

# Chapter 45

## The law applicable to coral reefs of New Caledonia

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Southern Province protected area, Larégnère Islet. © IRD-ENS/T. Berr

The reader may be surprised to discover that there is no specific law applicable to coral reefs in New Caledonia! In fact, unlike other ecosystems and despite their importance (several points of view have been widely developed in this book) and their extreme vulnerability to natural threats and anthropogenic pressures, with only a few exceptions there is no binding law related to coral reefs (“sea rainforests”) at an international, national, regional or New Caledonian level. Before proceeding further, it is important to clarify the concepts of hard law and soft law.

Hard law refers to binding legal texts. In the context of international law, hard law includes international treaties or

agreements, as well as international customary law, which create binding obligations and rights for parties (states) and other international entities. Failure to comply with these obligations may result in the prosecution of the party before international courts.

Soft law refers to rules that are neither strictly binding in nature nor completely devoid of legal meaning. In the context of international law, soft law refers to agreements that establish guidelines, political declarations, action plans, strategies, guides to good practice or codes of conduct that set standards. However, they are not directly applicable and their non-compliance may not result in any prosecution or punishment.

## Soft law rules

Over the past 50 years however, numerous programs and actions have been implemented for the conservation and direct or indirect management of coral reefs. These legal initiatives fall under the definition of soft law. They have been implemented, in terms of binding law, through the following legal mechanisms:

- most often, the legal procedure of protected areas and particularly marine protected areas (MPAs);
- legal rules on protected species and the protection of "marine biodiversity" in general;
- legal rules on fisheries management and the prevention of overfishing;
- rules for the prevention, control and remediation of marine pollution;
- rules for the control of invasive alien species;
- rules for the protection of "common heritage" or "World Heritage";
- rules intended to promote tourism.

Since the Paris Agreement on climate and taking into account the impacts of global warming and ocean acidification, legal measures to combat and mitigate these impacts can also be used to protect corals.

## International soft law texts that can be mobilized

Several soft law texts are applicable in New Caledonia and can be mobilized to protect coral reefs here.

At the international level, France signs and ratifies treaties, agreements and conventions. Not all agreements signed by France are automatically applicable in New Caledonia. The protection of biodiversity was devolved to New Caledonia and its provinces in 1988, and it is therefore necessary to ensure that international agreements are applicable to the area. These protections include the following agreements, which can be used for the conservation and management of coral reefs:

- the MAB program, Biosphere Reserves (UNESCO, 1971);
- the Ramsar Convention on Wetlands (1971);
- the Convention on the Protection of the World Cultural and Natural Heritage (UNESCO, 1972);
- the United Nations Convention on the Law of the Sea (Unclos, 1982);
- the Convention on Biodiversity (1992);
- the International Convention for the Control and Management of Ships' Ballast Water and Sediments (2004);
- Aichi Biodiversity Targets (2010);
- the International Coral Reef Initiative (ICRI). ICRI is defined as "an informal partnership between nations and organizations working to preserve coral reefs and related ecosystems around the world". While the ICRI is an informal group whose decisions are not binding on its members, its actions have been instrumental in continuing to highlight the overall importance of coral reefs and associated ecosystems for environmental sustainability, food security and social and cultural well-being;
- The UN Agenda 2030, particularly Objective 14 and its seven sub-objectives;
- the Paris Agreement on climate (2015).

## National texts favorable to coral reefs

At the national level, considering only the most recent texts, it is also important to mention the n° 2016-1087 Act for the restoration of biodiversity, nature and landscapes. Article 113 of the Act states that "to stop the loss of biodiversity in overseas France and preserve its role in promoting the adaptation of the territories to climate change, the State shall set the following objectives, with the support of its public institutions under its supervision and in consultation with the relevant local authorities":

1. Develop and implement a program of action at the scale of the territory to protect 55,000 hectares of mangroves by 2020;
2. Develop an action plan contributing to the protection of 75% of coral reefs in the French overseas territories by 2021, within the framework of the French coral reefs initiative and on the basis of an assessment of the state of health of coral reefs and associated ecosystems carried out every five years.

While Article 113, which comes under soft law, has not been made directly applicable in New Caledonia, the State may act with New Caledonia and its provinces - through its research establishments, IFRECOR and the French Agency for Biodiversity (AFB). It can also be assumed that funding requested by the New Caledonian authorities from the State for the protection of mangroves and coral reefs in the archipelago will be granted under Article 113.

