

Current Legal Developments

Small Island States

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

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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 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.

Key words: Small Island States; AOSIS; ITLOS; climate change; sea level rise; ICJ; UNGA; advisory opinion

On 31st December 2021, the day before the opening of the 26th Session of the Conference of the Parties to the 1992 UN Framework Convention on Climate Change (UNFCCC),¹ the Prime Minister of Antigua and Barbuda – the Hon Gaston Browne - and of Tuvalu – the Hon Kauesa Natano - signed an important and innovative agreement (Climate Commission Agreement). This agreement – the text of which is attached an Appendix 1 below² - established a

¹ 1992 United Nations Framework Convention on Climate Change (UNFCCC) 31 *International Legal Materials* (1992) 851. text at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Funfccc.int%2Fresourcere%2Fdocs%2Fconvkp%2Fconveng.pdf&clen=82836

² Hereinafter SIS Climate Commission Agreement See below pp. 000-000.

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 November 4th, 2021, the Government of Palau became the third member when Palau President, the Hon Surangel S. Whipps Jr., signed an instrument of Accession. Antigua and Barbuda is designated as the Depositary.³

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.

The Commission will have international legal personality.⁴ It will be represented by its Chair or co-Chairs and 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 procedure, to appoint a Secretariat and to establish committees and subcommittees.⁵ It also has the express power to appoint experts and advisors as necessary in furtherance of its mandate. The Co-chairs immediately appointed Professor Payam Akhavan to be the Chair of the Committee of Legal Experts. He was made responsible for proposing appropriate experts to compose this Committee for approval, in the first instance, by the Co-Chairs (as the original signatories).

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.⁶ One of its most significant express powers however is contained in Article 2(2). This expressly authorizes 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 *erga omnes* where, because of the interests of

³ Art. 4(3)

⁴ Art 1(2)

⁵ Art 3(4)

⁶ Art 2(4)

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.

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 is too limited to engage wider questions of liability for climate change and responsibilities for the protection of the marine environment under the law of the sea convention. 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 (SRFC)*.¹⁰ In light of this, it is worth reflecting briefly

⁷ *Responsibilities And Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area*. Case No. 17. Advisory Opinion. International Tribunal for the Law of the Sea, February 1, 2011. At <http://www.itlos.org/>. See also David Freestone, “Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area” Advisory Opinion of the Seabed Disputes Chamber of ITLOS (2011) 105 *American Journal of International Law*, 755-761.

⁸ Art 21 of the Statute of The International Tribunal for The Law of The Sea (Annex VI of LOSC), Art 21. Available at at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf

⁹ Art 138 of the Rules of the Tribunal (ITLOS/8) as adopted on 28 October 1997 and amended on 15 March 2001, 21 September 2001, 17 March 2009, 25 September 2018, 25 September 2020 and 25 March 2021. Available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf

¹⁰ Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal). Case No. 21. Advisory Opinion. International Tribunal for the Law of the Sea, April 2, 2021. At <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/>

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 1985,¹¹ that was amended in 1993 and again in 2012. The supplementary Convention of 8 June 2012¹² 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 authorized the Permanent Secretary of the SRFC to seek an advisory opinion from the International Tribunal for the Law of the Sea on three questions relating to the responsibilities of flag states for vessel engaged in IUU fishing.¹³

More than twenty LOSC Member States, a State Party to the 1995 UN Fish Stocks Agreement and large number of international originations 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.¹⁴ Other States supported the jurisdiction of ITLOS to give and advisory opinion.¹⁵ The case has attracted a degree of

¹¹ Available here: <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC025012>

¹² Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission. Available in French at: https://spsrpf.org/spsrpf/sites/default/files/csrp/documents/csrp2012/csrp-CMA_version_originale_juin_2012_fr.pdf . English version here: <https://jusmundi.com/en/document/pdf/treaty/en-convention-on-the-determination-of-the-minimal-conditions-for-access-and-exploitation-of-marine-resources-within-the-maritime-areas-under-jurisdiction-of-the-member-states-of-the-sub-regional-fisheries-commission-crfc-convention-on-the-determination-of-the-minimal-conditions-for-access-and-exploitation-of-marine-resources-within-the-maritime-areas-under-jurisdiction-of-the-member-states-of-the-sub-regional-fisheries-commission-crfc-friday-8th-june-2012>

¹³ On the substantive issues see D Freestone, "International Tribunal for the Law of the Sea Case 21. Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)," (2016) 1 *Asia-Pacific Journal of Ocean Law and Policy* 126-133.

