SECURING THE PACIFIC IN A GLOBALISED WORLD: NEW AND EMERGING DEVELOPMENTS IN INTERNATIONAL LAW

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Abstract

The United Nations Treaty on the Prohibition of Nuclear Weapons and two other proposed international laws currently under development through United Nations processes – to regulate the activities of corporations and business enterprises, and to govern the conservation and sustainable use of marine biological biodiversity in areas beyond national jurisdiction – hold enormous significance for Pacific states and people in today's globalised world. All three developments have seen strong involvement by civil society organisations, two of them emanating from civil society advocacy. These developments provide important avenues to potentially redress historical wrongs and protect against human rights abuses and marine resource pillaging. They are not sufficient, however, to protect the Pacific Ocean, which constitutes more than 90 per cent of the world inhabited by Pacific people. That may require legislating personhood rights for our Ocean.

I. Introduction

Kia ora, *Talofa lava*, *Mālō e lelei*, *Fakaalofa lahi atu*, *Kia orana*, *Fakatalofa atu*, *Malo ni*, *Mauri*, *Bula vinaka*, *Halo olgeta*. Let me begin by thanking the organisers of the Pacific Law and Culture Conference 2018 and especially Elizabeth MacPherson and Natalie Baird, for the kind invitation to give a keynote address. It is a little daunting to be here, to be honest, as I am not a lawyer and will be at a loss if you begin splitting

* This paper is a revised version, for publication, of a keynote address delivered to the "Voices of the Pacific in a Globalised World" Pacific Law and Culture Conference, University of Canterbury, Christchurch on 4 July 2018. Dr Claire Slatter is a retired University of the South Pacific academic with research interests in development politics, economic and trade justice, and women and development. She has a background in trade union, feminist and development NGO activism, is a founding member and Board Chair of Development Alternatives with Women for a New Era (DAWN), and a founding and active member of the Pacific Network on Globalisation (PANG).

legal hairs on anything I say. By way of a disclaimer, let me clarify that I am going to be speaking to you mostly as a Pacific feminist scholar/activist with a background in regional and global activism, recently retired from academia, and now free to write and engage more on issues of concern to the region.

Taking my cue from the theme of this Conference, "Voices of the Pacific in a Globalised World", I want to share with you my thoughts on the significance of three new and emerging international laws for Pacific states and people, namely, the historic Treaty on the Prohibition of Nuclear Weapons which was adopted by the UN General Assembly on 7 July 2017; the UN Human Rights Council's proposed international legally binding instrument to regulate the activities of transnational corporations and other business enterprises, on which an open-ended intergovernmental Working Group began work in July 2015; and a proposed UN binding treaty for the Conservation and Sustainable Use of Marine Biological Biodiversity in Areas Beyond National Jurisdiction (BBNJ), on which a UN Conference under UNCLOS (United Nations Convention on the Law of the Sea) will hold four sessions beginning in September 2018, concluding with a treaty in 2020. The three cases represent different stages in international norm setting. Two of them have resulted from sustained civil society advocacy; all of them have enormous significance for protecting the interests of Pacific Island states and peoples in a globalised world and should be of interest to both Pacific law scholars and emerging lawyers.

II. The Treaty on the Prohibition of Nuclear Weapons

On 7 July 2017, the UN General Assembly adopted, through the vote of 122 states, including nine Pacific states, the historic Treaty on the Prohibition of Nuclear Weapons. This monumental achievement of an international treaty that outlaws nuclear weapons was mostly due to sustained advocacy by the International Campaign to Abolish Nuclear Weapons (ICAN), a network of 465 organisations with campaigners in 100 countries.[1] I am very proud of the fact that a close friend and one of Fiji's early activists from her student days in the anti-nuclear movement in the Pacific, Dr Vanessa Griffen, has been part of ICAN.

In December 2017, ICAN was deservedly awarded the 2017 Nobel Peace prize for this milestone achievement. None of the seven nuclear states have signed the Treaty, and most strongly opposed it, clinging to the Cold War justification of nuclear

1 Vanessa Griffen "Pacific's role and history of nuclear suffering boosted treaty success" (24 October 2017) Pacific Islands News Association <www.pina.com>.

weapons for "deterrence". But the adoption of this new international law reflects a significant shift in thinking and judgement among non-nuclear states, signifying a strong moral rejection of nuclear weapons. After years of hard campaigning, agreement among a "critical mass of actors" reached the theorised "tipping point",[2] resulting in widespread agreement.

