977-PD 11 June 2017

⁷ *Le Monde* 16 August 2018 p5

- New Zealand: on 28 August the High Court rejected a narrow interpretation of the prohibition of an “adaptive management” (suck it and see) approach, rather than securing adequate baseline information, for granting an application under the Environment Protection Act to take iron sand from the seabed;⁸
- Canada: on 30 August the Federal Court of Appeal quashed an Order in Council approving proposed expansion of the Trans Mountain pipeline system for transporting diluted bitumen from Alberta to British Columbia, for failure of the Government during the consultation process to fire back at objectors to give them the chance of defending their grounds of objection;⁹

⁸ *Taranaki-Whanganui Conservation Board v. Environmental Protection Authority* [2018] NZHC 2217; cf *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, para. 153;

⁹ *Tsleil-Waututh Nation v. Canada (Attorney General)* [2018] FCA 153

- The current programme of the **International Law Commission**:
 - includes **protection of the atmosphere**;¹⁰
 - projected work
 - (i) **universality of criminal jurisdiction**,¹¹
 - (ii) **sea-level rise in relation to international law**:

¹⁰ http://legal.un.org/docs/?path=../ilc/reports/2018/english/a_73_10_advance.pdf&lang=E pp157 ff

¹¹ pp307 ff

1. **Sea-level rise** has become in recent years a subject of **increasing importance for a significant part of the international community — more than 70 States are or are likely to be directly affected by sea-level rise**, a group which represents more than one third of the States of the international community. Indeed, as is well known, this phenomenon is already having an **increasing impact upon many essential aspects of life for coastal areas, for low-lying coastal States and small island States, and especially for their populations**. Another **quite large number of States** is likely to be **indirectly affected (for instance, by the displacement of people or¹² the lack of access to resources)**. Sea-level rise has become a **global phenomenon and thus creates global problems, impacting on the international community as a whole**.

¹² Pp 326 ff

2. In **2015**, in paragraph 14 of the 2030 Agenda for Sustainable Development, the **U.N. General Assembly recognised that:**
“Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea-level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk.”

...

4. These factual consequences of sea-level rise prompt a number of **important questions relevant to international law**. For instance, **what are the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones**, whether by agreement or adjudication? **What are the effects upon the rights of States in relation to those maritime zones? What are the consequences for statehood under international law should the territory and population of a State disappear? What protection do persons directly affected by sea-level rise enjoy under international law?**
5. These questions **should be examined through an in-depth analysis of existing international law ...**

- The Security Council:
 - **on 20 July 2011 6587th Meeting the Security Council was divided over whether climate change is a threat to international peace and security falling within its jurisdiction, or rather a sustainable development issue which the Council did not have the means and resources to address;¹³**
 - **on 27 March 2018 in unanimously adopting Resolution 2408(2018) extending its Assistance Mission in Somalia¹⁴ it explicitly recalled its President's statement at the 2011 meeting:**

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¹³ <https://www.un.org/press/en/2011/sc10332.doc.htm>

¹⁴ <https://www.un.org/press/en/2018/sc13264.doc.htm>

As well as stating:

“The Security Council underlines General Assembly resolution 63/281 of June 3, 2009, which: reaffirms that the United Nations Framework Convention on Climate Change is the key instrument for addressing climate change ...”

that statement concluded:

“The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security.

“The Security Council expresses its concern that possible security implications of loss of territory of some States caused by sea-level-rise may arise, in particular in small low-lying island States.

“The Security Council notes that in matters relating to the maintenance of international peace and security under its consideration, conflict analysis and contextual information on, inter alia, possible security implications of climate change is important, when such issues are drivers of conflict, represent a challenge to the implementation of Council mandates or endanger the process of consolidation of peace. In this regard, the Council requests the Secretary-General to ensure that his reporting to the Council contains such contextual information.”¹⁵

¹⁵ <https://undocs.org/S/PRST/2011/15>

- the *Mauritius* case argued 3-6 September before the ICJ:
 - use of Art 96 of the UN Charter to seek an advisory opinion as to the rights of the Chagos Islanders following the adverse majority decision of the UK House of Lords (as it then was)¹⁶ and the greater success before the Permanent Court of Arbitration panel¹⁷

¹⁶ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453

¹⁷ *Republic of Mauritius v The United Kingdom* Award 18 March 2015

<http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>

- 17 September 2015, at the conference led by Lord Carnwath at the UK Supreme Court, Professor Philippe Sands QC in his lecture *Climate Change and the Rule of Law*:¹⁸
- the prospect of environmental disaster should be the subject of an advisory opinion of the International Court of Justice

¹⁸ The Supreme Court, Climate Change & the Rule of Law, available at <https://www.supremecourt.uk/news/climate-change-and-the-rule-of-law.html>

Ambassador Eden Charles of Trinidad and Tobago

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