

SMALL STATES CONFERENCE 2016

Integration and International Dispute Resolution in Small States

Small states make up about 20 per cent of all United Nations ('UN') member states.¹ They differ considerably in their geography, history, political structures, legal systems and wealth. Nevertheless, because of their size, small states face a set of common challenges, including vulnerability to external economic impacts such as changing trade regimes and limited ability to diversify economic activity; limited public and private sector capacity, including legal and judicial infrastructure; reliance on regional co-operation; and differential impact of international law and globalisation. Small states can also be flexible and adaptable sites of social development and innovation, and often have a degree of global influence that is disproportionate to their size.²

Issues pertaining to integration and international dispute resolution in small states were the focus of a one and a half day conference hosted by Wilmer Cutler Pickering Hale and Dorr LLP ('Wilmer Hale') in London in conjunction with the British Institute of International and Comparative Law ('BIICL'), the Centre for Small States, Queen Mary University London and the Open University on 19 and 20 May 2016.³ The aim of the conference was to bring together representatives of small states, lawyers litigating in or for small states and academics to discuss the particular issues these jurisdictions face in regard to international dispute resolution and regional integration.

DAY ONE: INTEGRATION

I. Keynote Panel: Integration in Small States

The keynote panel comprised **Dr Edwini Kessie**, Office of the Chief Trade Advisor, Pacific Island Countries, Vanuatu, **Mele Tupou**, Chief Executive of the Ministry of Justice in Tonga and **Dr David Berry**, Dean of Law at the University of the West Indies in Barbados. **Steven Finizio**, partner at Wilmer Hale, chaired the session.

The keynote panel started its "setting the scene" discussion by questioning the organisers' definition of small states as states with a population of less than 1.5 million.⁴ The

¹ By way of comparison, the European Union member states make up 14.5% of all UN member states.

² Compare Piret Tõnurist, 'What Is a "Small State" in a Globalizing Economy?' (2010) 11(1) *Halduskultuur* 8, 9–10; Wouter Veenendaal and Jack Corbett, 'Why Small States Offer Important Answers to Large Questions' (2014) 48(4) *Comp Pol Stud* 527, 528.

³ The conference proceedings can be viewed at: <<https://www.youtube.com/playlist?list=PL-M5JGQDtWUxJDCfuU8R5RI7JTv1apgwu>>.

⁴ Dr David Berry's keynote can be viewed at: <<https://www.youtube.com/watch?v=DYVEf1cBkZU>>.

discussion made it apparent that generalisations are difficult in this area and there are a number of defining features of small states beyond their population.⁵

The key characteristics of small states with populations ranging from 1500–1.5 million were specifically examined by **Dr Edwini Kessie**.⁶ Many of these states are Pacific or Caribbean Island countries prone to natural disasters, far removed from key markets and lacking economies of scale. Regional economic integration is fundamentally important for these states, which are heavily dependent on trade and investment and are limited by their small populations and correspondingly small markets. Dr Kessie considered that regional integration had not yet reached its potential, and intra-trade between island states in both the Caribbean and the Pacific continues to be limited. However, regional integration has brought great opportunity for small island developing states (SIDS).⁷ One example of the drive for regional integration are the ongoing free trade negotiations between fourteen Pacific Island countries (PICs) and Australia and New Zealand to conclude the Pacific Agreement on Closer Economic Relations Plus (PACER Plus). PACER Plus will integrate the small scale PIC economy of ten million people into an economy of 40 million people when joined with Australia and New Zealand. Dr Kessie pointed out that due to the proliferation of regional trade agreements, small countries are required to consolidate regional trade agreements to avoid conflicting obligations. Other challenges include the domination within these agreements of the larger states in these regions, as well as the need for political commitment to further regional integration. The challenge is not only to achieve deep integration among SIDS, but also to ensure that small states derive benefits from their agreements with large trading partners.

Another important consideration is the need for trade agreements to be accompanied by aid for trade packages to address supply-side constraints. Integration alone will not result in the countries being able to enhance their economic performance.

Dr Kessie stressed that the type of dispute settlement regimes which should accompany regional trade agreements remained an open question. Even though international arbitration is generally the preferred dispute resolution mechanism, many (if not most) small states lack international arbitration experience and their domestic courts may not be conversant in international arbitration rules. Unsurprisingly, there is frequently a lack of

⁵ Compare Tom Crowards, 'Defining the Category of 'Small' States' (2002) 14(2) J Int Dev 143; Tõnurist (n 2) 10. See also Schurr (n 17).