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

comment from scholars.¹⁶ 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 authorized 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 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 the protection of the marine environment.¹⁷ As noted previously, the Commission is expressly mandated to request an advisory opinion. 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.¹⁸

The initiative by Antigua and Barbuda and 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:

The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.¹⁹

Under the UN General Assembly Rules of Procedure, decisions on "important questions" - that are enumerated in Article 83 - are taken by a two-thirds majority of the members

¹⁶ See D Freestone, n. 13 above; M Becker, 'Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission' (2015) 109 *American Journal of International Law* 851; Y Tanaka, 'Reflection on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015' (2015) 14 *The Law and Practice of International Tribunals* 318; M Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission' (2016) 29 *Leiden Journal of International Law* 441; T Ruys and A Soete, "'Creeping" Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea' (2016) 29 *Leiden Journal of International Law* 155.

¹⁷ Agreement (Appendix) (000-000), Arts 1(3) and 2(1).

¹⁸ See Art 293 LOSC.

¹⁹ Available at <https://www.un.org/en/about-us/un-charter/chapter-14>

present and voting.²⁰ Article 85 provides that all others decisions “shall be made by a majority of the members present and voting.”²¹ Making a request to the 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 UN 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.²² In 2016, the World Conservation Congress of the International Union for the 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.²³

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 General Assembly Resolution to request an advisory opinion of the ICJ.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.²⁵ The same month it was reported that Vanuatu was leading a campaign to secure an advisory opinion from the ICJ.²⁶ In October 2021, Blue Ocean Law announced that they would be supporting Vanuatu’s efforts.²⁷

Conclusions

Readers of this Journal will be well aware that for small island States, rising sea levels, extreme weather events, coral bleaching, loss of fisheries and marine biodiversity, threaten not only their vital interests, but their very existence.²⁸ Several such States have to contend

²⁰ Available at <https://www.un.org/en/ga/about/ropga/plenary.shtml>

²¹ Including interestingly “the determination of additional categories of questions to be decided by a two-thirds majority”.

²² <https://news.un.org/en/story/2011/09/388202>

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 generations. Available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_079_EN.pdf

²⁴ <https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>
At para 16.

²⁵ See speech by Bob Loughman, Prime Minister of Vanuatu in United Nations General Debate, 76th Session on 25 September: <https://www.youtube.com/watch?v=izucIT9V3NQ>. Also, https://www.dailypost.vu/news/vanuatu-hosts-high-profile-event-on-legal-action-for-climate/article_4f58e312-e7f3-11e9-b713-2b437f0c7f2f.html

²⁶ <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>

²⁷ <https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>

²⁸ See D Freestone and D Çiçek, *Legal Dimensions of Sea Level Rise: Pacific Perspectives* (The World Bank and Global Facility for Disaster Reduction and Recovery (GFDRR), 2021); Also, D Vidas, D Freestone and J McAdam,

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 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 “We 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 UN and has much wider jurisdiction than ITLOS – which was established by the 1982 UN Convention on the Law of the Sea (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 lock step on key legal concepts. So, the two process 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

International Law and Sea Level Rise (Brill Nijhoff, 2019). (The 2018 Report of the ILA Committee on International Law and Sea Level Rise).

²⁹ See IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* [IPCC Special Report], approved at its 51st Session, 20–23 September 2019. And more recently IPCC, *Climate Change 2021: The Physical Science Basis*, Working Group I contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 7 August 2021, (Cambridge, Cambridge University Press, 2021) available at <https://www.ipcc.ch/report/ar6/wg1/>.

³⁰ “Tuvalu seeks to retain statehood if it sinks completely as sea levels rise”, *The Guardian*, 11 November 2021.

³¹ On this issue of maintenance of maritime entitlements, see D Vidas, D Freestone and J McAdam, *International Law and Sea Level Rise*. Brill Nijhoff, 2019. (The 2018 Report of the ILA Committee on International Law and Sea Level Rise).

³² New Zealand Ambassador Craig Hawke at the 75th UNGA General y Debate (29 September 2020), <https://news.un.org/en/story/2020/09/1074252>