Environmental Dispute Resolution and Small States Conference

> We all know the problem, we all know the causes, we all know the solutions. All that is left would be some political courage, some political guts to get out and tell the people of your country, 'Do this, this, this, or there is certainty of disaster.'[1]

The quote of the Samoan Prime Minister, the Hon Tuilaepa Sailele, to a Sydney audience at the end of August, captured the theme of the Environmental Dispute Resolution and Small States Conference, which was held on 6 and 7 September 2018, at Wilmer Cutler Pickering Hale and Dorr LLP in London. Even though the conference focused on the different avenues to resolve (international) environmental disputes especially in and with small states, environmental science and environmental politics provided the background to that discussion.

Sir David Baragwanath (former President of the New Zealand Law Commission, appellate court judge, and former President of the Special Tribunal for Lebanon), chairing the keynote panel, set out the broad themes of the conference: what are the disputes requiring resolution?; by what means can they be resolved?; and what role do small states play in considering either of those questions? Responding to Sir David, **Eden Charles** (former Ambassador at Trinidad and Tobago to the United Nations) discussed the tension between the principle of freedom of the high seas and the principle of common heritage of mankind. He warned that there was a lack of equitable sharing of marine resources. Small states, therefore, in his view had to ensure that the proposed United Nations Convention on the Law of the Sea on the Conservation and Sustainable use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ) would go a step further than UNCLOS. **Teleiai Dr Lalotoa Mulitalo** (Executive Director of the Samoan Law Reform Commission) responded by stressing that laws should be made for the benefit of the people the laws are intended to regulate. It was, therefore, a matter of national (and international) interest "how laws can take advantage of a combination of cultural practices and international best practice." **Elizabeth Mrema** (Director of the Law Division, UN Environment Programme) highlighted that experience had shown that issues affecting small states affect everyone. Given the effect of climate change and environmental degradation on small states it was not surprising that small states played an important role in global environmental governance. Environmental disputes are largely products of the economic, political, and social perceptions and usages of the environment. These perceptions and usages can fuel and cause different types of environmental disputes, such as biodiversity disputes, disputes related to pollution, or climate change disputes. Those trends in environmental dispute resolution are providing dispute resolution challenges and opportunities for small states. Especially the "ever-cumulating" effects of harmful human activities, the threats of climate change, the declining health of their coastlines, loss of livelihoods and threats of territorial integrity can make it difficult for small states to mitigate environmental disputes through direct and systematic interaction among disputants. So far two main ways of dispute settlement could be identified: either non-coercive diplomatic or political means or litigation, ie coercive, punitive means.

Lord Carnwath (Justice of the UK Supreme Court) in his keynote speech questioned whether environmental dispute resolution was actually going to be evidence-based given the scientific uncertainty in relation to many environmental issues. His keynote explored whether the

[1] Prime Minister of Samoa the Hon Tuilaepa Sailele cited in Kate Lyons "World leaders who deny climate change should go to mental hospital – Samoan PM" Guardian (31 August 2018)

precautionary principle was a suitable response to the problem of uncertainty. A survey of the case law of various international courts and tribunals reveal that the precautionary principle in international law remains contested and unclear. Investor-state arbitral tribunals might in practice more often be confronted with questions of the value of scientific evidence and therefore could be in a better position to develop standards regarding scientific proof in the international sphere.

The uncertainty of science in light of climate change was discussed by **Penehuro Lefale** (IPPC Nobel Peace Prize Contributor 2007). Even though he admitted that the science of climate change held some uncertainties, in his view any policy making should be based on the available science taking into account natural variability and human-induced causes. He advocated that the international community's response to climate change must: 1. Be guided by science; 2. Involve legally binding global GHG emissions reduction targets; 3. Recognise the common but differentiated responsibilities of nations based on their historic emissions; 4. Incorporate the right to develop; 5. Apply the precautionary and polluter-pays principles; 6. Fast-track the development and transfer of climate friendly energy efficiency and renewable energy technologies. **Dr Johanne Fischer** (expert in international fisheries management and former Executive Secretary, South Pacific Regional Fisheries Management Organisation) familiarised the audience with oceans in general and ocean uses in particular. She illustrated how current ocean governance systems address some of the most pertinent threats to oceans. In contrast to Eden Charles she advocated for a regional approach and for using existing governance systems to regulate the high seas to be able to respond to threats in a more targeted way. How blockchain technology can boost climate action was the topic of **José Rafael Mata Dona** (independent arbitrator). He discussed how blockchain technology can be used to establish a decentralised database and earth observation system to enable the possibility of more reliable Intended Nationally Determined Contributions reports.