⁶ Dr Edwini Kessie's keynote can be viewed at: <<https://www.youtube.com/watch?v=4Vz8mGV8BXM>>.

⁷ There are presently 58 recognised SIDS, 38 of which are UN member states while the remaining 20 are not: see <<http://www.sids2014.org/>>.

appropriate legal expertise in small island states.⁸ How small states can remedy this lack of legal expertise was discussed on the second day of the conference.

Mele Tupou continued the discussion of regional integration in the Pacific context by pointing to a number of successful regional integration efforts in the Pacific, such as the University of the South Pacific, the fisheries bodies of the Forum Fisheries Agency and the Secretariat of the Pacific Community.⁹ However, Tupou identified the lack of implementation of regional agreements and the missing links between regional and national development frameworks as major obstacles to regional integration. Several international frameworks, for example, are designed to garner support from the international community towards the sustainable development needs of SIDS. However, these frameworks are merely frameworks and do not necessarily have dedicated funding for implementation. The focus must be on national governments localising those goals and working with their wide array of partners to secure some of the sustainable development needs of SIDS.

Dr David Berry returned to the definitional debate of what constitutes a small state. He considered many different classifications to be possible, including on the basis of size of territory or GDP. He concluded that small states come in different shapes and sizes. For example, while Haiti has a population of more than 10 million, Barbados, another Caribbean state, has a population of 110,000. This huge variance illustrates the need to take care when making generalisations in respect of any of particular states being small states. Commonalities will exist but discussions of small states must be contextualised within their particular historical, sociological, economic and geographical circumstances. For example, many Caribbean small states gained their independence following the 1960s and share a common history of colonial oppression, including its worst form; slavery. This can contribute to an attitude on the part of states which rejects any notion of loss of sovereignty or restrictions imposed from abroad. This kind of variable must be taken into account by anyone seeking to work with Caribbean small states, as there are likely to be ripple effects to other areas of international legal relations.

II. Commercial Relations With(in) Small States

Chaired by **James Bridgeman**, Fellow of the Chartered Institute of Arbitrators, Dublin, this panel featuring **Dr David Berry**, **Professor Susan Farran**, **Dr Jan Yves Remy**, **Dr George Barker** and **Agnieszka Ason** elucidated commercial integration concerns of small states by way of examples.

⁸ See Nilesh Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer 2017).

⁹ Mele Tupou's presentation can be found at: <<https://www.youtube.com/watch?v=HuXY7c9Z1t0>>.

Dr David Berry gave his second presentation of the day on the enforcement of regional economic integration.¹⁰ He discussed the potential for regional integration stemming from the jurisdiction of the Caribbean Court of Justice (CCJ) to interpret and apply the Caribbean Community (CARICOM)'s Revised Treaty of Chaguaramas (RTC). He argued that the CCJ's jurisdiction makes real the possibility of judicial enforcement of the CARICOM Single Market and Economy (CSME). Acting under its original (treaty interpretation) jurisdiction, the CCJ has issued a number of important judgments in its first eight cases since 2005. These judgments have laid the foundation for strong regional integration jurisprudence, one that may be compared with the seminal jurisprudence of the European Court of Justice.

Dr Jan Yves Remy,¹¹ international lawyer at Sidley Austen LLP, discussed the use of the "SVE" vehicle to advance small state participation in World Trade Organization (WTO) disputes. SVEs are small and trade vulnerable economies, which are understood as a subcategory of developing countries that have particular concerns in the WTO space. However, there is no formal sub-categorisation of SVEs. SVEs are predominantly located in the Pacific, the Caribbean and Latin America. In Dr Remy's presentation, there was a return to the recurring theme for the conference, namely the question of definition. In the context of the WTO, a state's share of international trade is likely to be more important than its size, the relevant definition being less than 0.5% of international trade. Dr Remy considered the most problematic area for SVEs to be dispute settlement. She suggested four main reasons for this. First, although SVEs have a wide variety of profiles, some much more litigious than others, their commonality is their profile as countries that are hugely impacted by the decisions in which they are involved. Secondly, SVEs cannot afford to not be involved in dispute settlement. The issues to be resolved are broad and, for example involve decisions related to major issues such as climate change. Thirdly, dispute settlement can provide a bulwark against the imposition of illegal measures. Finally, international dispute settlement is an important area where "right perseveres over might". To conclude, Dr Remy considered *how* the participation of SVEs in WTO dispute settlement may be enhanced. Her suggestions fell under two main headings, these being changes to the rules and changes to practices. Her final conclusion was that the SVE vehicle is a viable advocacy and educational tool for promoting and addressing the concerns of small states in WTO dispute resolution.