The Nuclear Ban Treaty (as it is known as) will come into force when 50 states have ratified it. At the time of the Pacific Law and Culture Conference in July 2018, only ten had done so, including Palau. Vanuatu's Parliament had unanimously approved ratification in June 2018 and, on 26 September 2018, at a high level ceremony in New York coordinated by ICAN, Vanuatu ratified the Treaty.[3] Samoa did so the same day. Cook Islands had acceded to the Treaty earlier that month. All of the six Pacific Island states which signed the Treaty when it opened for signature on 20 September 2017 went on to ratify it. The Treaty has enormous significance for Pacific Island countries, especially for those which, under colonial occupation, were deliberately used for testing nuclear weapons, as their populations continue to suffer from the ongoing health effects of radiation exposure, as well as from the unknown risks of continuing environmental contamination from buried radioactive waste. I am referring here to the leaking concrete dome housing the United States' Military's buried radioactive waste on Runit Island in Enewetak Atoll, the Marshall Islands. The testimonies of Pacific Island states and peoples, together with those of the Hibakusha, the survivors of the horrific atomic bomb attacks on Hiroshima and Nagasaki in 1945, played an important role in galvanising support for the Treaty. So, too, did escalating tensions among nuclear states. Speaking at the UN General Assembly in September 2017, Samoa's Prime Minister said:[4]

> We cannot help but watch with trepidation and uneasiness the global dynamics nudging our world perilously close to a potential catastrophe of unimaginable proportions. … As a signatory to this historic treaty, we wanted to demonstrate unequivocally our aspiration to have a world without nuclear weapons.

Of particular interest are arts 6 and 7 of the Treaty, on victim assistance and environmental remediation, and international cooperation and assistance,

2 Martha Finnemore and Kathryn Sikkink "International Norm Dynamics and Political Change" (1998) 52(4) Intl Org 887–917.

3 "Vanuatu signs and ratifies UN Treaty on the Prohibition of Nuclear Weapons" *Vanuatu Daily Post* (online ed, Vanuatu, 29 September 2018).

4 Tuilaepa Sailele Malielegaoi *Statement by Hon Tuilaepa Sailele Malielegaoi Prime Minister of the Independent State of Samoa at the General Debate* UN LXXII (22 September 2017).

respectively. While art 6 appears to give responsibility for victim assistance and environmental remediation to the State Party within the jurisdiction of which affected individuals or areas are located, art 7 states that each State Party has "the right to seek and receive assistance from other State Parties", and that each State Party "shall provide technical, material and financial assistance to State Parties affected by nuclear-weapons use or testing, to further the implementation of this Treaty." So, the Treaty encourages solidarity and collective effort among State Parties in implementation. Assistance may be provided through the UN system, international, regional and national organisations and institutions, NGOs, the Red Cross/Red Crescent, or on a bilateral basis. The final clause under art 7 says:[5]

> … without prejudice to any other duty or obligations that it may have under international law, a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected State Parties, for the purpose of victim assistance and environmental remediation.

Might justice for Pacific victims of nuclear testing finally be at hand? The fact that none of the nine nuclear-armed states have signed, or intend to sign, the Treaty, might appear to rule out this possibility. But who is to say that increased moral pressure might not effectively be brought to bear on the United States, France and the United Kingdom (those states responsible for exposing Pacific people to nuclear testing and its harmful ongoing effects), whether from states that ratify the Treaty and cooperate in victim assistance and environmental remediation, or from their own citizens.

A Pacific Island political leader who stood tall in the campaign against nuclear weapons (and whose brilliance as a negotiator was critical to achieving the Paris Agreement on Climate Action) was the late Tony de Brum, former Foreign Affairs Minister and Ambassador on Climate Change for Marshall Islands. To increase momentum in the campaign for nuclear disarmament, De Brum joined international lawyers in filing a lawsuit in the International Court of Justice in 2014 against all nine nuclear-armed states. He argued that nuclear-armed states had

5 For further information and assessment of what needs to be taken into account by States Parties in meeting their obligations under articles 6 and 7 of the Treaty, given the long lasting environmental and inter-generational health effects of nuclear explosions, see International Human Rights Clinic "Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons" (April 2018) Harvard Law School <hrp.law.harvard.edu>; and International Human Rights Clinic "Environmental Remediation under The Treaty on the Prohibition of Nuclear Weapons" (May 2018) Harvard Law School <hrp.law.harvard.edu>.

failed to carry out good-faith negotiations towards nuclear disarmament, as they were required to under the nuclear non-proliferation treaty, which has been in force since 1970. Instead of nuclear states disarming themselves, they had concentrated on preventing other states from becoming nuclear-armed.

