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Article 62 of VCLT and Sea Level Rise: Applicability of *Rebis Sic Stantibus* to Maritime Zones and Boundaries

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Abstract

As a result of climate change, sea level rise puts many geographical coastal features and low-lying island countries at risk of disappearing within the coming decades. Sea Level Rise itself does not only pose catastrophic environmental damage but also presents a wide range of challenging legal uncertainties urging the legal society to reflect and find instruments which can help mitigate those challenges.
Raising a discussion about the possibility of applying the doctrine *clausula rebus sic stantibus* represents one of those challenges and therefore, puts under the doubt the stability and certainty of existing maritime boundaries treaties.
Being one of the most disputed doctrines in public international law, it has never attracted attention, particularly in the context of maritime law, as it has today.
Coming from the State practice and doctrine which was referred to as the "doctrine" or "principle" of *rebus sic stantibus,* Article 62 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides a possibility of terminating, withdrawing from or suspending a treaty in an orderly manner. Such a rule was included in the VCLT for situations when circumstances change substantially and the equivalence of treaty obligations may become imbalanced and treaties lose their objective and purpose.
Based on Article 62 (2)(a), treaties establishing boundaries cannot be subject to unilateral termination under a fundamental change of circumstances. However, the *travaux préparatoires* of the International Law Commission (ILC) and relevant case law suggest that the exclusion only covers treaties delimiting territorial boundaries and full sovereignty.
Thus, one of the most debatable and uncertain questions remains to be addressed:
"*Whether the fundamental change of circumstances (clausula rebus sic stantibus) referred to in Article 62(2) of 1969 Vienna Convention on the Law of Treaties (VCLT) applies to maritime boundaries in relation to the sea level rise issue?*"

Keywords

Rebus sic stantibus; Sea level rise; Fundamental change of circumstances; Law of the Sea; Law of Treaties; Maritime delimitation; maritime boundaries; UNCLOS.

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1. Introduction

The delimitation of maritime boundaries has indisputably become an important aspect of the practice of States in the modern law of the sea. Stable and definitive maritime boundaries ensure a peaceful relationship between the States concerned in the long term,[1] and preserve the legal stability, security and peace between States.

Maritime boundary delimitation belongs to the category of politically sensitive processes. It has a direct effect not only on the maritime zones under the national jurisdiction of the States involved but also on the rights and interests of those States concerning fishing and marine living resources, mineral and hydrocarbon resources, navigation and other uses of the sea.[2]

Due to climate change, sea level rise is threatening the foundation of all maritime entitlements generated by the States’ coasts. The most important of these, related to the possible effect of sea-level rise on maritime spaces and maritime delimitation, refers to the entitlements, under legal regimes provided by the United Nations Convention on the Law of the Sea (hereafter - UNCLOS), of the coastal States and, as the case may be, of third States.

More than 70 States are or are likely to be directly affected by sea-level rise. By some estimates, more than one-third of the States of the international community will be affected. Essential aspects of life for coastal areas, low-lying coastal States, and especially small island States have already suffered an increasing impact due to sea-level rise.[3]

Sea-level rise might generate humanitarian and economic disasters or conflict, in particular as many maritime boundaries are not settled, and the threat it poses to the very survival of some States.[4] Sea-level rise has begun to raise questions on whether maritime boundaries will continue to exist unchanged when coastlines shift.

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[1] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Case No. 2010-16, Award, Permanent Court of Arbitration, 7 July 2014. Available at www.pca-cpa.org/en/cases/18; para. 216.

[2] Ibid.

[3] ILC Report, A/CN.4/740, para 28, page 15.

[4] ILC Report, A/CN.4/734, para 43, page 11.

As a result, the relevant points that have been or will be used to establish a maritime boundary, either by agreement or by adjudication, may also change. Since each of the maritime zones is measured from the baseline from which the territorial sea is determined, any change or loss of the baseline could lead to a wide range of consequences including reductions or even, in extreme cases, complete loss of maritime entitlements. This will affect the ability to exercise the sovereign rights and jurisdiction of the coastal State and its nationals, as well as the rights of third States and their nationals, in maritime spaces in which boundaries or baselines have been established.

