BLUE OCEAN LAW & THE PACIFIC NETWORK ON GLOBALISATION

Statement in Preparation for the United Nations Conference to Support the Implementation of Sustainable Development Goal (SDG) 14:

Conserve and sustainably use the oceans, seas and marine resources

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Blue Ocean Law (BOL) is a boutique international law practice, headquartered in Guam with a rotating satellite office and consultants, which works closely with government and civil society organization (CSO) clients on issues affecting the Pacific region related to self-determination, demilitarization, nuclear justice, seabed mining, and climate change. The Pacific Network on Globalisation (PANG) is a regional network of CSOs, educators, students, and campaigners based in Suva, Fiji. PANG promotes economic justice in globalisation with specific attention to accountability and transparency in trade policy, poverty eradication, equitable development, sustainable livelihoods, food security, and environmental sustainability.

BOL and PANG will attend the Oceans Conference and contribute to ongoing dialogue between governments and civil society with respect to safeguarding the world's oceans—which are at their most vulnerable moment in history—as well as the many communities that rely on the ocean for survival.

Our work revolves around the following issue areas, all of which bear direct relevance to Sustainable Development Goal (SDG) 14. We set out some summary policy points below.

SDG 14

Sustainable Development Goal (SDG) 14, adopted by world leaders in September 2015 as part of 16 SDGs that entered into force in 2016, aims to conserve and sustainably use the oceans, seas and marine resources for sustainable development. Among other targets, SDG 14 sets out the following: 1) addressing marine pollution; 2) protecting, restoring, and conserving marine and coastal ecosystems; 3) addressing ocean acidification; 4) regulating illegal and overfishing while retaining access for artisanal fishers; 5) distributing marine resources more equitably and sustainably, especially to Small Island Developing States (SIDS); 6) transferring knowledge, technology, and capacity to developing countries and SIDS; and 7) ensuring sustainability through international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS).

These goals, while laudable, require situating in the global and political realities of the 21st century. In particular, all sustainable development initiatives must take into account relevant principles of international environmental law, international human and indigenous rights law, and established international best practices. This will help to identify and overcome the myriad unique challenges faced by SIDS with respect to a general lack of resources, enforcement of legislative and regulatory frameworks, and complex governance schemes involving customary rights and large indigenous populations, particularly in the Pacific. Protecting the rights of vulnerable populations, including women, youth, the elderly, and historically marginalized indigenous communities, will ensure more sustainable development and make permanent progress with respect to the SDG 14 targets more probable. We lay out some of the basic framing undergirding this position below.

PACIFIC OCEAN CONTEXT

The Pacific Ocean comprises nearly half of the Earth's water surface and around one-third of its total surface area, making it larger than all of Earth's land area combined. Humans have travelled the Pacific Ocean since prehistoric times, settling the islands of Micronesia, Melanesia, and Polynesia thousands of years ago, and developing longstanding traditions of seafaring, navigation, and sustainable usage of ocean resources, many of which remain effective and unparalleled today. Long before the codification of States' Exclusive Economic Zones (EEZs) in the United Nations Convention on the Law of the Sea (UNCLOS), Pacific islanders could chart their genealogy based on ocean voyage routes, which extended sometimes for thousands of miles between remote islands.[1] Pacific peoples' wellbeing has never derived solely from the land, but equally and perhaps in greater part from the ocean, which, along with all of its resources, has long been treated as a single, sacred unit, integral to life and culture in the region.[2] This belief, along with regular travel between distant islands, was crucial to the protection and conservation of ocean resources that characterized pre-colonization Pacific States.[3]

It is important to remember that traditional laws and customs relating to ocean stewardship and management of marine resources predate the modern international state system and, in many ways, represent a more effective and sustainable approach than what exists today. Returning to such a system may not be feasible, but acknowledging the value of and incorporating such practices into a modern oceans management regime, in particular through the inclusion of indigenous peoples' voices and concerns, is critical to achieving the targets of SDG 14. Conversely, excluding the indigenous presence and leaving the agenda to developed nations and private interests could

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[1] *See History of Ocean Voyaging*, PACIFIC VOYAGERS, http://pacificvoyagers.org/history-of-ocean-voyaging/ (last accessed Apr. 20, 2016); Tevita O Ka'ili, *Tauhi va: Nurturing Tongan Sociospatial Ties in Maui and Beyond*, 17 THE CONTEMPORARY PACIFIC 83-113 (2005).

[2] Epeli Hau'ofa, *The Ocean in Us*, 10 THE CONTEMPORARY PACIFIC 391-410 (1998).

[3] *Note by the Secretariat: Study on the Relationship Between Indigenous Peoples and the Pacific Ocean*, U.N. ECON. & SOC. COUNCIL [ECOSOC], Permanent Forum on Indigenous Issues, U.N. Doc. E/C.19/2016/3 (May 9-20, 2016), ¶ 19, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E%2FC.19%2F2016%2F3.

doom SDG 14 to failure. The following section explains the need for grounding the issues of SDG 14 in modern indigenous rights law.