Tony de Brum brought the experience and voices of Marshall Islanders to global centre stage and shone a light on the immorality of nuclear weapons and nuclear weapons testing:[6]

> Nuclear weapons are a senseless threat to essential survival. There are basic human and ethical norms, not to mention longstanding treaties, which compel those who possess them to pursue and achieve their elimination.

Six of the nuclear-armed states refused to participate in the ICJ case. The case against the three states which "submitted to the court's compulsory jurisdiction" – India, Pakistan and the United Kingdom – was lost because of the ICJ's finding of "non-existence of a dispute between the parties".[7] Despite the case being lost, it remains significant that Tony de Brum, as Foreign Minister of a small Pacific Island country which, while under UN Trusteeship, had been subjected by the United States to the injustice of 67 nuclear tests and knew first hand its terrible long-lasting effects, had the courage to bring this case against nuclear armed states to the ICJ, speak with moral force (or "speak truth to power" as it is often termed by NGO activists) and put them to shame.

How do we in the Pacific use the Treaty, now that we have it? The first step is to encourage all of our governments to ratify it to help achieve the 50 required ratifications to bring it into force.[8] Then, I suggest, there is work to be done by legal eagles in our region exploring how the Treaty can be used to help bring nuclear justice to Pacific Island people who continue to suffer from the on-going health effects and environmental damage arising from American, French and British nuclear testing.

6 Fiona Harvey "Tony de Brum obituary" *The Guardian* (online ed, London, 10 October 2017).

7 See Joyeeta Banerjee and Rajdeep Banerjee "Behind World Court Dismissal of Marshall Islands' Case" Toward a Nuclear Free World (26 November 2016) <www.nuclearabolition.info>.

8 By 9 August 2020, the Treaty had been ratified by 44 states, including seven Pacific Island states and New Zealand.

III. A Binding Treaty on Transnational Corporations and Human Rights

In July 2015, an open-ended intergovernmental working group on transnational corporations (TNCs) and other business enterprises with respect to human rights began work to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". The intergovernmental working group was established by mandate not of the UN General Assembly, but of the UN Human Rights Council, through a resolution adopted on 26 June 2014.[9]

The origin of this proposed treaty can be traced to longstanding civil society demands for regulation of multinational or transnational corporations. The last four decades have witnessed increased levels of TNCs profiting with impunity from human rights abuses in different regions of the world, often with tacit support from host states. At the same time, we have seen the rising power of corporations *vis-à-vis* states, facilitated by neoliberal deregulation and trade liberalisation policies which have given primacy to free markets and the private sector as the engine of growth, while eroding the regulatory power of states.

The extent to which corporations now enjoy unbridled power at the expense of states is most starkly illustrated by the inclusion of investment clauses in "new generation trade agreements,"[10] which give TNCs the right to sue states in international arbitration tribunals. Drafted in the interests of multinational investors, Investor State Dispute Settlement (ISDS) Tribunals can impose financially crippling fines on a host State Party that violates a trade agreement by introducing a new law or policy that affects an investment. Through this mechanism, compensation for loss of expected profits can be sought by a State party on behalf of a national commercial entity operating extraterritorially.[11] The seeming legitimacy with which trade agreements between states have been made legally binding agreements, institutionalised as international law, with punitive measures for violations, began with the emergence of the World Trade Organisation in 1995 and its institution of a rules-based global trade regime. Its ideological foundations lie in what we might call hegemonic neoliberalism.

A Treaty Alliance comprising 600 NGOs launched the campaign for a binding treaty to regulate TNCs and stop corporate abuses of human rights, which resulted

9 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* UN Doc A/HRC/Res/26/9 (14 July 2014).

10 Roberto Bissio "What are we talking about when we talk about gender and trade?" DAWN Development Alternatives with Women for a New Era (4 July 2018) <dawnnet.org>.

