Current Legal Developments

Small Island States

Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)

David Freestone | ORCID: 0000-0002-0550-3411
Editor-in-Chief, IJMCL; Member, Committee of Legal Experts (COSIS)
DFreestone@law.gwu.edu

Richard Barnes | ORCID: 0000-0002-2778-5034
Editor, Current Legal Developments, IJMCL
RBarnes@lincoln.ac.uk

Payam Akhavan | ORCID: 0000-0001-6713-3236
Professor of International Law, Senior Fellow, Massey College,
University of Toronto, Toronto, Canada; Chair, Committee of Legal
Experts (COSIS)
payam.akhavan@utoronto.ca

Abstract

This contribution outlines the content of a new agreement, signed initially by Antigua and Barbuda and Tuvalu, that establishes a Commission of Small Island States on Climate Change and International Law. This Commission has, inter alia, the express power to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) on issues within the ITLOS jurisdiction relating to international law and climate change. The complementary initiative by Vanuatu to seek an advisory
opinion from the International Court of Justice through the UN General Assembly is also discussed. The text of the agreement is attached as an appendix at the end of this article.

**Keywords**

small island States – Alliance of Small Island States (AOSIS) – International Tribunal for the Law of the Sea (ITLOS) – climate change – sea level rise – International Court of Justice (ICJ) – UN General Assembly (UNGA) – advisory opinion

On 31 October 2021, the day of the opening of the 26th Session of the Conference of the Parties (COP) to the 1992 UN Framework Convention on Climate Change (UNFCCC), the Prime Ministers of Antigua and Barbuda, the Honourable Gaston Browne, and of Tuvalu, the Honourable Kausea Natano, signed an important and innovative agreement (Climate Commission Agreement). This agreement – the text of which is attached as Appendix 1 below – established a Commission of Small Island States on Climate Change and International Law. The Climate Commission Agreement is now open to accession by any other members of the Alliance of Small Island States (AOSIS), and on 4 November 2021, the Government of Palau became the third member when Palau President, the Honourable Surangel S. Whipps Jr., signed an instrument of accession. Antigua and Barbuda is designated as the Depositary.

The mandate of the Commission, which is to be comprised of the representatives of the States Parties to the Agreement, is set out in Article 1(3); namely,

> to promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to protection and preservation of the marine environment and the responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.

---

2 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (Glasgow, 31 October 2021) [SIS Climate Commission Agreement]. See, Appendix below.
3 Ibid., Article 4(3).
The Commission will have international legal personality.\textsuperscript{4} It will be represented by its Chair or Co-Chairs. Although the Climate Commission Agreement envisages the Chair or Co-Chairs will be elected every two years, in the first instance the two founding States assumed the role of Co-Chairs and in the immediate aftermath of their signing the agreement, the co-Chairs took a number of executive decisions.

The Commission has the normal powers to settle its own rules and procedures, to appoint a Secretariat and to establish committees and subcommittees.\textsuperscript{5} It also has the express power to appoint experts and advisors as necessary in furtherance of its mandate. The Co-chairs appointed the Chair of the Committee of Legal Experts, together with fourteen jurists with expertise in the international law of the environment, law of the sea, and other relevant areas.

The Commission may assume such tasks and responsibilities as the Parties may determine from time to time, including representing the interests of the Parties in international fora.\textsuperscript{6} One of its most significant express powers however is contained in Article 2(2). This expressly authorises the Commission to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

Unlike judgments in contentious proceedings, advisory opinions are not binding. Nonetheless, they are authoritative pronouncements of law that in the past have made significant contributions to the progressive development of international law. They are especially persuasive in respect of obligations \textit{erga omnes} where, because of the interests of the international community as a whole, contentious proceedings may be less feasible. Given that greenhouse gas emissions and climate change implicate the very survival of humankind, it is difficult to imagine any legal question that is better suited to clarification through the advisory opinion jurisdiction of international courts and tribunals. However, establishing jurisdiction to give an advisory opinion is not a straightforward matter.

