

Climate Change, Small Island States, and the Law of the Sea: The ITLOS Advisory Opinion Request

Introduction

Climate change and its impact on small island states has gained increasing prominence in multiple international fora in recent years. This has been especially evident in the political and diplomatic agenda that Pacific and Caribbean small island states have pursued in recent years. In August 2021, the 18 member Pacific Islands Forum¹ adopted the “Declaration on Preserving Maritime Zones in the face of Climate Change-Related Sea-Level Rise,”² which declared the stability of baselines and maritime zones under the 1982 United Nations Convention on the Law of the Sea.³ This was followed by the September 2021 Leaders’ Declaration of the Alliance of Small Island States (AOSIS)⁴ which echoed the Pacific Islands Forum Declaration. These initiatives have significant implications for how island states in particular view the impact of sea level rise and UNCLOS.⁵

In December 2022, an even more significant legal development took place when a separate and new international organisation of small island states—the Commission of Small Island States (COSIS)—made a formal request for an Advisory Opinion to the International Tribunal for the Law of the Sea (ITLOS). This request is unprecedented for the law of the sea, and is the first such advisory opinion sought on specific issues associated with sea level rise, and climate change more generally. This development also comes at a time when a number of requests for climate change focused advisory opinions have been sought from international courts and tribunals, including a request from the UN General Assembly (led by Vanuatu and other small island states) for an International

Court of Justice (ICJ) advisory opinion on April 12, 2023.⁶ This *Insight* focuses on the ITLOS Advisory Opinion request and briefly reviews the history of UNCLOS advisory opinions before considering COSIS and the request for an ITLOS Advisory Opinion, including jurisdiction and admissibility issues that the request raises.

UNCLOS Advisory Opinions

The UNCLOS is well known for its detailed and sophisticated Part XV mechanisms dealing with the settlement of disputes. It is less well known for the capacity of ITLOS to exercise an advisory jurisdiction. This is unsurprising as only the ITLOS Sea-Bed Disputes Chamber was originally conferred jurisdiction under UNCLOS Article 191 to give advisory opinions. That advisory jurisdiction is specifically limited to “legal questions” within the scope of the Assembly or Council of the International Sea-Bed Authority under UNCLOS Part XI. To date, only one 2011 advisory opinion has been delivered under this mechanism.⁷

A second 2015 Advisory Opinion was delivered following a request from the Sub-Regional Fisheries Commission (SRFC), which concerned flag state obligations with respect to illegal, unreported, and unregulated fishing activities, and coastal state obligations concerning certain fish stocks.⁸ That request did not arise via UNCLOS Article 191, but rather through reliance on Article 138 of the ITLOS Rules. The Tribunal’s rules, first issued in 1997 and subsequently amended, provide for an advisory opinion to be given “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.”⁹ A contested jurisdictional issue that arose in the *SRFC Advisory Opinion* was whether the Commission could properly make an advisory opinion request. ITLOS determined that it could do so based on the competence of the SRFC and the procedures followed within the Commission for requesting the advisory opinion. The *SRFC Advisory Opinion* therefore created an important jurisdictional precedent for ITLOS and its capacity to deliver Advisory Opinions, which COSIS has sought to rely upon.

To date, ITLOS has had limited opportunities to consider UNCLOS environmental obligations. No contentious ITLOS case or Advisory Opinion has considered UNCLOS obligations with respect to climate change, nor specific issues arising from ocean warming, ocean acidification, and sea level rise. Arguably the most significant decision of an UNCLOS court or tribunal interpreting environmental obligations to date, was the 2016 *South China Sea* award by an Annex VII Arbitral Tribunal in an arbitration between the Philippines and China,¹⁰ however that case did not address any UNCLOS environmental obligations relating to climate change.

Commission of Small Island States

The 2021 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS Agreement)¹¹ was concluded during the Edinburgh COP26 UN Climate Change Conference. There were two original parties to the Agreement: Antigua and Barbuda, and Tuvalu. The COSIS Agreement is distinctive in a number of respects due to its focus on the interests of small island states, and climate change and international law. Membership of the Commission is limited to the members of AOSIS.¹² Importantly, the activities and authority of the Commission extend to assisting small island states in the definition, implementation, and progressive development of international law rules concerning climate change.¹³ In this regard, the Agreement empowers the Commission to request ITLOS advisory opinions “on any legal question within the scope” of UNCLOS.¹⁴ Following a COSIS meeting in August 2022, a request¹⁵ was formally made on December 12, 2022. At the time of the requesting of the Advisory Opinion, COSIS had grown to six members: Antigua and Barbuda, Niue, Palau, St Lucia, Tuvalu, and Vanuatu.

The COSIS Advisory Opinion request is framed upon the specific obligations states have under UNCLOS, in particular those relating to Part XII of the Convention, which addresses the protection and preservation of the marine environment. Two questions are posed with respect to obligations:

- a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere; and,
- b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

ITLOS has set June 16, 2023, as the time limit within which written submissions are to be made.¹⁶ Oral proceedings will follow and are most likely to be scheduled for late 2023.

Jurisdiction and Admissibility

Two important procedural issues are raised by the COSIS Advisory Opinion. The first is jurisdictional. The COSIS Agreement uniquely refers to the Commission having authorization to make ITLOS advisory opinion requests “consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.”¹⁷ The ITLOS Statute is found in UNCLOS, Annex VI where Article 21 confers jurisdiction with respect to disputes and applications submitted in accordance with the Convention, and “all matters specifically provided for in

any other agreement which confers jurisdiction on the Tribunal.” The clear and unambiguous wording of the COSIS Agreement, Article 2, confirms the Commission has authorization to request an Advisory Opinion consistent with these provisions.