11 The serious risks posed by Investor State Dispute Settlement (ISDS) mechanisms in trade agreements have long been flagged by Auckland University Law Professor, Jane Kelsey.

in the Human Rights Council adopting Resolution 26/9. Legal scholars and NGOs featured prominently in the first three sessions of the Intergovernmental Working Group on the proposed binding treaty.[12] Sixty states and 50 NGOs accredited with ECOSOC attended the first session of the Working Group in July 2015; 80 states and 41 NGOs participated in the second session held in October 2016; and 99 states and 43 NGOs participated in the third session in October 2017.[13]

NGOs have made the strongest statements within the process, arguing from the first session of the Open-ended Intergovernmental Working Group that a legally binding treaty should make companies liable for all human rights abuses, not just gross human rights violations, and calling for the "asymmetry in international law" to be addressed. They view the treaty making process as "a historic opportunity to address impunity for corporate-related human rights abuses in international human rights law" and have called for "a world court or tribunal to receive claims, adjudicate and enforce judgments".[14] They also insist on comprehensive coverage of *all* human rights violations, including "evictions, depletion of fish stocks and forests, harm to health and the destruction of food, crops, animals and seeds" as all had impacts on the right to self-determination, the ability to achieve an adequate standard of living and, in indigenous territories, on the right to subsistence.

American economist and director of the Earth Institute at Columbia University, Jeffrey Sachs, in a videoed keynote address to the second session of the Working Group, said TNCs were "more powerful than many Governments; therefore they should be accountable and comply with human rights for the decent development of the world economy".[15] An international treaty, he said, "could strengthen the capacity of governments to ensure remediation".

A regional group of states at the second session similarly emphasised that TNCs and other business enterprises "had social and political impacts disproportionate to their legal and social obligations, nationally and internationally". Other delegations considered a legally binding instrument necessary "to redress the current

12 Reports of all three sessions of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights can be accessed at <www.ohchr.org>.

13 Development Alternatives with Women for a New Era (DAWN), a South feminist network of scholars and activists of which I am a founding member and current Board Chair, supports the campaign for a binding treaty, and has recently begun to engage with the formal process through Feminists for a Binding Treaty, an International Women's Alliance.

14 María Fernanda Espinosa *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument* UN Doc A/HRC/31/50 (5 February 2016).

15 Jeffrey Sachs "Keynote speaker presentation" (Open-ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights Resolution UN Doc A/HRC/RES/26/9, Second Session, Palais des Nations, Geneva, 24 October 2018).

imbalance between the progressive recognition of rights on the one hand, and the economic and political guarantees extended to transnational corporations on the other". They argued that "without corresponding obligations for corporations to respect human rights', rights were ... undermined".[16] Most delegations agreed that voluntary standards were "insufficient", and that a binding instrument "should affirm that human rights obligations prevailed over commercial law". They asserted the obligation of states:

> ... to regulate in the public interest, defend the rights of people against privatization, strengthen mechanisms for due diligence and ensure that transnational corporations did not use their influence to avoid accountability and payment of reparations to victims.

One delegation suggested that "maximum deterrence could be achieved by imposing criminal liability".

NGOs at the second session called for the binding instrument to clearly establish the obligations of transnational corporations "to comply with environmental, health and labour standards and international humanitarian law". The treaty needed to outline:

> ... the right of individuals and affected communities to access justice and include provisions for the accountability of parent companies, for protection of human rights defenders, and for the right to self-determination.

Several argued that any treaty proposed should provide for "international implementation mechanisms and possibly an international tribunal" and that such an instrument should allow States "to regain policy space for the protection of human rights". NGOs warned against "corporate capture in the negotiation of a binding instrument", saying States have responsibility "to act in the interests of their people and not in the interests of transnational corporations". They referred to the WHO Framework Convention on Tobacco Control, which protects against interference by TNCs.[17]

16 María Fernanda Espinosa *Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* UN Doc A/HRC/34/37 (4 January 2017).

17 Espinosa, above n 16.

A second keynote speaker in the third session of the Working Group, Dominique Potier, Member of the French National Assembly, highlighted the importance of ethics in guiding any discussion on human rights. He pointed out that:[18]

> … historically, attempts to fight slavery and provide labour protection were initially challenged as regulations leading to "the end of the world", but ended up being the dawn of a new era. Such efforts led to significant decreases in abuse.

A strong submission from the International Alliance of Women called for states to "stop eroding their duty to regulate business and protect the environment and people through trade and investment agreements" and "live up to their responsibility to protect human rights, including by safeguarding political institutions from the undue influence of corporations". The submission demanded that states regulate corporate activities, prioritise people and environment over corporate interest/profits, and advance gender equality and women's human rights.