\vspace{0.5cm}
\textsuperscript{4} \textit{Ibid.}, Article 1(2).
\textsuperscript{5} \textit{Ibid.}, Article 3(4).
\textsuperscript{6} \textit{Ibid.}, Article 2(4).
It will be recalled that Article 191 the United Nations Convention on the Law of the Sea 1982 (LOSC) expressly confers advisory jurisdiction on the Seabed Disputes Chamber of ITLOS at the request of the Assembly or Council of the International Seabed Authority ‘on legal questions arising within the scope of their activities’. Such a successful application was made in 2011 concerning the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area.7 This advisory jurisdiction, relating as it does to the work of the ISA is too limited to engage wider questions of liability for climate change and responsibilities for the protection of the marine environment under the LOSC. However, the Statute establishing ITLOS also defines the jurisdiction of the Tribunal to comprise ‘all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal’.8

This provision is further clarified by the Tribunal’s Rules of Procedure which provide that:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.9

This wide advisory jurisdiction – which unlike the jurisdiction of the Seabed Disputes Tribunal is not based upon an express provision of the LOSC – was questioned by some States, during the proceedings of ITLOS Case 21, the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission

7 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10. See also D Freestone, ‘Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area’ (2011) 105 American Journal of International Law 755–761.
In light of this, it is worth reflecting briefly on this case since some of the questions raised there may need to be addressed in any future request for an advisory opinion.

The SRFC is based in Dakar, Senegal and has seven member States: Cape Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. It was established by a Convention of 29 March 1985 that was amended in 1993 and again in 2012. The supplementary Convention of 8 June 2012 relates to the definition of the minimum conditions of access and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC member States; it entered into force on 16 September 2012. It includes a specific provision in its Article 33 that reads as follows:

**Article 33: Seizure of the International Tribunal for the Law of the Sea for Advisory Opinion**

The Conference of Ministers of the SRFC shall authorize the Permanent Secretary of the SRFC to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion.

In 2013, in a resolution adopted during its fourteenth session (27–28 March 2013), the Conference of Ministers of the SRFC authorised the Permanent Secretary of the SRFC to seek an advisory opinion from the ITLOS on three questions relating to the responsibilities of flag States for vessels engaged in illegal, unreported and unregulated fishing; and a fourth question on the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest.

More than twenty LOSC Member States, a State Party to the 1995 UN Fish Stocks Agreement and a large number of international organisations and others made written interventions in this case. A number of States voiced strong

---

opposition to the Tribunal’s general jurisdiction to give advisory opinions – which is not expressly contemplated by the LOSC – and also to its jurisdiction to address the questions in the instant case. Other States supported the jurisdiction of ITLOS to give an advisory opinion. The case has attracted a degree of comment from scholars. Nevertheless, the Tribunal decided unanimously that it had the jurisdiction to give the advisory opinion requested and decided by 19 votes to 1 to respond to the request for an advisory opinion submitted by the SRFC.

As noted above, Article 138 of the ITLOS Rules of Procedure sets out the preconditions for the exercise of ITLOS’ advisory jurisdiction. There are three elements to this: ‘an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion’; the request must be transmitted to the Tribunal by a body authorised by or in accordance with the agreement mentioned above; and such an opinion may be given on ‘a legal question’. Any future request for advisory jurisdiction will have to fulfil these conditions.

Article 2(2) of the Climate Commission Agreement is therefore taking advantage of the procedure envisaged in Article 138 of the ITLOS Rules that was upheld in Case 21, so as to confer upon the Commission the authority to request advisory opinions on relevant questions within the scope of the LOSC. The Agreement is prima facie related to the purposes of the LOSC in that its mandate includes matters related to the protection of the marine environment. As noted previously, the Commission is expressly mandated to request an advisory opinion.

---

14 States opposing the jurisdiction included Argentina, Australia, China, European Union (addressing only admissibility, without prejudice to jurisdictional issues), Ireland, Spain, Thailand, United Kingdom, and the United States.
15 Chile, Federated States of Micronesia, Germany, Japan, New Zealand, Somalia, and Sri Lanka.
17 Commission of Small Island States Agreement (n 2), Articles 1(3), 2(1).
The third element is the submission of legal question(s). The formulation of such questions will be critical to the success of any potential request for an advisory opinion because the questions will need to be formulated in a way that will allow the Tribunal the opportunity to articulate the relevant climate-related legal rights and obligations under the LOSC, whilst also respecting the limits on its judicial function and that can readily be ascertained under the Tribunals' applicable law.\textsuperscript{18}