States may claim maritime rights in different ways. First, in the absence of other overlapping claims, a state may unilaterally institute the outer limits of its national jurisdiction. Second, when there are overlapping claims, states must reach a boundary agreement, either through negotiation or by submitting to third-party dispute resolution.[5]

There are different scenarios on how the coastlines may potentially, for example: when the mainland coastline retreats with no overlapping maritime claims; when the island or islands are totally submerged; when the adjacent or opposing states share a maritime boundary dividing their exclusive economic zones; or when the coastline shift introduces a new maritime zone between the two countries.

The above-mentioned scenarios might generate a ground for any State with particular legal interests to initiate proceedings against other countries due to the change of realities and the nature of the maritime delimitation agreements.

Apart from the geographical impact on existing baselines and maritime boundaries, sea-level rise brings many questions related to the legal consequences of changing coastlines. Changing coastlines can be problematic from the perspective of international law.[6] The international community has taken on the challenge of addressing the legal implications brought about by this concern, which is reflected in the agendas of international organisations, such as the International Law Commission (hereafter - the ILC),[7] the Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS),[8] the International Law Association[9] and others; and the creation of numerous fora, such as international conferences and meetings, where this issue may be discussed.

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[5] Stability of Maritime Boundary Agreements, Julia Lisztwan, Yale Journal of International Law, Vol. 37, No. 1, 2012, page 171.

[6] Lando, M. (2022). Stability of maritime boundaries and the challenge of geographical change: A reply to Snjólaug Árnadóttir. Leiden Journal of International Law, 35(2), 379-395. doi:10.1017/S0922156522000061

[7] Provisional agenda for the seventy-second session of International Law Commission: "Sea level rise in relation to international law". Geneva, 27 April–5 June and 6 July–7 August 2020: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/002/64/PDF/N2000264.pdf?OpenElement;

[8] Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS). Official web-site: https://www.un.org/Depts/los/meeting_states_parties/thirtyfirstmeetingstatesparties.htm

Report of the twenty-seventh meeting of the Meeting of States Parties to the 1982 United Nations Convention on the Law of the Sea, New York, 12-16 June 2017: http://undocs.org/SPLOS/316.

[9] Report of the International Law Association Committee on International Law and Sea Level Rise, "International Law and Sea Level Rise" by Davor Vidas (Editor), David Freestone (Editor), Jane McAdam 1974- (Editor), 27 Mar 2019.

Thus, the ILC decided to include the topic of "sea level rise in relation to international law" in its long-term programme of work.[10]

However, the ILA Committee[11] emphasised the "considerable legal and political complexity" in formal law-making options, especially an amendment of UNCLOS, as one response to settle the question as to "what happens to exist maritime entitlements affected by a sea-level rise".[12] A variety of legal solutions have been explored to address these impacts, including the development of new customary international law, the adaptation of protocol under the UNFCCC,[13] as well as the adaptation of a new agreement under the auspices of the UNGA and even an amendment to UNCLOS. [14]

Unstable coastlines caused by sea-level rise have an impact on all types of maritime boundaries: undelimited maritime boundaries or those that have existing claims regarding the entitlement to maritime spaces in the case of future maritime delimitation; maritime boundaries delimited by an agreement; adjudicated maritime boundaries. One of the most controversial questions in this respect relates to maritime boundary delimitation (by agreement) in particular. Is it possible to preserve the stability and certainty of maritime boundary agreements under the *pacta sunt servanda* principle? Or does sea-level amount to a fundamental change of circumstances (*rebus sic stantibus* doctrine), as enshrined in Article 62 of the Vienna Convention on the Law of Treaties? In other words, if sea-level rise represents a fundamental change of circumstances that might be invoked in the context of maritime delimitation, can treaties delimiting maritime zones be subject to termination or revision on this basis?

Despite the fact that since the times of Dutch Jurist and Diplomat Hugo Grotius the *clausula rebus sic stantibus* has been one of the most controversial issues in public international law, still it did not prevent it from becoming a recognized ground for terminating a treaty.