The topic of anti-dumping and competition policy was addressed by **Dr George Barker**.¹² His focus was on how the goal of sustainably optimising wellbeing could be achieved in

¹⁰ Dr David Berry's presentation can be found at:

<<https://www.youtube.com/watch?v=stzbQCc5ODU&t=12s>>. His paper has since been published in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 61.

¹¹ Dr Jan Yves Remy's presentation can be viewed at: <<https://www.youtube.com/watch?v=VrM4u-CiWa4>>.

¹² Director of the Centre for Law and Economics at the Australian National University, Visiting Fellow of BIICL and Visiting Fellow at the London School of Economics. His presentation can be viewed at: <https://www.youtube.com/watch?v=2t_1Exa98iA>.

small states. In relation to competition and consumer law, Dr Barker emphasised the need for clear, simple, targeted and efficient rules, independent institutions ensuring credible commitment to property rights and phased and flexible introduction of these rules, with sensitivity to starting points. He highlighted the importance of access to capital and stressed that if states do not credibly commit to controlling their sovereign powers, there will either not be the necessary access to capital, or it will come at a high cost. If states have clarity about their objectives of optimising the welfare of their people, then they need a wider economic framework involving incentives to invest and trade. There is also a need for competition and consumer law in order to safeguard both consumers and investors. These rules not only regulate the investor/state relationship but also the relationship between investors. Sovereignty must not be left unfettered but must instead be controlled to enable it to be used to create and foster wellbeing. Caribbean economies have generally been more successful in their choice of substantive legal rules to adopt for economic regulation. Consistent with an emerging theme of the conference, Dr Barker commented on the importance of the rule of law in its ability to help small state economies to grow. Dispute resolution provides the essential framework for this.

Professor Sue Farran¹³ discussed intellectual property consequences from a Pacific perspective. In attempting to protect and preserve indigenous intellectual property, foster creative industries, promote tourism and utilise natural resources – including a wealth of biodiversity – for commercial advantage, small states face a number of dilemmas. According to Professor Farran, forces in two conflicting directions are faced by the Pacific in relation to intellectual property rights (IPR). The first of these is the rapid development of these states, while in the other direction is an increasing awareness of the value of cultural knowledge and heritage and the potential of this cultural heritage to contribute to economic growth. Several challenges to IPR can be identified in these countries. Firstly, there are issues of enforcement in states with limited legal resources. Secondly, there are problems with the underpinning legal concepts of IPR, which may be alien to these states. Thirdly, there are conflicting views of the advantages and disadvantages of IPR laws. For example, while IPR may be supported by young musicians and artists, there may be disadvantages for education providers due to books and materials becoming more expensive as a result of IPR. Additional challenges identified were the need to grapple with exceptions and restrictions to IPR and efforts to incorporate traditional knowledge within non-traditional legal frames. After offering potential solutions including contract and criminal law, Professor Farran concluded by stressing the importance of trade being “two-way” in terms of understanding the legal, social and cultural environment in which these exchanges take

¹³ Professor of Laws at Northumbria University Law School, Adjunct Professor at the University of the South Pacific and Associate of the Centre for Pacific Studies at St Andrews University. Her presentation can be viewed at: <<https://www.youtube.com/watch?v=dpiBUmFzujc>>. Her paper has since been published in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 141.

place. Without this two-way understanding, IPR rules cannot be effective, whatever form they take.