The initiative by Antigua and Barbuda and Tuvalu is not the only one that may result in a request for an advisory opinion on the subject of climate change. Under Article 96(a) of the Charter of the United Nations, ‘[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question’.\textsuperscript{19}

Under the UN General Assembly Rules of Procedure, decisions on ‘important questions’, which are enumerated in Article 83, are taken by a two-thirds majority of the members present and voting.\textsuperscript{20} Article 85 provides that all other decisions ‘shall be made by a majority of the members present and voting’.\textsuperscript{21} Making a request to the International Court of Justice (ICJ) for an advisory opinion is not included in the list of ‘important questions’ in Article 83, so it appears to require a simple majority. Nevertheless, there are currently 193 members of the United Nations and securing the agreement of nearly 100 States to the idea of an advisory opinion in principle, as well as to the actual wording of the ‘legal question’ to be posed to the ICJ, is a substantial undertaking.

In 2011, Palau announced its intention to seek an advisory opinion from the ICJ on whether countries have a legal responsibility to ensure that any activities on their territory that emit greenhouse gases do not harm other States.\textsuperscript{22} In 2016, the World Conservation Congress of the International Union for Conservation of Nature (IUCN) passed a plenary resolution calling upon the UN General Assembly to seek an advisory opinion from the ICJ on the legal status and content of sustainable development, including threats from climate change.\textsuperscript{23}

\textsuperscript{18} See LOSC (n 8), Article 293.
\textsuperscript{21} Including interestingly ‘the determination of additional categories of questions to be decided by a two-thirds majority’.
\textsuperscript{23} See ‘WCC-2016-Res-079-EN Request for an Advisory Opinion of the International Court of Justice on the principle of sustainable development in view of the needs of future
Since 2018, the Pacific Island State of Vanuatu has also been exploring the possibility of an ICJ advisory opinion. That initiative appears to be gaining ground. In 2019, the Pacific Islands Forum noted the proposal for a UN General Assembly resolution to request an advisory opinion of the ICJ.\textsuperscript{24} In September 2021, Vanuatu raised the possibility of a question being submitted regarding the duties of States to protect the rights of present and future generations against the adverse effects of climate change.\textsuperscript{25} The same month it was reported that Vanuatu was leading a campaign to secure an advisory opinion from the ICJ.\textsuperscript{26} In October 2021, Blue Ocean Law announced that they would be supporting Vanuatu’s efforts.\textsuperscript{27}

**Conclusion**

Readers of the *Journal* will be well aware that for small island States, rising sea levels, extreme weather events, coral bleaching, and loss of fisheries and marine biodiversity threaten not only their vital interests, but their very existence.\textsuperscript{28} Several such States have to contend with the possibility that their land territory may become fully submerged in the coming years, requiring the re-settlement of their entire population. Both these initiatives demonstrate the increasing

\begin{footnotesize}
\bibitem{24}

\bibitem{25}

\bibitem{26}

\bibitem{27}

\bibitem{28}
\end{footnotesize}
concern felt by the small island States at the ever more serious predictions of the impacts of sea level rise – as well of course as climate change generally – emanating from the Intergovernmental Panel on Climate Change.29

A vivid demonstration of current impacts was provided by the Tuvalu Minister of Foreign Affairs, Simon Kofe, who delivered his address to the Glasgow UNFCCC COP while standing knee deep in water at a place that had until recently been dry land. He commented that ‘[w]e are actually looking at legal avenues where we can retain our ownership of our maritime zones [and] retain our recognition as a state under international law’.30

The two processes for requesting advisory opinions discussed above each represent such ‘legal avenues’ and the legal questions that can be posed of course range over a much wider spread of issues than the important issue of maintenance of maritime entitlements threatened by sea level rise.31 The ICJ is the premier legal institution of the United Nations and has much wider jurisdiction than ITLOS – which was established by the LOSC. However, despite widespread concerns initially voiced about the fragmentation of jurisdiction that the creation of ITLOS would cause, the two tribunals do largely march in lockstep on key legal concepts. So, the two processes should be seen as complementary and not as mutually exclusive. There are a large number of major legal questions still at large relating to the threats posed by climate change and sea level rise that would definitely benefit from greater clarity. Both this new Antigua and Barbuda/Tuvalu initiative and the ongoing campaign by Vanuatu could each help shed light on some of the wider legal ramifications of what has been called ‘the defining challenge of our generation’.32