For decades, there was no consensus among international lawyers and States whether *clausula rebus sic stantibus* was a reflection of customary law. Nevertheless, this changed after the adoption of the VCLT. Article 62 (2)(a) does not show that the original customary rule excluded maritime boundaries treaties.

Althoght, after the VCLT was adopted, the ICJ in *Gabčíkovo-Nagymaros case (Hungary/Slovakia)* stated that the art 62 is a reflection of a customary rule,[15] there are still remain doubts as to its scope, and in particular whether it applies to maritime boundaries (in light of the exclusion in respect of territorial boundaries). Moreover, the *travaux préparatoires*

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[10] Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), para. 369.

[11] The International Law Association Committee on International Law and Sea Level Rise - established to assist the ILA in the realisation of its objectives of studying, clarifying and developing international law, particularly on topics of Sea Level Rise. https://www.ila-hq.org/en_GB/committees.

[12] Report of the International Law Association Committee on International Law and Sea Level Rise, "International Law and Sea Level Rise" by Davor Vidas (Editor), David Freestone (Editor), Jane McAdam 1974- (Editor), 27 Mar 2019, p. 18.

[13] Kyoto Protocol To The United Nations Framework Convention On Climate Change: https://unfccc.int/resource/docs/convkp/kpeng.pdf; As proposed in 1990 by the Coastal Zone Management Subgroup of the IPCC, reported by Freestone and Pethick (n. 58), at 76.

[14] Report of the International Law Association Committee on International Law and Sea Level Rise, "International Law and Sea Level Rise" by Davor Vidas (Editor), David Freestone (Editor), Jane McAdam 1974- (Editor), 27 Mar 2019, p.18-19.

[15] *Gabčíkovo-Nagymaros project (Hungary/Slovakia)*.https://www.icj-cij.org/sites/default/files/case-related/92/7377.pdf

of the ILC demonstrate that members of the discussions never considered the possibility of excluding maritime boundaries. The nature of maritime zones is different from that of land territory and the reason for excluding treaties establishing land boundaries, the need for stability, is not a necessary requirement of maritime frontiers, which generally fluctuates with changes to the coastal front.
This article will analyse, whether, despite the restrictive wording of Art. 62 as well as its exceptional character, a fundamental change of circumstances may give rise to a unilateral denunciation of a maritime boundary treaty.
Furthermore, this article will also rise an importance and impact of states' practice on problem resolution, which might potentially contribute to the formation of new customary law.

2. Fundamental Change of Circumstances

Under Art. 62 of the 1969 Vienna Convention, in the situations when obligations under the treaty, become impossible to be performed by one of the parties due to the unforeseen change of circumstances, the doctrine of *rebus sic stantibus* can be invoked.
The final draft of Art. 62 of VCLT can be seen as following:

Article 62 Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

It is assumed that approximately 250 treaties relating to maritime delimitation might be affected. Thus, after looking into Art 62 it is possible to highlight the main criteria that have to be met in order to invoke the *rebus sic stantibus*, these are foreseeability, a fundamental

change of circumstances, the essential basis of consent, radical transformation, notion "boundary".[16]

2.1. Foreseeability

In order to invoke *rebus sic stantibus,* it is necessary that at the time of the conclusion of the treaty the change was unforeseen. In other words, it means that at the moment of the conclusion of a treaty parties should not have any anticipation of the fundamental change of circumstances.

While discussing the draft article, Fitzmaurice mentioned the admissibility of "reasonable foresight".[17] Nonetheless, the exact wording of Art 62 differs from this suggestion and indicates that the relevant criteria are what parties to an agreement actually foreseen. This makes us suggest that the principle should definitely not be invoked to withdraw from, suspend or terminate a treaty if the treaty provides for the change in any way.

During the seventy-second session of the ILC in 2021, after examining the literature, jurisprudence and case law, the ILC concluded that sea-level cannot be assimilated with a fundamental change of circumstances, since "it is not a sudden phenomenon and it cannot be claimed that it could not be foreseen"[18]. In its report, the Commission asserted that the international community started to be aware of sea-level rise at least after the 1980s.