Delegations to the third session drew attention to the inadequacy of "soft law instruments and voluntary principles" and called for "a mandatory regulatory framework … to ensure accountability and access to justice".[19] Many delegations and NGOs "welcomed recognition of the primacy of human rights obligations over trade and investment agreements". One regional organisation and several delegations, however, questioned the legal basis for that, asking whether this would require the renegotiation of existing treaties and whether that implied that states could disregard provisions of trade and investment treaties, citing human rights. Good question.[20]

So, what makes this proposed binding treaty on TNCs and human rights significant to Pacific Island states and peoples? The economies of many Pacific Island states are dominated by big corporations, particularly in extractive industries. In Papua New Guinea (PNG), which has the richest deposits of natural resources and where multinational mining companies have operated the longest and been responsible for causing incalculable and often irreversible, environmental

18 Guillaume Long *Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* UN Doc A/HRC/37/67 (24 January 2018).

19 Long, above n 18.

20 The Committee on ESCR, commenting on intellectual property rights in 2001, said it deplored the abuse of intellectual property rights made in the interests of investors and clarified that, "In contrast with human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else": Committee on Economic Social and Cultural Rights *Substantive Issues arising in the Implementation of the ICESCR* UN Doc E/C.12/2001/15 (14 December 2001). This suggests, more broadly, that investor rights to profit under a trade agreement similarly cannot be equated to inalienable human rights.

devastation and triggering social conflict, including, in the case of Bougainville, a ten-year mining war: a mining company (BHP) went as far as manipulating government to secure legislative changes to give it immunity from landowner litigation. This was subsequently reversed following a change of government in PNG. However, stepped up terrestrial mining in other Pacific Island states and extremely risky deep-sea mining scheduled to commence in the Bismarck Sea in PNG in 2019 would have exposed more areas of our natural environment, including our ocean, and more Pacific communities to the damaging impacts of extractive industries. A binding treaty on TNCs is critical to ensuring that the activities of multinational corporations are regulated, that the right of states to regulate in the national interest is protected, that the principle of polluter pays is embedded in the treaty and that an untrammelled right to profit is no longer permitted to trump human rights.

Negotiations on the zero draft of the treaty text began in the fourth session of the Working Group in October 2018. While no Pacific Island states have participated in this treaty-making process to date, this is too important an international norm-setting process to ignore, as it may prove vital to safeguarding the interests of Pacific Island states and people in coming years as we face new challenges in what DAWN has described as the "fierce new world" of present times.

What eventuates from the process, however, remains to be seen as not all states are in favour of a binding treaty on TNCs. At the fourth session the European Union "refused to enter the conversation" and the United States did not send a representative to the meeting.[21]

IV. A Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Biodiversity in areas beyond National Jurisdiction

UNCLOS lays down the rights and responsibilities of states in relation to use of the world's oceans and ocean resources and protection of the marine and coastal environment.[22] Under UNCLOS, which was adopted on 10 December 1982 and came into force in November 1994, small island states and coastal states gained exclusive sovereign rights over areas of sea/ocean and seabed within a radius of 200 miles from their shorelines (the 200-mile Exclusive Economic Zones or EEZs). The area of the seabed lying beyond national jurisdictions (that is, outside of states' 200-

21 Cecilia Alemany, Claire Slatter and Corina Rodrígues Enríquez "Gender Blindness and the Annulment of the Development Contract" (2019) Development and Change 50(2) 468–483.

22 IISD Reporting Services "Earth Negotiations Bulletin" 25(141) (24 July 2017) <enb.iisd.org> at 1.

mile zones) is referred to as the "Area" and is described in UNCLOS as "the common heritage of mankind".

