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SHIPPING

Pacific States Battle At The International Maritime Organisation Negotiations To Reduce GhG Emissions From Shipping

Pacific States battle at the IMO negotiations to reduce GHG emissions from shipping

By **Professor Pierre-jean Bordahandy**

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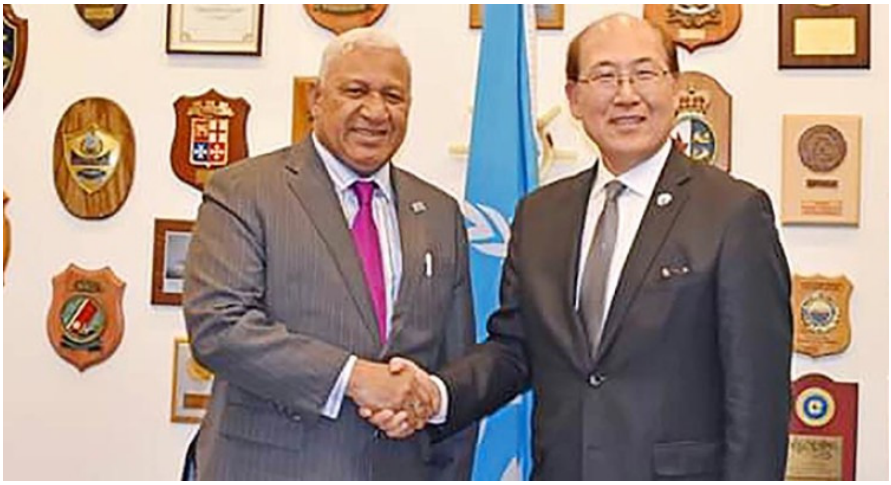

Prime Minister Honourable Josaia Voreqe Bainimarama met with the Secretary-General of the International Maritime Organisation Mr Kitack Lim on the margins of the biennial IMO in London last year.

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Although very well entrenched in the Pacific psyche through the words of Epeli Hau'ofa in his 1993 work 'Our Sea of Islands', the peculiarity of the situation of Pacific States in relation to maritime connectivity is both poorly comprehended and not economically important enough to be considered with the attention it deserves on the international scene.

NEGOTIATIONS

In this context, the mere idea of Pacific States' delegates having any weight in the negotiations for the reduction of greenhouse gas (GHG) emissions from ships at the Marine Environment Protection Committee might seem quite laughable. Especially as the shipping industry likes to remind us that over 90 per cent of world trade is seaborne. It is therefore even more remarkable that a coalition of Pacific States, have been sending a handful delegates to participate in the International Maritime Organisation (IMO) negotiations.

Only about 10-15 per cent of Small Island Developing States (SIDS) and Least Development Countries (LDCs) have been represented at IMO meetings on GHG emissions reduction, and nearly all of these have been from the Pacific. This act of participation alone was a struggle given that the IMO Convention requires that each delegation pay for their own cost, which has the direct effect of preventing small Pacific Islands States as well as Least Developed Countries and developing countries more generally to be represented at the IMO, in London, for meetings that can extend for weeks. Other United Nations (UN) organisations have trust funds that support the travel costs for SIDS and LDCs to participate in their meetings, but not the IMO.

Fortunately, there have been various countries that recognised the inequity of those most affected by climate change not being present, and over the past few years, several different partners have stepped in to provide the necessary financing to enable Pacific Islands' participation.

Having passed this funding hurdle, for the time being at least, other challenges have faced the Pacific States participating in the IMO negotiations. These range from lack of trained, experienced and available staff, the need for detailed analysis of, highly technical

submissions, interventions, and debates, to lack of data for the Pacific.

Two important legal issues, like elephants in the room, have led the IMO to embark in convoluted debates in order to reconcile opposing concepts, both of critical importance to the Pacific.

The first of these issues comes from the tension created between the "precautionary approach" relevant for environmental law (after all one would expect that this is what GHG emission reduction would be about) and the requirement for "science-based" decision-making at the IMO.