The ILC made it clear from the beginning that its work will not propose modifications to existing international law, including UNCLOS and scholars, alternatively, have widely argued for an adoptive interpretation of the relevant provisions of UNCLOS, such as Art. 7 paragraph 2 regarding Straight baselines.[19] It would allow for (stable) straight baselines for unstable coastlines.[20] It can be also argued that at the moment of the UNCLOS negotiation the Sates have need already aware of the usability of the coastlines.

However, predictions relating to climate change are still not precise enough to account for all the effects it may have on coastal geography or the marine environment.

2.2. Radical transformation

In accordance with Article 62, paragraph 1 (b),

> "*The effect of a change must be to radically transform the extent of obligations still to be performed under a treaty*."

[16] Vienna Convention on the Law of Treaties 1969 Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, Art. 62.

[17] UN Doc A/CN.4/107 (n 18) 33.

[18] ILC Report, A/CN.4/740, para 119, page 46.

[19] "Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention".

[20] Rozemarijn J.Roland Holst, "Change in the Law of the Sea. Context, Mechanism and Practice", Brill Nijhoff, 2022, p.283.

In the jurisprudence, there is still no explanation on how radical transformation should be to meet the standard, but it refers to the condition of a fundamental change and assumes that the change must affect ongoing obligations to a large extent.[21]
Nevertheless, by looking at ICJ jurisprudence in the *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* case, as an example, it is possible to assert that a change affecting the economic viability of treaties may qualify as a fundamental change radically transforming ongoing obligation, but only where economic interests led to the conclusion of a treaty and those interests have been severely affected.

2.3. The essential basis of consent

Termination, suspension or withdrawal from the treaty based on a *rebus sic stantibus* will be impossible if the essential basis of that treaty is not affected by the fundamental change. It concerns the stipulated in the treaty obligation that State is willing to terminate. In order to invoke the Art. 62 of VCLT it is important to establish a causal link between the specific circumstances that have undergone changes and the subject matter of the treaty.
It is important to note, that generally, maritime boundary treaties contain no explicit reference to the essential basis or confirmation of the significance attached to relevant coastlines. This is why this can be difficult to prove that a change to coastal geography affects a maritime boundary's essential basis.[22]
However, the fundamental obligation, in delimiting exclusive economic zone and continental shelf boundaries, is to achieve an equitable solution. [23]Therefore, it can be argued that the essential basis of maritime boundary treaties is that they delimit maritime entitlements in an equitable manner and it depends on the circumstances surrounding each treaty what the State deemed to be equitable at the time of its conclusion.[24]

2.4. Notion "boundary"

After defining the fundamental change of circumstances in article 62, paragraph 1 of VCLT, the convention specifies in paragraph 2 of the same article, that

> "*Fundamental change of circumstances may not be invoked as a ground for termination or withdrawing from a treaty… if the treaty establishes a boundary*".

Upon reviewing the International Law Commission debates when working on the draft articles on the law of treaties, the Commission asserts that territorial sea boundaries might not fall within the boundary exclusion of article 62, paragraph 2 (a).[25] Thus, this question concerns maritime boundaries beyond the territorial sea.[26]

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[21] S. Árnadóttir, "Climate Change and Maritime Boundaries. Legal Consequences of Sea Level Rise". Cambridge University Press, 2022, p. 196.
[22] S. Árnadóttir, "Climate Change and Maritime Boundaries. Legal Consequences of Sea Level Rise". Cambridge University Press, 2022, p. 212.
[23] UNCLOS Art 74 (1) and 83 (1).
[24] See footnote n.16. p.212.
[25] ILC, Report of the Commission to the General Assembly on the Work of the Thirty-fourth Session, 3 May-23 July 1982, p. 60-61.
[26] ILC Report, A/CN.4/740, para 116, page 46.