Over the last 13 years, international concern has been focused on issues that affect the health of the world's oceans and threaten marine biological diversity, including illegal, unrecorded and unreported (IUU) fishing and destructive fishing practices, bottom trawling, climate change and emerging activities such as bio-prospecting in the deep sea.[23] Concern about the conservation and sustainable use of marine biological diversity in areas of the oceans beyond national jurisdiction has heightened in recent years with growing scientific information and understanding about "the richness and vulnerability of such biodiversity, particularly in seamounts, hydrothermal vents, sponges and cold-water coral reefs".[24]

From 2013, civil society organisations began calling for a moratorium on deep sea mining, and urging the International Seabed Authority (ISA) to stop issuing exploration licenses.[25] In January 2018, the European Parliament called for an international moratorium on commercial deep sea mining exploitation licenses until the effects had been sufficiently studied and researched "and all possible risks were understood".[26] In April 2018, Hunter, Singh and Aguon synthesised the findings from scientific research on deep sea ecosystems, highlighting not only the richly diverse life forms that deep sea mining will threaten, but also the vital seabed functions of hydrothermal vents and seeps that contribute critically to climate regulation by sequestering carbon and methane.[27]

At the UN headquarters in New York, an intergovernmental conference (IGC) began in September 2018 with the aim of drafting and adopting the first international law on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. The IGC followed the work of an ad hoc Working Group and four meetings of a Preparatory Committee held between 2016 and 2017, which resulted in agreement among participating states on the elements of a draft text of a treaty. Between 17 and 23 NGOs, mainly conservation groups with a strong interest

23 IISD Reporting Services "Earth Negotiations Bulletin" 25(25) (20 February 2006) <enb.iisd.org> at 2.

24 Above n 23.

25 See Alicia Craw *Deep Seabed Mining: An urgent wake-up call to protect our oceans* (Greenpeace International, Amsterdam, 2013); and Deep Sea Mining Campaign "Worldwide pressure on the ISA for a moratorium on deep sea mining" (press release, 20 July 2015) <www.deepseaminingoutofourdepth.org>.

26 *International ocean governance: an agenda for the future of our oceans in the context of the 2030 Sustainable Development Goals: European Parliament resolution of 16 January 2018 on international ocean governance: an agenda for the future of our oceans in the context of the 2030 SDGs (2017/2055(INI))* P8_TA (2018)0004 (2018); and Woody, Todd "European Parliament Calls for a Moratorium on Deep-Sea Mining" (1 February 2018) News Deeply <www.newsdeeply.com>.

27 Julie Hunter, Pradeep Singh and Julian Aguon "Broadening Common Heritage: Addressing Gaps in the Deep Sea Mining Regulatory Regime" (16 April 2018) Harv Envl L Rev <www.harvardelr.com>.

in creating Marine Protected Areas, participated in the Prepcoms, together with between 99 and 147 states. The scheduled four sessions of this IGC are expected to conclude with the adoption of an international binding treaty in 2020. There has been a strong focus in this UN treaty-making process on benefit sharing between states in respect to accessing resources, including marine genetic resources, technology and the outcomes of scientific research conducted in the high seas as well as the "Area".

Not surprisingly, Pacific Small Island Developing States (PSIDS) are actively participating in the BBNJ process. At the intergovernmental conference in April 2018 on organisational and procedural matters for the four sessions of the IGC on BBNJ, the PSIDS position was made clear by Nauru:[28]

> The ocean is at the very heart of our shared identity as Pacific SIDS. It is the foundation of our economies, our environment, and our societies. For us, conservation and sustainable [use] of the marine environment is part and parcel of providing for the well-being of our peoples and ensuring our sustainable development, even in the face of mounting threats to its health, productivity and resilience.

Indeed, Pacific delegations intend to play a key role in the critical BBNJ negotiations – they have a history of closely engaging in the work of the Law of the Sea, from the negotiations of UNCLOS itself, and of the Fish Stocks Agreement. As stated by Nauru for PSIDS:[29]

> We must work towards an Agreement which is equitable, which recognizes the special case of small island developing states as well as the least developed countries, the principle of adjacency [and] integration of traditional knowledge, addresses transboundary and cumulative impacts, and recognizes the need for funding mechanisms which support the implementation of the Agreement.

There is no doubt about the importance of this new treaty to PSIDS and about the opportunity it provides to strengthen global governance of the oceans.

28 Pacific Small Island Developing States "Statement of the Pacific Small Island Developing States" (Intergovernmental Conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, New York, 16 April 2018).