Which procedures and which laws are available to protect the environment and to redress the impact of climate change was addressed by Stuart Bruce (senior associate, Wilmer Hale), Monica Feria-Tinta (barrister, 20 Essex Street), Dr Orsolya Toth (assistant professor, University of Nottingham), and Dr Alejandra Torres Camprubi (associate, Foley Hoag). Placing some trust but also obligations on corporations to behave in a sustainable manner and to safeguard the environment is one piece of the mosaic actions required. **Stuart Bruce** gave an overview of the different initiatives, such as the UN Global Compact, Project Financing standards, UN Principles of Responsible Investment, UN Principles on Sustainable Insurance, or the OECD Guidelines for Multinational Enterprises, aimed at making corporations good global environmental citizens. **Monica Feria-Tinta** discussed the two core foundational principles of environmental law: the polluter pays and states have a duty to prevent transboundary harm.[2] In the context of climate change the fundamental question today is whether the world's largest emitters of greenhouse gases can be held to account in international fora for the environmental damage these emissions are causing. One of the most interesting developments to date is *Saul Luciano Lliuya v RWE* currently before the Court of Appeal of Hamm in Germany.[3] The Court held that[4]

> …the fact that multiple parties have caused the interference ('disturbers') does not necessarily mean that eliminating that interference would be impossible. On the contrary, the established interpretation is that, in the case of multiple 'disturbers', each participant must eliminate its own contribution,…

Liability for environmental damage and/or climate change based on contributory causation opens exciting possibilities in holding emitters to account. In addition, being the victim of climate change or environmental degradation, small states can become the unintended victims of disputes of much

[2] See *Trail Smelter* arbitration (1941).

[3]

[4] Para 4 – insert original German text.

bigger players. **Dr Orsolya Toth** discussed the effect that the enforcement of high value arbitral awards can have on small states. An example is the enforcement efforts by ConocoPhillips of its US$2billion award against Venezuela's national oil and gas company (PDVSA) in several small Caribbean states. ConocoPhillips obtained court orders for the seizure of PDVSA's assets in the oil refineries of these small states. Since those small states are heavily dependent on the supplies by PDVSA for fuel and electricity the seizures have caused a serious risk of disruption of supplies and jeopardised thousands of jobs. Should small states be able to voice their concerns during the dispute as amicus curiae or is the impact on a small state a public policy ground for refusal under the New York Convention? How the statehood of small states can be protected should they cease to exist due to sea level rise was discussed by **Dr Alejandra Torres Camprubi**. Sea level rise challenges the territorial, demographical, and political dimensions of the state and some of the small states, especially in the Pacific, have taken drastic measures to ensure their survival, such as buying land in other states.[5]

Steven Finizio (partner, Wilmer Cutler Pickering Hale and Dorr LLP) picked up on the topic of possible dispute resolution mechanisms and illustrated not only the advantages and disadvantages of the civil and common law respectively but also of litigation versus arbitration. Whereas **Professor Alberto Costi** (Victoria University of Wellington) took up again the question whether lawyers and judges are able to use science. Drawing on Penehuro Lefale's and Lord Carnwath's contributions Professor Costi especially draw attention to the capacity issues small states face regarding providing evidence. He suggested that for an more equitable playing field and in view of the limitations of traditional dispute resolution mechanisms, as highlighted by previous speakers, small states must explore alternatives. They need to build foundations for cooperative means and platforms that will stimulate collaboration and support for future agreements. **Elizabeth Mrema** drew attention to the limits of dispute resolution and urged that states and the global citizenry need to take urgent action on environmental issues. She stressed the inequities faced by small states through having fewer resources to address proportionately greater environmental problems, while also having comparatively little economic and political bargaining power to create solutions to environmental disputes.

After exploring the foundations of climate change and environmental dispute resolution, and the role of science in it, special attention was paid to the costs of dispute resolution, causation and the calculation of damages. **James Neill** (barrister, Landmark Chambers) discussed the advantages of the Aarhus Convention which imposes obligations on states parties to ensure procedural access to justice in environmental cases. In his view, the Convention could benefit small states and he encouraged them to become parties. **Simon Milnes** (barrister, 20 Essex Street) explored in more detail principles of causation. Given the scientific uncertainty, the causation requirement is the most significant hurdle in climate change/environmental degradation cases. It is an encouraging development that the strict "but for" causation standard seems to be usurped by the previously mentioned "material contribution to the harm" test. **Scott MacDonald** (principal, Ramboll) illustrated how climate change and/or environmental damages are assessed and calculated. The tools utilised to assess known or potential environmental damages are: 1. A forward -looking assessment that relies on health and environmental risk assessment; 2. Ecosystem valuation methods taking a holistic look at the environmental services impacted; and 3. A retrospective assessment using site investigation and actual field-collected data. For planned future project activity a quantitative risk assessment is a more appropriate method to asses risk.

Following the detailed discussion on the existing dispute resolution mechanisms regarding environmental degradation and climate change and their challenges, the conference focused on

[5] Kiribati in Fiji

alternative ways of dispute resolution and on options how to prevent dispute resolution altogether. **Graham Dunning QC** (barrister, Essex Court Chambers) in his keynote explored whether the Bangladesh Accord — the Accord on Fire and Building Safety in Bangladesh — was a model for environmental dispute resolution. Dunning addressed the background and key features of the Accord, and aspects of its operation. in environmental regulation and dispute resolution. Given the parlous state of many cross-border environmental rules and public institutions, and political and economic barriers to more conventional solutions, he suggested that the Accord model should be seen as an important and workable tool in the sustainable management of scarce global resources.