There is no unified approach to the interpretation of the notion of "boundary" stated in the Art. 62, paragraph 2 (a) in the context of sea-level rise. Nowadays, after adoption of the VCLT, experts' opinions on the interpretation of Art.62, 2 (a) were divided into two groups: first, an approach that suggests that the use of term 'boundary' excludes maritime boundary as such, and, second, the opposite approach, which – on the grounds of stability –assimilated maritime and territorial boundaries for the purposes of Art 62 (2)(a).
During its seventy-second session in 2021, the ILC relied on the 1978 judgment of the International Court of Justice (ICJ) in the *Aegean Sea Continental Shelf (Greece v. Turkey),* in order to equate the concept of 'maritime boundaries' with the 'boundaries'. In that case, the Court held that:

> "*Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and persistence, and is subject to the rule excluding boundary agreements from the fundamental change of circumstances*".[27]

In the opinion of the Commission, international jurisprudence is clear in this respect[28] and therefore "States cannot invoke article 62, paragraph 2 (a) of the 1969 Vienna Convention on the Law of the Treaty to unilaterally terminate or to withdraw from a maritime boundary treaty, including because of sea-level rise".[29]
However, reference to the *Aegean Sea Continental Shelf* judgment in such a context can be criticized. There is no doubt that the treaties that do not establish boundaries are not subject to the boundary exception. Thus, Árnadóttir correctly asserts that the court's *obiter dictum* regarding continental shelf boundaries does not definitely settle whether the provision covers all maritime boundaries.
The central issue in the *Aegean Sea* case was the admissibility of a dispute concerning the delimitation of a continental shelf between Greece and Turkey and a detailed analysis of the term "territorial status".[30] The exclusion of dispute from mandatory jurisdiction under the Greek reservation was not because of the classifying a continental shelf as "territory" or having "territorial status". The real question for decision was, whether the dispute was one which relates to the territorial status of Greece:[31]

> *"The question for decision is whether the present dispute is one "relating to the territorial status of Greece", not whether the rights in dispute are legally to be considered as "territorial" rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status."*

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[27] Aegean Sea Continental Shelf (Greece v. Turkey) (Jurisdiction), 1978, ICJ Rep 3, para 85.

[28] Ibid, para 141, page 54.

[29] Ibid, para 118, page 46.

[30] Upon accepting the compulsory jurisdiction of the Permanent Court of Internatioal Justice, Greece excluded "disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication". Aegean Sea Continental Shelf (Greece v. Turkey) (Jurisdiction), 1978, ICJ Rep 3, para 85.

[31] Ibid, para 86.

Thus, Árnadóttir concludes that this differs from the test applicable to Art. 62 paragraph 2 (a) of the 1969 Vienna Convention, as this provision only concerns treaties that, in fact, establish (territorial) boundaries, and not those relating to such boundaries or otherwise creating "territorial status".[32]

Another comments in support to equate 'maritime boundaries' to the 'boundaries' during the seventy-second session of the ILC was one raised by the delegation of Papua New Guinea[33] by referring to case of the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*[34]*.* On this view:

> *"Maritime boundaries, just like land boundaries, must be stable to ensure a peaceful relationship between the States concerned in the long term".*[35]

Furthermore, the delegation of Papua New Guinea claimed that in the case it was directly referred to and specified climate change and the sea-level rise as its effects:

> *"In the view of the Tribunal, neither the prospect of climate change nor its possible effects can jeopardize a large number of settled maritime boundaries throughout the world. This applies equal to maritime boundaries agreed between States and to those established through international adjudication"*[36]*.*

However, Árnadóttir asserts that following the *Bay of Bengal Maritime Boundary Arbitration,* the principal objectives of continental shelf delimitation are to achieve stability and finality because the exploration and exploitation of the continental shelf call for "important investments and the construction of off-shore installations"; and stable continental shelf boundaries were necessary for "development and investment".[37] Consequently, Árnadóttir fairly claims that the purpose of the maritime boundary agreement cannot affect the general interpretation of VCLT article 62, paragraph 2 (a) since it is the object and purpose of the VCLT that is relevant when interpreting that particular provision under VCLT article 31.[38]

3. Early Signs of Emerging State Practice

A significant part of the ILC Report on rising sea level was dedicated to the expression of the States' general desire for stability, security, certainty and predictability of maritime delimitation in connection with the present topic. A common interest in legal certainty and stability, which serve to avoid conflicts, are indeed explicitly reflected in the submissions made by Member States in connection with the work of the ILC on rising sea levels.

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[32] S. Árnadóttir, "Climate Change and Maritime Boundaries. Legal Consequences of Sea Level Rise". Cambridge University Press, 2022, p. 247.