## **Regional agreements that can be implemented in New Caledonia**

Environment Program (SPREP) and the Pacific Islands Forum. The agreements and action programs of these regional organizations can be implemented in New Caledonia.

To date, there is no legally binding coral reef legislation at the regional level. In January 2018, on the occasion of the launch of the third IYOR (International Year of the Reefs), from the available solutions, Fiji chose the Ramsar Convention on Wetlands to protect their Great Barrier Reef (Cakaulevu). In this convention, wetlands have a fairly broad definition and can include coral reefs.

Soft law documents have existed for a long time and allow the adoption of action plans for reefs. The first of such documents was the Apia Convention on the Protection of Nature in the South Pacific (1976), which was approved by France in 1988 and has been in force since 1990. It focuses on broad environmental protection with incentives for the creation of conservation areas to protect "representative samples of natural ecosystems".

Following this, in 1986, the Convention for the Protection of Natural Resources and Environment of the South Pacific Region, known as the "SPREP (or Nouméa) Convention", included the South Pacific in the Regional Seas Program of UNEP (United Nations Environment Program), which was itself launched in the early 1970s. Control measures - against pollution sources, in particular - provide actions which support coral reefs, even if they are not mentioned in the Convention.

Interestingly, SPREP declared a double Year of the Reefs (2018-2019) to promote the protection of coral reefs among its member states.

## **The legal texts of New Caledonia**

In the legal order of New Caledonia, there are several texts pertaining indirectly or directly to the coral reefs of the archipelago.

With respect to the general provisions, reference should be made to the amended Organic New Caledonia Act 99-209, which allocates jurisdiction between the State, New Caledonia and its provinces. The protection of biodiversity falls within the normative jurisdiction of each of the three provinces, hence the existence of three environmental codes that apply within their geographical boundaries. The maritime zone outside one of the provinces but within the limits of the Exclusive Economic Zone (EEZ) falls within the jurisdiction of New Caledonia. Coral reefs located in the public maritime domain of a province fall under provincial jurisdiction and those located in the EEZ currently fall under the protection and management rules adopted by New Caledonia. This means that there may be four different protection regimes in existence (even if there are also informal or formal mechanisms and space for consultation and harmonization, such as the Conservatory of Natural Areas). As well as these different regimes of formal law, endogenous law (customary rules) also plays an important role regarding the management of maritime spaces, as part of customary land tenure, which may involve the inclusion of protected areas under endogenous law. Their effective consideration by the entire population requires a formalization that only the Loyalty Islands Province has formally accepted, initially in the form of the "Ouvéa Joint Declaration" co-signed by the customary and provincial authorities in 2007 and later in its Environmental Code in 2016.

At the level of New Caledonia's maritime zones, the protection of reefs may be carried out within the categories of marine protected areas provided for in the 2011 51/CP decision. In accordance with this decision, the decree of April 23rd 2014 was adopted for the creation of the natural marine park known as the Natural Park of the Coral Sea. However, by early February 2018, no practical rules had yet been adopted for the specific protection of coral reefs. As part of its expertise in foreign trade, New Caledonia also acts for the protection of corals and, since 2009, has imposed a ban on coral exports.

Finally, the jurisdiction (shared with the State) over external relations at the scale of the Pacific region provides the possibility of

signing bilateral and multilateral agreements on the protection of coral reefs. The provinces are involved in the legal protection of coral reefs through the various provisions of their respective environmental codes (protected areas, protected species, actions against pollution, etc.).

Among the measures that specifically target corals and fall under binding law, mention should be made of the provisions of Title III of Book 2 of the South Province Environmental Code, which are dedicated to the conservation of "ecosystems of heritage interest", including coral reefs over 100 m<sup>2</sup>.

As we can see, it is either rare or impossible to find binding legal texts imposing enforceable rights and obligations specific to coral reefs. This is particularly worrying when we know that protection, especially through the protected areas mechanism, is not always satisfactory (chap. 43), and neither are the actions taken to combat pollution. The 3<sup>rd</sup> International Year of the Reefs should be used to study the feasibility of an international convention on coral reefs, including necessary regional, national and local variations, with binding provisions to protect them more effectively. The recognition of the legal status of the ocean and elements of marine biodiversity - such as coral reefs, which would thus be granted rights of their own would be a real step forward.

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