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Latin America's Contribution to the Normative Discussion Around Rising Sea Levels: Incorporating the Principles of Uti Possidetis and Solidarity

Abstract

Ladies and gentlemen, dear colleagues, good morning. Initially, I would like to give thanks for the kind invitation made by Professor Claudio Grossman and now members of the committee to participate in this special conference on sea level rise and International Law's impact on the Americas, which has set up an ahead of time debate due to the effects that are being experienced by the entire international community.

The conference that preceded me today highlighted the emergence of this discussion, and this systemic character that involves its interpretation by impacting our states and peoples, demanding coordinated action in a spirit of mutual understanding and cooperation. As a phenomenon, climate change generates a series of serious environmental consequences, which can already be observed today. One of the consequences of the planet's rise in temperature is the rise in sea level, which is due to the melting of glaciers in the arctic and in Antarctica, in an unprecedented and unexpected way. This will result in flooding and submersion of coastal areas, causing various damage such as reconfiguring the geographical boundaries that make up these states. In this sense, the goal of this presentation is a quick and objective analysis of the existing norms around the theme, and then to reflect how Latin America is situating this discussion and what could be its contribution to normative interpretation of this subject.

Keywords

International Law, International Environmental Law, Global Warming, Sea Level Rise, Law of the Sea, Latin America, Foreign and Comparative Law

LATIN AMERICA'S CONTRIBUTION TO THE NORMATIVE DISCUSSION AROUND RISING SEA LEVELS: INCORPORATING THE PRINCIPLES OF *UTI POSSIDETIS* AND SOLIDARITY

WAGNER MENEZES*

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Ladies and gentlemen, dear colleagues, good morning. Initially, I would like to give thanks for the kind invitation made by Professor Claudio Grossman and now members of the committee to participate in this special conference on sea level rise and International Law's impact on the Americas, which has set up an ahead of time debate due to the effects that are being experienced by the entire international community.

The conference that preceded me today highlighted the emergence of this discussion, and this systemic character that involves its interpretation by impacting our states and peoples, demanding coordinated action in a spirit of mutual understanding and cooperation. As a phenomenon, climate change generates a series of serious environmental consequences, which can already be observed today.¹ One of the consequences of the planet's rise in temperature is the rise in sea level, which is due to the melting of glaciers in the arctic and in Antarctica, in an unprecedented and unexpected way.² This will result

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1. See RAJENDRA K. PACHAURI ET AL., CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2–8 (Rajendra K. Pachauri & Leo Meyer eds., 2015) (detailing the global effects of climate change and environmental implications).

2. See Michael Oppenheimer et al., *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, in IPCC SPECIAL REPORT ON THE OCEAN

in flooding and submersion of coastal areas, causing various damage such as reconfiguring the geographical boundaries that make up these states.³ In this sense, the goal of this presentation is a quick and objective analysis of the existing norms around the theme, and then to reflect how Latin America is situating this discussion and what could be its contribution to normative interpretation of this subject.

With regard to normative interpretations, different normative manifestations dialogue with the proposed theme and need to be analyzed in a systematic way. Although it has not specifically addressed the subject of sea level change, the United Nations Convention on the Law of the Sea in Article 192 established the obligation of all states to protect and preserve the marine environment.⁴ Such protection and preservation is prescribed in Article 201 as a parameter which appropriates scientific criteria for the formulation and the elaboration of rules and standards, as well as recommended practices and procedures.⁵ It describes the rise in sea levels as a result of a problem related to the sustainable use of the oceans and a challenge for the entire international community in the Convention's jurisdiction.⁶

Specifically on the subject, Resolution 44/206 of the United Nations General Assembly of 22 December 1989 warned about the possible negative effects of sea level rise of islands and coastal areas, specifically low-lying coastal areas, which reinforced the concerns of discussions from the South Pacific forum.⁷ The Langkawi Declaration of the Environment took place in 1989 and demonstrated the beginning of international mobilization on this topic.⁸ In turn, the 1992

AND CRYOSPHERE IN A CHANGING CLIMATE 321, 323, 326 (Ayako Abe-Ouchi et al. eds., 2002) (assessing rising sea levels and the implications for island communities).

3. *Id.* at 324, 328.

4. *See generally* United Nations Convention on the Law of the Sea art. 192, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (discussing the likely environmental impact and flooding to occur if sea levels continue to rise at current rates).

5. *Id.* art. 201.

6. *Id.*

7. *See generally* G.A. Res. 44/206 (Dec. 22, 1989).