INDIGENOUS RIGHTS

Under the common UN understanding of indigenous peoples,[4] at least some communities—and in many cases, a majority of citizens—in every PI nation are indigenous. Indeed, the Pacific is perhaps unique among the world's regions in having so many countries where the majority population can be considered indigenous at large. It is thus one of the few remaining bastions of indigeneity in the world. In addition to what this means for the accumulation of traditional knowledge and indigenous sustainability practices, the high concentration of Pacific indigenous peoples also connotes a special status under international law, relating to both unique privileges and special duties of care accorded to these individuals.

In short, as designated vulnerable members of society, indigenous peoples are afforded a special relationship with States that includes protection of their distinctive cultures and their traditional lands, territories, and resources. These rights are established norms under international mechanisms such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), and various treaty bodies and case law from institutions such as the Inter-American Court of Human Rights, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination.

The duty to obtain indigenous peoples' free, prior, and informed consent (FPIC) regarding development activities that *impact* their lands, communities, and culture is expressly recognized by these international instruments and bodies. This duty is premised on indigenous peoples' right to self-determination, particularly their right to "freely determine their political status and freely pursue their economic, social and cultural development."[5] In the Pacific, any major development implicating ocean resources is likely to impact indigenous lands, communities, and/or culture. Such activities trigger the FPIC of Pacific indigenous peoples—not just the States and governments professing to represent them.

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[4] Although there is no official definition of "indigenous" within the UN system, the following are examples of listed criteria which help determine indigeneity: self- identification as indigenous peoples at the individual level and acceptance by the community as such; historical continuity with pre-colonial and/or pre-settler societies; strong links to territories and surrounding natural resources; distinct social, economic or political systems; and a distinct language, culture and beliefs, among others. *See, e.g.*, *Who are indigenous peoples?* UN PERMANENT FORUM ON INDIGENOUS ISSUES, available at http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

[5] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), art. 3 [hereinafter *UNDRIP*]. *See also* International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989); Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997); Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Forty-third session, 2009), U.N. Doc. E/C.12/GC/21, (2009).

In many fora, indigenous peoples and the need to gain their FPIC have been left out of the equation. This is especially true with respect to the ocean governance regime, in particular the issue of seabed mining and other extractive industries, as well as negotiations and discussions concerning fisheries, continental shelf extension and marine boundaries, and other vital marine resource matters. Indigenous peoples must have a seat at the table and actual recognition of their rights – not mere lip service or co-optation of the language of indigenous rights in order to garner resources to the State. It is our contention that no oceans policy will be viable—much less sustainable—without the inclusion of indigenous rights, and ideally, its positioning at the forefront.

CLIMATE CHANGE & ENVIRONMENTAL PROTECTION

In part due to disproportionate sea level rise that has occurred throughout the region, constituting an existential threat to multiple islands and their peoples, Pacific islanders suffer some of the worst effects of climate change – despite having contributed the least to its existence. There is no reconciling the lack of action on climate change with any existing regime of international law. Beyond the Paris Agreement and climate change law, longstanding tenets of environmental law such as transboundary harm and the precautionary principle, foundational human rights norms and indigenous rights law all require immediate, decisive action on climate change to prevent the dissolution of entire countries and their peoples. Anything less, at this stage in history, is unconscionable as well as illegal.

Indeed, the ocean (including efforts to protect it) must be central to any international action to address climate change and its root causes. The ocean absorbs almost a third of all greenhouse gas ("GHG") emissions as well as about 90 percent of the excess heat trapped in the Earth's atmosphere due to those emissions. The resultant impacts on the ocean are numerous and compelling, including: sea level rise (as noted above); changes in the salinity of the ocean, leading to a stratification of seawater as well as adverse harms to the ocean nutrient cycle and the development of plankton (i.e., the base of the ocean food chain, including for highly lucrative tuna fisheries); reductions in the oxygen content of the ocean (which affect marine life and certain marine processes); altered ocean currents (potentially undermining open ocean traditional navigation practiced by Pacific islanders); reduced ice coverage on the ocean (leading to, among other things, disruptions in the migratory patterns of certain marine creatures that have cultural significance for Pacific islanders, including whales); and ocean acidification (contributing to the devastation of major coral reef systems throughout the Pacific and elsewhere in the ocean). In short, food security, ecosystem health, economic livelihoods, and cultural practices for Pacific islanders are threatened by the harmful impacts of GHG emissions on the ocean.

There are several ways that the international community can work to address the impacts of GHG emissions on the ocean. For one, the Parties to the Paris Agreement can include ocean conservation measures as part of their nationally determined contributions submitted pursuant to

the Paris Agreement. The absorptive capacity of the ocean has played a significant role in preventing global temperatures from being much higher than they currently are, so measures to protect the ocean and its resources (including through the establishment of marine protected areas and other area-based management tools) will aid the ocean in that role. Such measures will also help address the harms already inflicted on the ocean by GHG emissions. For another, the international community—whether as a whole or on a regional basis—can push for the adoption of a moratorium on the extraction of fossil fuels for energy production. The more fossil fuels left in the ground (including in the seabed), the better off the ocean and other components of the natural environment will be. Fossil fuel extraction further exacerbates the threats and harms to the ocean and its resources already inflicted by excess GHG emissions.