In view of the terms of UNCLOS, the ITLOS Rules, the COSIS Agreement, and the precedent set by ITLOS in the *SRFC Advisory Opinion*, there would appear to be a firm basis for jurisdiction. Admissibility would likewise appear to be clearly addressed as the two questions posed directly relate to the interpretation of UNCLOS, including Part XII. In this respect, the COSIS Advisory Opinion request is more narrowly framed than that considered in the *SRFC Advisory Opinion*, which while founded upon UNCLOS obligations also extended to those found in related international fisheries agreements.

Legal Questions posed by the Advisory Opinion Request

As to the substance of the two Advisory Opinion questions that have been posed, there is the prospect that multiple issues will be raised by state parties and intergovernmental organizations in their written and oral submissions. The first is the request of the Tribunal to consider “obligations of State Parties” to UNCLOS. No reference is made to the responsibility of state parties in the COSIS request. By doing so, ITLOS is not being asked to address the potential responsibility of states under the Convention for any previous international wrongs. Instead, the focus is only on existing UNCLOS obligations.

The second likely issue arises from the focus on the marine environment and UNCLOS, and particularly Part XII of the Convention. While UNCLOS has scattered references to the capacity of coastal states to preserve the marine environment within maritime zones such as the territorial sea and exclusive economic zone,¹⁸ the most detailed marine environmental protection and preservation provisions are found in Part XII “Protection and Preservation of the Marine Environment.” Importantly, those obligations are framed in multiple dimensions and range from individual states, to regional, and global settings.¹⁹ Of relevance for pollution arising from climate change, is the Article 1 definition of “pollution of the marine environment” which includes the introduction of substances, directly or indirectly, that have harmful effects to marine life and are hazards to human health. Part XII particularly references pollution from land-based sources in Articles 194, 207, and 213. All provide a basis for an UNCLOS framed argument that states are to take measures to prevent, reduce and control climate change inducing land-based activities that pollute or impact the marine environment.

A third issue is that the questions specifically focus on the control of pollution of the marine environment resulting from climate change, and protection and preservation of the marine

environment in relation to climate change impacts. Those impacts are not narrowly framed, and extend to ocean warming, sea level rise, and ocean acidification. These were not matters under active consideration when UNCLOS was negotiated. This dimension reinforces the importance of the Advisory Opinion request seeking clarification as to the current obligations of states, rather than seeking to make states responsible for past conduct.

Conclusion

The COSIS Advisory Opinion request has the potential to have a profound impact upon how UNCLOS environmental obligations, and specifically those as they may relate to the impacts of climate change, are interpreted in the future. One potential looming issue for ITLOS is that the parallel ICJ Advisory Opinion on climate change may also address the law of the sea. It remains to be seen how ITLOS may exercise its judicial function if a view is formed that the ICJ is considering similar legal questions.

The actions of COSIS have also highlighted the way in which small states may seek to utilise the advisory jurisdiction of ITLOS. The parallel ICJ Advisory Opinion on climate change, which also arose from the international advocacy of island states in the UN, is another example of how the advisory jurisdiction of international courts and tribunals is being utilized to seek to bring clarity to a range of international climate law issues. Small island states directly impacted by climate change are proactively utilizing diplomatic and legal forums to have their voices heard on issues which directly impact their existence. While Advisory Opinions can sometimes be seen as symbolic, the COSIS initiative will at a minimum gain considerable global attention on the legal issues arising from climate change and especially the impact arising from sea level rise for small island states. The resulting ITLOS Advisory Opinion will be at the forefront of these processes and inevitably have a lasting legacy for the law of the sea.

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¹ Founded in 1971, the members are: Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

² 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' Pacific Islands Forum (Aug. 6, 2021), <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>.

³ Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁴ Association of Small Island States (Sept. 22, 2021), <https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/>. AOSIS members are 39 small island and low-lying coastal developing states geographically located in three regions: the Caribbean, Pacific, and Africa, Indian Ocean, and South China Sea; see Alliance of Small Island States, <https://www.aosis.org/>.

⁵ Donald R. Rothwell, *Line in the sand: How sea-level rise is challenging international law*, The Interpreter (Lowy Institute) (Oct. 12, 2021), <https://www.lowyinstitute.org/the-interpreter/line-sand-how-sea-level-rise-challenging-international-law>.

⁶ See *Obligations of States in respect of climate change* (Request for an Advisory Opinion) (Apr. 12, 2023), <https://www.icj-cij.org/case/187>.

⁷ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Case No. 17 (Feb. 1, 2011) 2011 ITLOS Rep. p. 10.

⁸ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Case No. 21 (Apr. 2, 2015) 2015 ITLOS Rep. p. 4

⁹ ITLOS, Rules of the Tribunal, art. 138 (1), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.

¹⁰ *The South China Sea Arbitration* (Philippines v. China), PCA Case 2013-19, Award (July 12, 2016).

¹¹ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, U.N. Reg. 56940 (Oct. 31, 2021).

¹² COSIS Agreement, art. 3 (1).

¹³ *Id.*, art. 2(1).

¹⁴ *Id.*, art. 2(2).

¹⁵ ITLOS, Case No. 31, <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> Decisions of the Third Meeting of the Commission of Small Island States on Climate Change and International Law (Aug. 26, 2022).

¹⁶ *Id.*, Order of 15 February 2023.

¹⁷ COSIS Agreement, art 2(2).

¹⁸ UNCLOS, arts. 21, 56.

¹⁹ See, e.g., UNCLOS, arts. 192, 197.