8. *See* Langkawi Declaration on the Environment, Oct. 21, 1989, <https://thecommonwealth.org/langkawi-declaration-environment-1989> (summarizing the meeting of minds between heads of government and the global

Convention on Climate Change recognized the negative effects of earth's climate change as human activities were increasing atmospheric concentrations of greenhouse gases, resulting in an increase of the temperature of the earth's surface, which in turn affected natural ecosystems.⁹ The 2015 Paris Climate Convention acknowledged that climate change is a common concern of humanity.¹⁰ Guided by the concept of climate justice, the State Parties recognized the importance of avoiding, minimizing, and facing losses and harm associated with the negative effects of climate change, including: extreme weather events; the slow evolving events and the role of sustainable development in reducing the risk of loss and damage by strengthening the states; and cooperation in the adoption of a precautionary system for emergency situations with particular attention to slow evolving events that may involve irreversible and permanent losses and damage, such as rising sea levels.¹¹

The Sustainable Development Goals signed in 2015 in Resolution 70/1, setting targets by 2030, reflect the concern about climate change.¹² Goal 13 set goals for strengthening resilience and the ability to adapt to risks related to climate and natural disasters.¹³ Goal 14, in addressing the sustainable use of the oceans, calls on the states to sustainably manage and protect marine and coastal ecosystems by 2020 to avoid significant adverse impacts.¹⁴ At the UN Ocean Conference in July 2022, and as a result of the discussion expressed in their final documents, the States declared to be alarmed by the rise in sea levels and the decrease in polar ice cover, with climate change and its effects on the oceans being one of the greatest challenges of

mobilization of countries toward halting progressive deterioration of the environment).

9. *See generally* United Nations Framework Convention on Climate Change, at 166, May 9, 1992, 1771 U.N.T.S. 107 (discussing efforts to stabilize greenhouse gas concentrations in the atmosphere).

10. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (discussing goal of enhancing implementation of Paris climate agreement).

11. *Id.* art. 8.

12. *See generally* G.A. Res. 70/1 (Sept. 25, 2015).

13. *Id.* at 23.

14. *Id.*

contemporaneity, calling for action to address rising sea levels.¹⁵ The catalog of normative documents demonstrate the emergence of the theme from the 1990s until its progressive strengthening as a concern of states and is today concretely a central theme that makes up the international normative agenda, which reinforced the need for discussion on the structuring of the normative framework for its interpretation. The rise of sea level will modify the maritime spaces with impact on the baselines that serve to measure the width of the sea, according to the United Nations Convention, established in 1982, by questioning how to create the baselines and whether measurements will be modified, given that some states may disappear, and their population will be drifting without a geographical space.

How should the international community react to that? In this sense, it is appropriate to analyze how this phenomenon impacts Latin America in the South Atlantic area, and what its legal contribution to confront the issues from a legal point of view could be. Latin America faces the South Atlantic below to the equator, separated from the Indian Ocean to the east, and the Pacific Ocean to the west, making the region geopolitically quite strategic.

Scientific studies point to a catastrophic scenario in this region due to the rise in sea levels. According to the map published by Climate Central in 2020, the impact of rising sea levels will directly affect Brazil, for instance, at Tambau beach in Joao Pessoa in the state of Paraíba, and Argentina, at Punta Mogotes and Playa Grande beaches in Mar del Plata, as well as several other world-renowned touristy locales in South America that could simply be submerged by 2090.¹⁶

15. See U.N. Ocean Conf., *Report of the 2022 U.N. Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development*, ¶¶ 5,13, U.N. Doc. A/CONF.230/2022/14 (June 27-July 1, 2022) (detailing conference co-hosted by Kenya and Portugal governments for discussion surrounding science-based innovation and solutions aimed toward restoring ocean health).

16. *Coastal Risk Screening Tool*, CLIMATE CENTRAL, https://coastal.climatecentral.org/map/10/-34.828/-7.1292/?theme=sea_level_rise&map_type=year&base_map=roadmap&contiguous=true&elevation_model=best_available&forecast_year=2090&pathway=ssp3rcp70&percentile=p50&refresh=true&return_level=return_level_1&rl_model=gtsr&slr_model=ipcc_2021_med (last visited May 24, 2023) (providing an interactive map showing areas threatened by sea level rise and coastal flooding through combining the most advanced global model of coastal elevations

Another study reveals that currently 7.5 million inhabitants and 299 billion in built capital are exposed to coastal flooding within 100 years in Latin America and the Caribbean, without considering hurricanes.¹⁷ In other words, the problem of rising ocean levels will have a concrete impact on the continent and the discussion must be initiated for the exchange of perspectives, specifically to change the baselines and economic impacts on states as well as on vulnerable people or who depend directly on the sea for their subsistence.

With regard to a regional action strategy, to address the problem institutionally, according to the catalog of multilateral institutions involved in the region, there is no movement, publication, or concrete initiative to address the problem in the Zone of Peace and Cooperation in the Atlantic South block formed by African and Latin American countries, Mercosur, Latin American Integration Association, and the Organization of American States. In this sense, the presence here of Professor Jean-Michel Arrighi—who is the Secretary for Legal Affairs of the OAS—is very, very important to open the discussion in the OAS.