[33] Papua New Guinea (A/C.6/73/SR.23, para.34).

[34] Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Case No. 2010-16, Award, Permanent Court of Arbitration, 7 July 2014. Available at www.pca-cpa.org/en/cases/18

[35] Ibid, para. 216.

[36] Ibid, para 217.

[37] S. Árnadóttir, "Climate Change and Maritime Boundaries. Legal Consequences of Sea Level Rise". Cambridge University Press, 2022, p. 211

[38] Ibid, p. 211.

It is thus important to consider the relevance of State practice in this context. As Rayfuse has noted, jurisdictional ambiguities caused by sea-level rise are indeed most likely to be resolved through the accretion of state practice over time.[39] It is worthy to note that the statements of States on the present topic are also indicative of State practice that contributes to the development of new customary international law. So far, all statements referred to the issues of maritime delimitation in the context of sea-level rise favoured their preservation and maintenance.[40]

For instance, the Maldives considered that "sea-level rise does not have any effect on maritime boundaries between two States when they have been fixed by a treaty. Maritime boundary treaties, such as those that the Maldives has negotiated, are binding under the rule of pacta sunt servanda, and sea-level rise does not constitute a fundamental change of circumstances that would allow termination or suspension of such treaties".[41] Furthermore, the delegation from the Maldives asserted that "when elaborating the draft articles that served as the basis for the adoption of the [Vienna Convention on the Law of Treaties], the International Law Commission … never provided a clear definition of the term "boundary," but according to the [Commission]'s report to the General Assembly, the clause "embrace[s] treaties of cession as well as delimitation treaties," without any qualifier."[42]

A submission made by Romania quoted the provision of the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters, of 2003. [43] The treaty shows that at the moment of concluding of that treaty states were already aware of the possibility of the alternation of the borders and "objective modifications due to natural phenomena" was predicted. It reads as follows:

> "If objective modifications due to natural phenomena which are not related to human activities and that make it necessary for these coordinates to be changed are noticed, the Joint Commission shall conclude new protocols." [44]

The United Kingdom, in turn, emphasized in its submission to the Commission "the legislation establishing the [United Kingdom]'s Exclusive Economic Zone which is defined by fixed coordinates as agreed in bilateral Maritime Boundary Delimitation Treaties with neighbouring countries".[45]

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[39] R Rayfuse, "Climate Change and the Law of the Sea' in R Rayfuse and SV Scott (eds), International Law in the Era of Climate Change (Edward Elgar Publishing 2012), p.173".

[40] ILC Report, A/CN.4/740, para 127, page 49.

[41] Submission of Maldives, forwarded through note verbale No. 2019/UN/N/50 of 31 December 2019 to the United Nations, p. 9. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms

[42] Ibid, para. 20-21.

[43] Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters (Cernauti, 17 June 2003), United Nations, Treaty Series, vol. 2277, No. 40547, p. 3.

[44] Submission of Romania, forwarded through note verbale No. 84 of 9 January 2020 to the United Nations. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[45] Submission of the United Kingdom of Great Britain and Northern Ireland, forwarded through note verbale No. 007/2020 of 10 January 2020 to the United Nations. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

The United States expressed its position that it "generally considers maritime boundaries established by treaty to be final. A maritime boundary established by treaty would not be affected by any subsequent changes to the baseline points that may have contributed to the construction of a maritime boundary unless the treaty establishing the boundary provides otherwise."[46]

While some countries are participating in the discussions in international and national arenas, others are taking also serious measures in practice. Due to the danger caused by sea level rise, some states, which appear to be the most vulnerable, have started to practice regional cooperation. One of the latest examples is the declaration dated 12th August 2021 of the Pacific Island Leaders to Agree to Set Permanent Maritime Borders notwithstanding climate-change consequences.[47]