29 Pacific Small Islands Developing States, above n 28.

The treaty should include strong accountability mechanisms for states and corporations which obtain licenses to access and use ocean areas beyond national jurisdiction. It should make independent environmental and social impact assessments of any proposed industrial activity mandatory, allow objections to applications to be made by states as well as non-state actors and require objections to be taken into account before licenses are approved. It should also require states and corporations to comply with existing international laws, binding agreements, obligations and principles, including international laws on human rights, the precautionary principle, prevention of transboundary harm, free, prior and informed consent, and the Paris Agreement on Climate Change. It should, moreover, incorporate the principle of "polluter pays" and include legal liability for damage to marine ecosystems and fisheries caused by industrial activity in ocean areas beyond national jurisdiction.[30]

But here is the rub. The oceans constitute Planet Earth's last frontier. As such, there is race to extract from it its considerable resources, including marine biological resources, genetic resources and rare earth metals used in advanced technologies, including, ironically, green technologies. Quite aside from the obvious interest of big mining companies, Pacific Island states are patently interested in the potential wealth to be derived from mining the ocean floor, if not within their own national jurisdictions, in the "Area". Papua New Guinea issued a license to Nautilus Minerals to prospect and mine in the Bismarck Sea (Solwara 1) and four Pacific Island states (Nauru, Tonga, Kiribati and Cook Islands) have applied for and been granted contracts by the International Seabed Authority (ISA) to explore polymetallic nodules with a view to mining in the mineral-rich 6 million square metre zone in the "Area", known as the Clarion Clipperton Fracture Zone, which lies in the Eastern Pacific Ocean.[31] The ISA was established under UNCLOS to "promote, organise, regulate and control all mineral-related activities in… 'the Area', or the international seabed lying beyond the exclusive economic zones (EEZs)."[32] The applications to the ISA by Pacific Island states were made on behalf of mining companies, namely Nautilus Minerals, Deep Green and Global Sea Mineral Resources (GSR).[33]

A major concern about this treaty making process is its limited remit of regulating conservation and sustainable use of marine biological diversity, without

30 The above perspective is the shared position of the joint DAWN/PANG (Pacific Network on Globalisation) team that is engaging in the BBNJ process.

31 For details on the ISA and awarded exploration contracts, see "Deep seabed minerals contractors" (2019) International Seabed Authority <www.isa.org>.

32 Charles W Schmidt "Going Deep: Cautious Steps Towards Seabed Mining" (2015) 123(9) Environmental Health Perspectives A234–A241 <www.ncbi.nlm.nih.gov>.

33 ISA licenses have been awarded to: Cook Islands Investment Corporation (July 2016); Marawa Research and Exploration Ltd (Kiribati January 2015); Tonga Offshore Mining Ltd (January 2012); and Nauru Ocean Resources Ltd (July 2011).

reference to activities regulated by other UNCLOS bodies, especially the ISA.[34] Despite deep sea mining potentially posing the greatest threat to marine biological biodiversity, it falls under the authority of the ISA and is therefore outside of the BBNJ's remit. There is a seeming anomaly in existing legal arrangements for the global governance of oceans in relation to the seabed beyond national jurisdiction. The ISA, as the international regulatory body charged with responsibility for both developing environmental regulations to prevent harmful impacts of seabed mining, and for due diligence in assessing applications, also issues licences to explore and mine the deep seabed and, most worrying of all, evidently has authority to actively promote seabed mining.[35]

There are deep concerns within the region about the dangers of experimental seabed mining. The Pacific Network on Globalisation (PANG) has been engaged in research, analysis and advocacy on DSM for the last eight or nine years and is part of a regional civil society campaign against DSM that has spawned a dynamic regional network of young activist artists called *Young Solwara Pacific.* Several years ago, PANG engaged the Guam-based firm Blue Ocean Law (BOL) to undertake a legal assessment of the Secretariat of the Pacific Community's Regional Legislative and Regulatory Framework (RLRF) for Deep Sea Minerals Exploration and Exploitation, which emerged from a regional project (SPC-EU EDF 10 Deep Sea Minerals Project) that began in 2011, funded by the EU and implemented by SPC's Applied Geoscience and Technology Division (formerly known as SOPAC). The BOL/PANG report strongly criticised the SPC's Regulatory Framework, saying:[36]

> By giving short shrift to any potential negative impacts of DSM, the RLRF creates an assumption of prosperity stemming from DSM exploration with little to no adverse environmental, health or cultural effects including on indigenous and other vulnerable groups.

34 The 1995 Fisheries Treaty on Straddling Stocks and Migratory Species, under UNCLOS, regulates global fisheries: Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 2167 UNTS 3 (opened for signature 4 December 1995, entered into force 11 December 2001).