This apparent inaction is not in line with the tradition of multilateral actions of Latin American States in their international relations, consolidated in the regional custom of actions with each other expressed both in the position of recognition of sovereignty on the continental shelf.¹⁸ Latin Americans, in a contribution to the development of the Law of the Sea, considered different initiatives developed by various state actors on the width of territorial sea and the measurement of 200 miles of free navigation border in a peaceful manner.¹⁹ Also, the production of normative text that harmonized the

with the latest projections for future flood levels).

17. See BORJA G. REGUERO ET AL., *EFFECTS OF CLIMATE CHANGE ON EXPOSURE TO COASTAL FLOODING IN LATIN AMERICA AND THE CARIBBEAN* 11, 16 (Juan A. Añel ed. 2015) (considering several important factors contributing to coastal flooding and the Latin American and Caribbean regions).

18. United Nations Convention on the Law of the Sea arts. 76–77, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

19. See Luis Valencia-Rodríguez, *The Contributions of Latin America to the Implementation of the UNCLOS*, in *LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*, 150, 153–58, 160–65, 171–72 (Lilian del Castillo ed., 2015) (discussing Latin America's contribution to issues of coastal flooding and effects of climate change on sea levels).

action of the states such as the Declaration of the Latin American States on the Law of the Sea, the Montevideo Declaration (signed in 1970 which already warned about the use of the sea and the disturbance of ecological balance and serious dangers,) and the Santo Domingo Declaration (signed in 1972) consolidated understandings that were universally recognized in joint documents that preceded the negotiation of the United Nations Convention.²⁰ In this regard, since the process of independence of the countries, specifically from the leadership of Bolivar, as well as with diplomatic action of the States, several principles, institutes, and rules were developed in the context of Pan-Americanism, many being recognized and applied in general International Law.²¹

Now, to address the problems of sea level rise, two principles must be considered: the change of the baselines, and the limits of the territorial sea. The most appropriate solution would be to apply the principle of *Uti Possidetis*, developed by the need to solve territorial disputes.²² The principle *Uti Possidetis*, which means “as you continually possess” led to the interpretation that those States that already exercise some form of de facto jurisdiction over the occupied territory must make peaceful, continuous, and prolonged possession to have territorial rights over the lands.²³ The preponderant factor object of the institute is the fact of an ownership relationship between the State and the territory, capable of consolidating a legal relationship. In this sense, it would be counterproductive to change the

20. See generally The Declaration of Montevideo on the Law of the Sea, May 8, 1970, 9 I.L.M. 1081 (recognizing necessity for rules relevant to delimitation of national sovereignty and jurisdiction over the sea); Organization of American States (OAS), Declaration of Santo Domingo: Good Governance and Development in the Knowledge-Based Society, OAS Doc. AG/DEC. 46 (XXXVI-O/06) (June 6, 2006) (discussing efforts of the Organization of American States in applying rules applicable to goal of improving climate conditions).

21. See generally Juan Pablo Scarfi, *Globalizing the Latin American Legal Field: Continental and Regional Approaches to the International Legal Order in Latin America*, 61 REVISTA BRASILEIRA DE POLÍTICA INTERNACIONAL (2018) (discussing how the process of the independence of countries can be a model for approaches to mitigating the effects of climate change in other jurisdictions).

22. See SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS 4 (2002) (discussing proposal for expanding competence on global understanding of effects of climate change).

23. *Id.* at 4, 13, 31, 34.

dimensions of the maritime space already consolidated. In particular, to guide the understanding of States in relation to other peoples who will be involved territorially, or will have to move, it is essential at the time to invoke the principle of Solidarity, whose meaning lies in the conception of mutual assistance between the peoples of the different States to face the most varied events, especially a rise from disasters or structural weakness.

This principle has appeared in different Latin American documents since 1826.²⁴ In this context, it is possible to understand through a systemic interpretation of the different principles consolidated on the theme, such as the common but differentiated responsibility, but also to include principles developed in Latin America that can serve as a mechanism of normative interpretation to face the challenge of the sea level rise. I understand as appropriate in this context the additional measure—the Inter-American legal committee of the OAS opened discussion on the subject—and also the submission of this discussion to the International Tribunal for the Law of the Sea to express an advisory opinion based on its expanded competence. Such documents would further consolidate the legal and normative understanding of the reflections of sea level rise, convention rules and the law of States.

The problems of the ocean space are closely inter-related and should be considered as a whole. Latin America will be affected and must make its contribution based on its experiences, the principle and doctrinal construction that marked its history in international relations. We proposed a normative solution that can be recognized and applied by all peoples on different continents and so the principles of *Uti Possidetis* and Solidarity may be these instruments. Thank you very much.

24. *Id.* at 47–48.

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