During 2021 session of the ILC, the Pacific Islands Forum, in its comments on behalf of its member States, which was relevant for evidencing the regional State practice, emphasized that members of the Forum have undertaken a sustained effort to conclude, where necessary, maritime boundary agreements in the region.[48] These regional agreements might contribute to the establishment of new and general practice in the formation of a new rule of customary international law. However, this practice is regional and not yet widespread enough to give rise to a new rule of general customary international law. Moreover, a new rule of the customary rule will require a pattern of State practice and also *opinio juris.* Therefore, at the moment, this practice does not completely evidence opinio juris yet. But in the case of the formation of a new rule of customary law, even if state practice is insufficient to evidence a new customary rule, it may be relevant for the interpretation of the Article 62 of VCLT in the event of a dispute. Singapore, in its submission to the Commission, listed several delimitation treaties.[49] In its submission, Singapore provides an example of one of these treaties and emphasizes the importance of analysis of every maritime treaty on a separate note. Thus, the 1995 Agreement between Malaysia and Singapore to delimit precisely the territorial waters boundary in accordance with the Straits Settlement and Johore Territorial Waters Agreement 1927,268 provides in its article 2, entitled "*Finality of boundary*", meaning that the respective boundary is permanent.

Moreover, in the report, the ILC "a view was expressed that whether maritime delimitation treaties were covered by Article 62 was a matter of treaty interpretation and that it was a matter for international courts and tribunals, and not for the Commission since that would be beyond its mandate".[50]

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[46] Submission of the United States, forwarded through note verbale of 18 February 2020 to the United Nations, pp. 1–2. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[47] The Maritime Executive. Pacific Island Leaders Agree to Set Permanent Maritime Borders https://www.maritime-executive.com/article/pacific-island-leaders-agree-to-set-permanent-maritime-borders accessed.

[48] Submission of the Pacific Islands Forum, forwarded through letter of 30 December 2019 of the Permanent Representative of Tuvalu to the United Nations, on behalf of the Pacific Islands Forum members (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms), p. 3.

[49] Submission of Singapore, forwarded through note verbale No. SMUN 054/2020 of 5 February 2020 to the United Nations, paras. 6–7. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[50] ILC Report, A/76/10, para 281, page 173.

4. Conclusions

Indisputably, sea-level rise has already become a truly challenging issue for the international community. The law exists to serve society and has accordingly evolved to meet the changing needs and challenges of society. With climate change, this evolution involves - both the application of existing legal concepts, including some ancient doctrines generally seen as dormant if not extinct.

This article aimed to examine the possibility of invoking the *clausula rebus sic stantibus*, the principle of fundamental change of circumstances, which is reflected in Art. 62 of the VCLT in respect of maritime boundary treaties, and concludes that these treaties are subject to termination or suspension under this provision. Despite the arguments in favour of equating "maritime boundaries" to "boundaries" for the purposes of the exclusion in Article 62(2)(a), these arguments are not based on solid ground. Thus, when the requirements for the invocation of Art. 62 VCLT are met – which can happen on a rare occasion – this provision will be applicable to maritime boundary agreements.

This said, it is also important to stress that in the case of a dispute regarding maritime boundary due to sea-level rise, one must begin by assessing whether there is an actual maritime treaty between the parties and what are terms that have been agreed between them.

Moreover, it should not be forgotten, that another question that will need to be addressed and taken into account is that bilateral maritime boundary agreements are not binding upon third States, which would therefore not be required to recognize agreements establishing or fixing maritime delimitation boundaries. Consequently, it would be in the interests of the States to conclude the maritime boundaries as soon as possible, even despite the fact of the possibility of a unilateral declaration of their baselines in accordance with UNCLOS.

The reason behind this is that the declarative character of the submission of the States baselines coordinates does not constitute the final and irrevocable status, because usually in accordance with the mandate of DOALOS, the submitted data can be registered and accepted but not become a subject of substantial cross-checking. Therefore, nothing stops the dissenting state to challenge this fact in the relevant courts and tribunals.

In any case, the desire of the states to preserve legal stability, security, certainty and predictability, to preserve maritime delimitation either effected by agreement or by adjudication, notwithstanding the coastal changes produced by sea-level rise it is necessary that such a state practice become worldwide. Unfortunately, it is not enough for this to be transformed into the rule of customary international law yet. However, such activities, as a result, can turn into a positive result and form an *opinio juris* in time.

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