INTRODUCTORY NOTE TO THE AGREEMENT FOR THE ESTABLISHMENT OF
THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW
BY MALGORZATA MATERNA*
[October 31, 2021]

Introduction

On October 31, 2021, the leaders of the Government of Antigua and Barbuda and the Government of Tuvalu signed the “Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law” (the Agreement). As noted in the title itself, the Agreement creates a Commission of “small island states” tasked with promoting international law principles that hold states responsible for failing to protect the marine environment by contributing to climate change. Among the responsibilities outlined in the Agreement, the Commission would have the power to seek advisory opinions from the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal) as part of its efforts to pursue its mandate.

Background

The Preamble to the Agreement reflects the growing concern about the threat of climate change to the livelihood—and perhaps even the very existence—of small island states. As noted therein, small island states are likely to be disproportionately affected by a warming climate, particularly any resulting increases in extreme weather events or rising sea levels. Island states have expressed particular concerns about the potential for rising sea levels to erode their coastlines, which can have significant implications for the safety, security, and general welfare of the populations of these islands.

As referenced by and alluded to in the Preamble, concerns about rising sea levels have prompted a number of island states to seek recognition of their maritime zones based on the baselines as they had submitted them pursuant to the 1982 Convention on the Law of the Sea (UNCLOS). In doing so, island states may be seeking to protect their existing maritime zones in the event their low-water lines may have shifted landward as a result of recent changes in sea levels. While various efforts have been made at the international level in this regard, no international court or tribunal has thus far issued any judgment or opinion addressing how shifting sea levels may impact existing internationally recognized baselines.

The Preamble also affirms the disproportionate burden borne by small island states from the emission of greenhouse gases, and further asserts that states have an obligation to “provide compensation for injuries arising from internationally wrongful acts.” Many island states are members of the Alliance of Small Island States (AOSIS), currently chaired by Antigua and Barbuda, which has advocated for compensation from large fossil fuel emitters for losses and damage incurred by extreme weather events attributed to climate change. As with the issue of baselines, the matter has not specifically been addressed in international jurisprudence.

Responsibilities of the Commission

The Agreement establishes the “Commission of Small Island States on Climate Change and International Law,” which has as its mandate the promotion of “rules and principles of international law concerning climate change.” These rules and principles include state responsibility for “internationally wrongful acts” that arise from breaching their obligations to protect and preserve the marine environment. The Commission’s responsibilities further include directly assisting small island states with these efforts, including through the jurisprudence of international courts and tribunals. To aid in the fulfillment of its responsibilities, the Agreement grants the Commission international legal personality, which could allow it to benefit from certain rights and obligations under international law. International legal personality generally confers the ability to enter into treaties or to bring a matter before an international tribunal.

*Malgorzata (Margaret) Materna is the Deputy Director of the National Security Law Division in the Office of the Judge Advocate General, Department of the Navy United States, as well as the Co-Chair of the American Society of International Law’s Law of the Sea Interest Group. Any views expressed or implied in this article are her own, and do not necessarily represent the views of the Department of the Navy, Department of Defense, or the U.S. Government.
The establishment of the Commission appears to reflect an effort by some small island states to seek legal avenues for holding larger states accountable for their fossil fuel emissions. As stated during the announcement of the establishment of the Commission at the 2021 UN Climate Change Conference in Glasgow (COP26), the founding members feel that loss and damage to their states resulting from extreme weather events that may have been triggered by the overuse of fossil fuels has not been addressed seriously at United Nations Climate Conferences. The founders’ goal, as indicated during the public announcement about the establishment of the Commission, is to shift the status quo “from one of vague voluntary commitments to legally binding obligations and compensation.” They specifically plan to do so through various legal options that may be available to them under UNCLOS, including seeking advisory opinions from ITLOS.2

Requests for Advisory Opinions

Perhaps the most remarkable provision in the Agreement is its authorization for the Commission to request advisory opinions from ITLOS to address “any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea.”3 The Rules of the Tribunal outline the specific procedures for requesting and rendering advisory opinions.

Advisory opinions are generally not binding, but they may be relied on to inform the development of international law. Advisory opinions from the International Court of Justice (ICJ), in particular, can “carry great legal weight and moral authority,” and are “often an instrument of preventive diplomacy.”4 The Special Chamber of ITLOS has granted significant weight to an ICJ advisory opinion as recently as January 2021 in a maritime boundary dispute case between Mauritius and the Maldives. In its ruling on a jurisdictional issue, the Special Chamber stated that determinations made by the ICJ in a prior advisory opinion have “legal effect” in that matter. Such a finding may effectively enshrine the ICJ’s advisory determinations into judicial precedent.5

Advisory opinions from ITLOS itself, however, have been rare—only two requests for advisory opinions are counted among the Tribunal’s list of cases,6 and only one other international agreement is known to have specifically authorized an entity to bring legal matters before ITLOS for an advisory opinion.7 In the matter of the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), the Tribunal rendered its first ever advisory opinion, which included a determination as to whether it does, in fact, have the capacity to render advisory opinions. Several states challenged the Tribunal’s competence to provide an advisory opinion in the SRFC matter, since neither the ITLOS Statute nor UNCLOS, which established it, make any specific indication that ITLOS holds advisory jurisdiction.8 However, the Tribunal unanimously determined that it did have jurisdiction to render advisory opinions, based on Article 21 of the ITLOS Statute granting it competency over “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”9 Since Article 21 separately mentions “disputes” as eligible for submission to the Tribunal, the Tribunal’s view was that the use of the term “matters” must mean something more—including advisory opinions.10

Having established its competency to render advisory opinions, the Tribunal appears poised to take future opportunities to assert this advisory jurisdiction. The establishment of the Commission, with its specific reference to requesting advisory opinions from the Tribunal in the Agreement, provides one example of how states may seek to derive an ostensible benefit from the Tribunal’s determination in the SRFC matter. Whether the Tribunal receives an increased volume of requests for advisory opinions, including from the Commission of Small Island States, remains to be seen. However, by specifically enshrining the Commission’s ability to seek advisory opinions from the Tribunal, the founders astutely noted an opportunity to address their concerns via international jurisprudence that was perhaps not quite so clearly available prior to the Tribunal’s advisory opinion in the SRFC matter. It is, therefore, not inconceivable that the Commission may seek advisory opinions on the very matters of utmost concern to small island states, as laid out in the Preamble—including the protection of their baselines or legal matters related to potential compensation from large fossil fuel emitters for internationally wrongful acts.

Conclusion

The Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law represents an effort by some small island states to utilize legal options to advance their interests, where
international negotiations have, in their view, failed to make sufficient progress on such issues as combatting greenhouse gas emissions leading to extreme weather events impacting their livelihoods. The Agreement also appears to be the first of its kind to bestow upon the Commission the responsibility to seek advisory opinions from international courts such as the International Tribunal for the Law of the Sea to notionally advance the objectives of states parties. Given the Tribunal’s apparent openness to provide advisory opinions, the Agreement may indicate more efforts in the future to seek some resolution through international jurisprudence when international discussions have disappointed affected States.

ENDNOTES


10 Id.
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 sub committees, 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

[Signature]
Hon. Gaston Alfonso Browne
Prime Minister

FOR THE GOVERNMENT OF TUVALU

[Signature]
Hon. Kausea Natano
Prime Minister

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