Suzanne Spears (partner, Volterra Fietta) discussed the initiative of the establishment of an international arbitration tribunal for human rights. In addition, she proposed additional contractual models as sources of a cause of action for environmental human rights claims and considered some of the principal opportunities and challenges for using international arbitration to resolve environmental disputes. **Dr Maria Banda** (Graham Fellow, University of Toronto) reminded the audience that transboundary environmental harm is a fact of life for many small states. While international law in theory provides a range of protections to states threatened or injured by transboundary environmental harm, in practice existing legal frameworks have provided few effective remedies to small States and their citizens in such cases. This is especially true of climate change, the quintessential global collective action challenge, which is having a disproportionately large impact on small states. Dr Banda discussed whether, and in what circumstances, some of the emerging alternatives to inter-state environmental dispute resolution might offer an effective avenue for redress. In particular, she explored how the international human rights regime could contribute to the resolution of transboundary environment disputes involving state actors. She drew especially on recent developments in the Americas, where the Inter-American Court of Human Rights may have signaled a new era of international environmental responsibility.

Teresa Mackey (marine research fellow, Sargasso Sea Commission) discussed dispute prevention through environmental protection agreements. The Hamilton Declaration is a non-binding political statement that aims to protect the Sargasso Sea, which is of unique ecological and biological nature and global significance as the breeding ground for the North American and European eel as well as for other marine species including turtles. The Sargasso Sea Commission has been established to encourage and facilitate voluntary collaboration toward the conservation of the Sargasso Sea. It has no management authority but exercises a stewardship role for the Sargasso Sea and keeps its health, productivity and resilience under continual review. **Catherine Iorns** (reader, Victoria University of Wellington) brought to the attention of the audience innovative legal measures for environmental protection. She addressed a human right to a healthy environment, rights of nature, legal personality for nature, ownership by the new legal person of its own land and/or resources, as well as responsibility-based governance frameworks. She presented three examples of the use of these tools to illustrate the differences between taking rights-based and responsibility-based approaches, suggesting that responsibility-based frameworks provide more effective governance models. Professor Iorns argued that these new tools provide alternative paradigms which have the potential to both avoid and resolve disputes over the ownership and use of environmental assets.

The Blue economy concept balances the preservation of the marine environment and the use of its resources for the benefit of humans and is an example of implementing the different strands of the conference. **Dr Johanne Fischer** reinforced that fisheries are important sources of food and income in small island developing states. It is expected that significant changes in oceanographic characteristics such as sea level, temperatures, salinity and currents will result in important shifts in habitats and the composition of species and their abundance as well as fish

behavioural patterns. Dr Fischer explored how climate change could impact on the coastal ecosystems and fisheries of small states and what has been suggested in terms of political, legal, and socioeconomic approaches to prepare the costal populations for the changes that the future might bring. **Dr Troy Waterman** (lecturer, University of the West Indies (Cave Hill)) discussed tourism development within the context of blue economy. Environment management in tourism development for small developing island states requires balancing public needs with the environmental and economic consequences of development. Enter the Blue Economy, and the complexity of these trade-offs expand considerably. The Caribbean may appear idiosyncratic in this regard because policy prescriptions need to give consideration to divergent economic realities, socio-cultural norms, and developmental priorities that characterize constituents. A nuanced approach therefore becomes an imperative. Using Barbados as a case study, the discussion reinforced some of the theoretical and empirical revelations in tourism development and environmental management in the main, and outlined some of the positive and negative externalities that can be accumulated by destinations. Inferences showed that the interactions represent a portion of the problems that are tourism-induced; and that the interplay between environmental management and economic development becomes onerous because of the presence of a number of innately complex and interlinked impacts. Finally, the discussion explored that when the above is considered within the context of the Dominant Social Paradigm; the new Environmental Paradigm; and the ethic of 'instrumentalism', the Caribbean might not be peculiar after all.

Dr Petra Butler (co-director of the Centre for Small States, Queen Mary University of London; professor, Victoria University of Wellington) recapped that the conference papers presented and the discussion during the conference had shown that for small states to effectively manage climate change and environmental degradation they need to be able to employ all available dispute resolution mechanisms and political means, need to be flexibly think outside the square, demand all available help and work with each other. **Frank Paulson** (Chairperson of the Solomon Islands Law Reform Commission) emphasised the need for alternative dispute resolution mechanisms to combat the effects of climate change and environmental degradation whereas **Monica Feria-Tinta** pointed out that litigation was slowly addressing the challenges that climate change and environmental disputes pose. She was confident that law was a tool of activism when it came to the environment. Sir David Baragwanath stressed the important role the judiciary should and can play regarding the resolution of environmental disputes and **Professor Ilan Kelman**, professor, University College London, aptly summarised the conference with a haiku

Disputes and small states
In need, in trouble, in strength
Law and science join.

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