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Small States and Climate Change

Petra Butler (Institute of Small and Micro States) · Tuesday, March 12th, 2024 · Institute for Transnational Arbitration (ITA)

In light of COP 28 UN Climate Change Conference in Dubai last year, the Prime Minister of Samoa and Chair of the Alliance of Small Island States (AOSIS), Honourable Fiam? Naomi Mata?afa, observed: “[Our islands are being pushed to the brink by the climate crisis and we need a strong plan of action for survival, right now.](#)”

This post discusses climate change redress from the perspective of small island states. It firstly sets out the role of climate change dispute resolution regarding the redress of climate change related challenges. It then asks the question how climate justice can be best achieved for small island states, ie whether claiming redress is the most effective remedy for small island states before offering some concluding remarks.

The Role of Climate Change-Related Disputes

One question that arises is what role climate change-related disputes can play in that action plan for small islands states? The general importance of climate change-related disputes can be measured on the steady increase of cases which are being brought by environmental advocacy organisations or governments in anticipation of the massive costs related to adapting to or mitigating climate change. They are suing to try to recover money to support those needs (see [Global Climate Change Litigation database](#)). One of the most famous and important cases before the courts at the moment is [Luciano Lliuya v RWE AG](#) (Case No. 2 O 285/15 Essen High Court). Luciano Lliuya is a Peruvian farmer who is suing RWE, Germany’s largest electricity producer, in tort arguing that RWE’s contributions to climate change mean that the company is proportionately responsible for the cost of mitigating this threat—being draining the lake or reinforcing levees. RWE’s calculated share of historical global greenhouse gas emissions is estimated by the plaintiff’s experts to be around 0.47%. One of the open questions is whether the Essen High Court should find that RWE is responsible for the loss of Mr Lliuya’s livelihood in the Peruvian alps and whether this will open the floodgates for other claimants, including small states, to recuperate some of their climate change adaptation and mitigation costs.

Despite the rise in climate change dispute resolution, seeking legal redress for climate change has been a challenge often due to inequalities of arms of the parties. Small (island) states are not immune from that challenge.

Achieving Climate Justice for Small Island States

How best to access climate justice from a small states' perspective was discussed by the panel on climate change and access to justice at the *Small States and Access to Justice* conference held in London in November last year co-organised by the [Institute of Small and Micro States, WilmerHale](#) (London), and the [British Institute of International and Comparative Law](#). The panel was chaired by [Ingrid Gubbay](#) (Hausfeld). [Monica Feria-Tinta](#) (Twenty Essex), explored climate litigation as a 'Small States' statecraft'. She examined in what manner small states have been (i) accessing courts to get them to address climate change in international law; (ii) shaping the legal landscape and the law in so doing; and (iii) considering international law's capacity to provide actual legal remedies.

[Aisha Abdallah](#) (Anjarwalla & Khanna LLP), focusing on African small states, pointed out that there are no principles governing liability for transboundary emissions and most importantly that without debt justice, climate justice cannot be achieved. Climate justice demands debt cancellation, reparations, and non-debt climate finance.

His Excellency Mr [Jitoko Tikolevu](#), [High Commissioner of Fiji](#), discussed the importance of small states' alliances to seek climate justice. Bethany Mataiti and Mary Moeono-Kolio from the youth organisation [Pacific Climate Warriors](#) based in Wellington, New Zealand, illustrated to the audience the impact of climate change on the local communities in the Pacific Islands – one of which, for example, is that houses and graves had to be moved – and advocated for the signing of the [Fossil Fuel Non-Proliferation Treaty](#).

The panel amplified the facets of the climate crisis and the complexity of finding adequate responses to combat the crisis. It will need a multi-faceted approach involving global cooperation, innovative technologies, adaptable dispute resolution mechanisms, and sustainable policies.

Concluding Remarks

Small island states were instrumental in the drafting of Article 8 of the 2015 [Paris Agreement](#) which recognises the importance of “averting, minimizing and addressing loss and damage associated with the adverse effects of climate change.” Article 8 stops short of providing a basis for any liability or compensation. One of the breakthrough decisions of COP 28 was the approval of setting up a fund specifically to address loss and damage after a year of negotiations and compromise regarding the fund's structure, mechanisms, and governance (the idea of a loss and damage fund had been re-floated at [COP 27](#) in Sharm El Sheikh based on a 1991 proposal at the United Nations Framework Convention on Climate Change in Geneva, Switzerland). However, even the welcomed progress in the establishment of a loss and damage fund will and can only be one dish in a smorgasbord of available mechanisms to achieve climate justice for small island states. Accessing funding will depend on meeting funding criteria and not every event, loss or damage caused by climate change will meet the criteria. Ironically, existing funding for climate change adaptation and mitigation often cannot be accessed currently by small island states. As discussed at the [2022 Trade, Investment and Small States'](#) conference, the money needed for the project, often does not meet the minimum spending criterion of the funder. For example, a sea wall needed to mitigate the impact of rising sea levels in small island community might “only” cost

US\$120,00 but to be eligible under the funding regime of the most appropriate fund projects must have a volume of at least US\$1million. The less surprising obstacle for small island states to access funding is often the lack of capacity to develop a funding proposal and to oversee the funding.

Given that even the proposed loss and damage fund will not be the panacea for small island states in combating the effects of climate change, small islands states need to be aware of the importance and the advantages of available dispute resolution mechanisms for combating climate change effects. Currently two initiatives of small island states exemplify how small island states can use international courts and tribunals for their cause and how capacity can be generated by working together. The importance of the latter was emphasised by His Excellency Mr Jitoko Tikolevu, High Commissioner of Fiji during the panel discussion.

In December 2022, the Commission of Small Island States (COSIS), a newly formed international organisation of small island states initiated by Tuvalu and Antigua and Barbuda, 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. The COSIS's Advisory Opinion request is framed upon the specific obligations states have under the UN Convention on the Law of the Sea (UNCLOS), in particular those relating to Part XII of UNCLOS, which addresses the protection and preservation of the marine environment. Two questions are posed with respect to the obligations:

1. 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,
2. to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

Last year, the UN General Assembly (led by small island states), in accordance with Article 95 of the UN Charter, requested the International Court of Justice (ICJ) to issue an advisory opinion on the obligations of states with respect to climate change. As part of the opinion the ICJ is asked to opine on the legal consequences for states where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to in particular, small island developing states.

If states which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, are found to be under an obligation to provide redress to affected small island states, the panel discussion at the *Small States and Access to Justice* conference exemplified that this can and would be only the first step to ensure that small island states achieve a level of climate change adaptation and mitigation that will guarantee their continued existence (to watch the panel, see [here](#) (to see the full [agenda](#) and to watch the [full conference](#))).

Past conferences in this series include [Regional Integration and Dispute Resolution](#) (2016), [International Financial Services and Small States](#) (2017), [Environmental Dispute Resolution and Small States](#) (2018); [Small States, International Law and the Realisation of Rights](#) (2019), [Human Rights and Small States: Challenges, Resilience and Advocacy](#) (2020),

Culture, Art, Cultural Identity and Small States (2021), and Trade, Investment and Small States (2022).


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This entry was posted on Tuesday, March 12th, 2024 at 8:21 am and is filed under [Climate change](#), [Dispute Resolution](#), [Small States](#)

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