PRECAUTIONARY APPROACH

Simply presented, the "precautionary approach" says that the "lack of scientific certainty about the actual or potential effects of an activity must not prevent States from taking appropriate measures when such effects may be serious or irreversible". Practically speaking, the precautionary approach has the effect of reversing the burden of proof requiring the actor intending to conduct an activity to prove that there is no risk to the environment.

One can easily see the tension resulting from the juxtaposition of this precautionary approach with the requirement of "science-based" decision making whereby any regulation, even those intending to protect the environment, have to scientifically demonstrate the need for such a measure. Either the burden of proving the absence of risk of an activity is on the person willing to undertake it or it is on the person opposing it, at some stage a line needs to be drawn.

Some are often eager to recall that, although recognised in various forms of international treaty law, there isn't an absolute recognition of a formal "principle of precaution" in International law and that some International Courts have shown strong reluctance in going down that path. However, when it comes to legal value, the same can be said about the requirement of "science-based" decision making, which does not appear in the text of the IMO Convention nor many of the IMO regulations.

This science-based direction seems to have conveniently slipped from Trade Law (GATT, WTO, etc.) into the IMO modus operandi. One might question the legitimacy of this slip as one thing is for the IMO to create rules applicable to the shipping industry and another is to create the rules by which it is going to regulate shipping.

Is it reasonable to allow IMO member to have such a power? As a basic principle, no lawmaker should have the freedom to decide the rules by which it is going to make laws.

Furthermore, the adequacy of the "science-based" requirement with the original IMO convention is not necessarily self-evident, which raise a concern about the hierarchy of norms with the necessity to give preference to the letter and the intention of the IMO Convention.

REQUIREMENT

Lastly, this quantum leap of the "science-based" requirement from the WTO to the IMO is all the more regrettable that a more formal transposition would have probably led to the realignment of its balancing provisions in place under the GATT and the WTO, which provide for exceptions in order to protect the environment or the health.

The second of these issues comes from the tension created between the principle of "Common But Differentiated Responsibilities-Respective Capabilities" (CBDR-RC), a well-known principle of equity in International Law, and the requirement of "No More Favourable Treatment" (NMFT) that the IMO seems to have adopted in a similar fashion as to that described for the "science-based" requirement.

The principle of CBDR-RC aims to distribute the cost of addressing a global environmental problem among different States according to their historical responsibilities and respective capabilities.

The idea of differential treatment is present in other areas of public international law as well, including in the WTO and in the Law of the Sea, and is well accepted.

On the other hand, NMFT does not seem, once again, to be entrenched in the IMO textual legal reference and appears to have also 'slipped in' by convenience.

Beyond the legal value of the concepts of CBDR-RC and NMFT, it is not difficult to appreciate how tensions could arise from attempts to conciliate them.

The rule is either to apply a regulation equally to all or to treat some different to others, but you can hardly do both.

CONTRADICTION

This contradiction seems to have led the IMO to create an Impact Assessment Procedure where any State will be able to demonstrate a disproportionate impact that the application of a certain measure aimed at reducing GHG emission might have on its economy.

Whoever had any ambition to achieve some reduction of greenhouse gas emission from ships might be concerned that such a lengthy procedure could cause substantial delay, if not block, the entry into force of effective measures to curb emissions.

After all, the role of the IMO, as per its founding treaty, is certainly to protect the ocean. Despite the tireless efforts of Pacific delegations that have attended IMO / MEPC negotiations, not much seems to have been gained in terms of reduction of GHG emission from ships or allocation of the responsibility to address this issue.

The IMO and the majority of its members appear to be content to navigate uncertain seas by choosing to ignore difficult legal and financial questions, hoping perhaps for innovation and market adaptation or transition from outside to save the day.

In the meantime, the Pacific can rely on its moral high ground, as it might be the only thing that we have left while the sea continues to rise.

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