---


31 On this issue of maintenance of maritime entitlements, see Vidas, Freestone and McAdam (n 28).

Appendix I

Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law

PREAMBLE

The Parties to this Agreement,

Alarmed by the catastrophic effects of climate change which threaten the survival of Small Island States, and in some cases, their very existence,

Recognizing that Climate Change is the Common Concern of Humanity,

Mindful of the fundamental importance of the oceans as sinks and reservoirs of greenhouse gases and the devastating impact for Small Island States of related changes in the marine environment,

Acknowledging the importance of maritime zones and the significant reliance of Small Island States on marine living resources within such zones, as well as the impacts of climate change on the marine environment including marine living resources,

Affirming that maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the 1982 United Nations Convention on the Law of the Sea, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise,

Considering that the emission of greenhouse gases by Small Island States is negligible but that they bear a disproportionate and overwhelming burden of the adverse effects thereof,

Recalling the urgent actions for which the Alliance of Small Island States have called repeatedly to address the urgency and fundamental injustice of this situation,
Determined to take immediate action to protect and preserve the climate system and marine environment based on equity and the common but differentiated responsibilities of States to combat climate change,

Recognizing the imperative necessity of pursuing climate justice in accordance with the principles and progressive development of international law in response to the unprecedented crisis facing humankind,

Having regard to the obligations of States under the 1992 United Nations Framework Convention on Climate Change and related instruments, the 1982 United Nations Convention on the Law of the Sea, and other conventions and principles of international law applicable to the protection and preservation of the climate system and marine environment,

Noting the obligation of States to provide compensation for injuries arising from internationally wrongful acts,

Have agreed as follows:

Article 1

Establishment and Mandate of the Commission

(1) The Commission of Small Island States on Climate Change and International Law (‘the Commission’) is hereby established.
(2) The Commission shall have international legal personality.
(3) The mandate of the Commission shall be to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.


**Article 2**

*Activities and authority of the Commission*

1. The activities of the Commission shall include *inter alia* assisting Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals.

2. Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (‘ITLOS’) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

3. The Commission may appoint experts and advisors as necessary in furtherance of its mandate.

4. The Commission may take on such other tasks and responsibilities as the Parties may determine from time to time, including representing the interests of the Parties in international fora.

**Article 3**

*Membership and Structure of the Commission*

1. All members of the Alliance of Small Island States may become Parties to this Agreement.

2. All Parties to this Agreement shall be Members of the Commission.

3. The Commission shall be represented by a Chair, or by co-Chairs, among the Parties, who shall be elected by majority vote among its Members, beginning with the entry into force of this Agreement and once every two years thereafter.

4. The Commission may adopt its rules and procedures, establish committees and subcommittees, appoint a Secretariat, and make such other decisions that are necessary and appropriate for the discharge of its functions.
(5) Decisions of the Commission shall be made in principle by consensus, or otherwise by a majority of Members present and voting.

(6) Member States of the Commission shall bear the costs of the Commission's activities in an equitable manner.

Article 4

Signature, Entry into Force, depository, accession, reservations

(1) This Agreement shall be open to signature by all States that are members of the Alliance of Small Island States.

(2) The Agreement shall enter into force upon signature by two or more States.

(3) This Agreement shall be deposited with the Government of Antigua and Barbuda which shall be responsible for its registration with the United Nations in accordance with Article 102 of the Charter of the United Nations.

(4) Following entry into force, this Agreement shall be open for accession by other States that are Members of the Alliance of Small Island States. For each State acceding to this Agreement, the Agreement shall enter into force on the day after deposit by such State of its instrument of accession.

(5) Reservations to this Agreement shall not be permitted.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective Governments, have signed this Agreement.

FOR THE GOVERNMENT OF ANTIGUA AND BARBUDA
FOR THE GOVERNMENT OF TUVALU

[Signatures]

DONE in Edinburgh, United Kingdom of Great Britain and Northern Ireland this 31st day of October Two Thousand and Twenty-One.