SEABED MINING AND EXTRACTIVES

The discussion on seabed mining has proceeded narrowly for the past thirty years, without inclusion of indigenous voices or much thought as to the inordinate risks in operating an untested extractive industry in a fragile and almost completely unknown deep sea environment. Just last year, a joint study from 14 international universities and organizations discovered that hydrothermal vents and methane seeps on the ocean floor play a crucial role in regulating global climate – and that releasing or destroying them "would be a doomsday climatic event."[6]

In addition to likely and potentially irreversible environmental impacts, seabed mining is a long-term, experimental venture in which any potential profits for States must be offset by the short-term impacts, which could include destruction of local fisheries and resultant impacts on human health and livelihoods. It is, in short, a gamble, especially when compared to already profitable industries with a proven track record of sustainability. Rather than shoulder inordinate risk in the hopes of a hypothetical, distant, and comparatively small cut of revenue, governments should allow time for significantly more scientific study, and consider alternative partnerships with more established, sustainable industries. Pacific island nations in particular lack the resources, the land area, and the capacity to recover from major environmental shocks, such as an oil spill or contamination from toxic tailings. At the very least, significantly more consultation must be done with local communities, and FPIC obtained from indigenous ones, before any seabed mining or other extractive activities proceed. This is not only required under international law; it is imperative to minimize conflict and to ensure that the targets of SDG 14 remain even remotely attainable. Moreover, Pacific States must not only consider the risks of seabed mining in their own waters, but must take into account potentially expensive transboundary harm claims emanating from other States who may be affected by pollution or contaminated fish stocks across national boundaries.

[6] David Stauth, Andrew Thurber, Hydrothermal vents, methane seeps play enormous role in marine life, global climate, May 31, 2016, http://oregonstate.edu/ua/ncs/archives/2016/may/hydrothermal-vents-methane-seeps-play-enormous-role-marine-life-global-climate.

Our assessment is that these risks have been greatly underestimated. Until significantly more knowledge of the deep sea environment is obtained, industry actors and foreign governments should focus on creating alternative, more sustainable methods of resource use before considering seabed extraction – which portends the destruction of untold numbers of known and unknown species, in addition to the aforementioned effects.

DEMILITARIZATION & NUCLEAR LEGACIES

Pacific peoples have suffered greatly from the destructive programs of militarized colonial powers during the 20th century, continuing into the 21st. The legacy of nuclear testing throughout Oceania, in particular with respect to the Marshall Islands, French Polynesia, and elsewhere, has never been effectively remedied or addressed. The consequences of detonating hundreds of nuclear bombs of a much greater destructive power than the Hiroshima and Nagasaki atomic bombs are still being felt today by indigenous islanders – manifesting in, among other impacts, debilitating health and intergenerational maladies. This legacy continues to threaten not just Pacific islanders and the Pacific Ocean, but the health and wellbeing of all the planet's oceans and the people who depend upon them. For instance, radioactive materials currently contained in Runit Dome on Enewetak Atoll in the Marshall Islands are leaking into the surrounding ocean and groundwater. The Runit Dome was a haphazard attempt by the U.S. military to contain 111,000 cubic yards of radioactive waste in an unlined crater. It was never replaced by a safe, permanent structure and instead is currently cracking and polluting the local surroundings. Such manifestly inadequate measures in place of effective environmental clean-up, damage payouts, and aid transfers continue to imperil efforts to address the legacy of nuclear testing and achieve sustainable ocean goals.

Unfortunately, attempts to continue the militarization of the oceans continue today. In the northern Pacific, the U.S. military's expansion and planned buildup of base presence in Guam, the Northern Mariana Islands, and elsewhere has occurred without adequate consultation or the consent of local indigenous groups. Similar attempts by large powers to assert ownership and project military force across large swathes of ocean territory, which may or may not fall under their actual jurisdiction, continue unabated. Lest we resign ourselves to an aggressive zero-sum scramble for military and economic ascendancy by this or that singular political entity, States must make a concerted effort to form regional alliances and to engage their civil societies to ensure a more equitable, sustainable, and environmentally-conscious approach to ocean stewardship. The oceans have still not recovered from the destructive acts of world wars, nuclear testing, and continued military maneuvers. Intensified efforts must be made to demilitarize the oceans and to clean-up existing messes.

CONCLUSION

The first UN Oceans Conference is an important step towards bringing to light many of the issues that have affected countless people worldwide, among them indigenous Pacific islanders. The existing frameworks within international law, including relevant bodies of environmental, indigenous, and human rights law, are useful blueprints to achieving an equitable, sustainable outcome with respect to these issues of ocean pollution and acidification, climate change and rising sea levels, fisheries, and marine resource distribution. Reframing SDG 14 targets in terms of indigenous rights is a necessary step in this process, as is highlighting the voices of indigenous actors in the upcoming debates. It is our hope that Pacific island governments will represent these interests first and foremost, that there will be adequate space and attention paid to those who have long been sustainable stewards of the marine world, and that other governments and international entities will take note and incorporate these fundamental principles of international law into a new, 21st century approach to global oceans governance.