35 ISA's Secretary General, Michael Lodge, told the Hamburg Business Club on 28 September 2018 that it had been "a long and arduous road to turn the promise of seabed mining into commercial reality" and that "the contribution of deep seabed mining towards increased long-term demand for minerals must be part of the overall vision for a sustainable world". "Secretary-General Michael Lodge makes deep sea mining presentation at Hamburg Business Club" (25 September 2018) International Seabed Authority <www.isa.org>.

36 Blue Ocean Law in collaboration with the Pacific Network on Globalisation (PANG) An Assessment of the Secretariat of the Pacific Community Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation (Blue Ocean Law, Hagåtña, 2016) at 2.

In evident reference to the EU's interest in DSM, it said:[37]

> In a process that is already being fast-tracked, and dictated from above by multinational corporations ... and foreign governments, this assumption poses great risks to Pacific Island states, citizens and indigenous peoples.

V. Conclusion

Since giving this keynote address, calls for a moratorium on DSM have been gaining momentum. I have been thinking more about the challenges of protecting our long-term interests in our Ocean and I want to suggest that we should consider seriously the possibility of legally protecting the Pacific Ocean, at least, before it is too late, by securing environmental personhood for it. Significant achievements have been made in the last 10 years, as part of an international "rights of nature" movement to strengthen environmental and cultural protection for rivers, mountains and forests.[38] In 2008 and 2010, Ecuador and Bolivia, respectively, enshrined the rights of nature in their constitutions. New Zealand granted legal personhood to Te Urewera National Park (forest) in 2014, and to Whanganui River and Mount Taranaki in 2017. The High Court in the Northern Indian State of Uttarakhand in 2017 accorded the Ganges and the Yamuna Rivers the status of legal entities, citing New Zealand's Whanganui River Act.[39] Also in 2017, Colombia's Constitutional Court granted legal personhood rights to the Atrato River and ordered the state to clean it up. In Australia, legal precedent was set with the 2017 Yarra River Protection Act recognising "the river and lands as an integrated system", the "intrinsic connection" of its traditional owners to the river and their country, and their role "as the custodians of the land and waterway which they call Birrarung". The Yarra River case has inspired other community-led movements to seek similar codification of the rights of nature for other rivers in Australia, as well as for the Great Barrier Reef and the Blue Mountains. Rights of nature laws make natural entities rights holders, and states duty bearers, bound by law to protect them. Rights of nature movements are people-led – local government leaders, civil society and environmental activists, religious leaders, and not least, legal scholars and law students such as yourselves have initiated them.

37 At 2.

38 Jane Gleeson-White "It's only natural: the push to give rivers, mountains and forests legal rights" The Guardian (online ed, London, 1 April 2018).

39 Gleeson-White, above n 38.

The Pacific Ocean is the world's largest ocean. As Dame Meg Taylor has pointed out, "ninety-eight per cent of the area occupied by Pacific Island countries and territories is ocean".[40] Oceanic people have an intrinsic connection with the Pacific Ocean, a relationship of deep historical, cultural and cosmological/spiritual significance that reaches back centuries to the times of the original peopling of Oceania by our ocean voyaging ancestors, and this connection with the ocean is metaphorically summed up in Epeli Hau'ofa's simple pronouncement: "We are the Ocean". In the words of Hau'ofa, "No people on earth are more suited to be guardians of the world's largest ocean than those for whom it has been home for generations."[41] We see ourselves not so much as SIDS as "Big Ocean Stewardship States"[42] and we successfully lobbied for a stand-alone goal on oceans in the SDGs. There can be no stronger claimants for enshrining in law the Pacific Ocean's right to protect itself than the peoples of Oceania. Achieving legal personhood status for the Pacific Ocean may be the only way to protect it and its life systems from being ravaged for short-term gains by rapacious corporate interests and complicit, short-sighted leaders. I hope some of you will become interested in learning more about these new and emerging developments in international law, and exploring their implications for our region, and the avenues they open up for protecting or securing the long-term interests of Pacific people.

40 Dame Meg Taylor "A Sea of Islands: How a Regional Group of Pacific States Is Working to Achieve SDG 14" UN Chronicle (online ed, Manhattan, May 2017).

41 Epeli Hau'ofa "Our Sea of Islands" in Eric Waddell, Vijay Naidu and Epeli Hau'ofa (eds) *A New Oceania: Rediscovering Our Sea of Islands* (The University of the South Pacific, Suva, 1993).

42 Taylor, above n 40.