Agnieszka Ason¹⁴ looked at integrated energy programmes of SIDS. One commonality of SIDS is a lack of energy resources leading to a heavy or complete dependence on imported fossil fuels. The implications of this are that SIDS are prone to interruptions in energy supply and vulnerable to changes in oil prices. She argued that the energy sector is the principal source of economic vulnerability of these countries. Opportunities for renewable energy which could hugely benefit SIDS include wind, solar, marine, hydro and geothermal. Developments in renewable energy can contribute to the global climate change agenda, however this is somewhat paradoxical given that SIDS have been amongst the smallest contributors to emissions causing climate change. Renewable energy is not only a necessity for SIDS but in many cases also a pragmatic choice. Ms Ason agreed with Dr Remy that small states cannot exclude themselves or stand outside these issues. The ambitions of PICs in relation to renewable energy are striking. Tokelau, a dependent territory of New Zealand, already achieved 100% renewable energy in 2012. Samoa is striving to follow in its footsteps by 2017. Several other PICs have goals to achieve 100% renewable energy in the coming decades. Ms Ason identified three success factors to renewable energy goals: strong national policies, regional cooperation and international support.

III. Small States as Financial Centres

Dr Eva Lein¹⁵ was joined by **Professor Francesco Schurr**, **Professor Baldur Thorhallsson**, and **Dr Petra Butler** (for **Professor Gordon Walker**¹⁶) to examine some financial implications for small states.

Small island developing states face unique challenges in advancing their economic growth and challenging the barrier of lack of access to capital. SIDS need to take innovative steps to further the growth of micro-, small- and medium-sized businesses (MSMEs) by creating an enabling environment for MSMEs and alleviating their financing constraints. Fiji was the major case study in **Professor Gordon Walker's** paper, which addressed the promotion of sustainable development in SIDS through innovative capital raising solutions. As recognised at the 2002 World Summit on Sustainable Development, access to capital and an enabling

¹⁴ Energy disputes lawyer and PhD candidate, Freie Universität Berlin. Her presentation can be viewed at <<https://www.youtube.com/watch?v=dpiBUmFzujc>>.

¹⁵ Herbert Smith Senior Research Fellow in Private International Law, BIICL.

¹⁶ Professor of Law, Hamid bin Khalifa University, Doha (at the time of the conference). Dr Petra Butler's presentation can be found at: <<https://www.youtube.com/watch?v=nUmZeiat1rQ>>. Professor Gordon Walker's paper can be found in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 89.

environment for investment is critical for developing countries to achieve sustainable economic growth. Small Pacific island states in particular face challenges in this respect, including their large developmental needs, geographical remoteness, climate change and reliance on aid. MSMEs are crucial for economic growth and private sector employment in small island states. However, MSMEs face particular financing constraints.

In Fiji, many MSMEs remain capital-constrained. Fiji has failed to mobilise its domestic resources, improve its economic growth and achieve its Millennium Development Goals (MDGs). In particular, the Fijian Companies Act 2015 has not incorporated community companies or crowd-funding as other jurisdictions, such as New Zealand, have done. Although the authors considered there to be a number of problems with Fiji's new companies legislation, their main focus was on the new provisions for fundraising. The principal fundraising mechanism contained in the Fijian legislation is a prospectus, and concessions or exemptions for small-scale fundraising are limited. The limited exemptions demonstrate a mismatch between the new capital raising regime and the nature and needs of the majority of businesses in Fiji. The authors considered Fiji's options, including a reformation of the secure transactions regime, the introduction of community companies, a bill providing for small business access to capital or an amendment to the existing Companies Act 2015.

Professor Francesco Schurr¹⁷ examined the influence of big states on small states, in particular the influence on private law. His address was structured upon a number of related questions, the first being a return to the question of definition. Professor Schurr considered whether there is a viable definition of small states and big states, determining that the definition of "small states" could be understood in three different ways. Firstly, small states could be defined negatively as states that are *not* "great powers" or *not* "great financial centres". The capabilities of states could also be a defining feature, for example the size of their populations or assets. Finally, big and small states could be defined in terms of their influence.

This led to discussion of the ability of big states to influence small states and questions as to what form this influence may take. In this context, Professor Schurr used the examples of his home jurisdiction of Liechtenstein as well as examples from Jersey, Guernsey and San Marino. These states are not merely small states, but may be classed as microstates which, despite their nimbleness and flexibility, are exponentially exposed to legal and economic challenges due to their geographical and demographical size. In the case of Liechtenstein, private law has been influenced by both Austrian and Swiss law, both of which continue to

¹⁷ Professor at the University of Liechtenstein. His presentation can be viewed at: <<https://www.youtube.com/watch?v=kulvty-A7EU>>.

influence the development of the law in particular areas. There is also a more general influence on the private law of small states at a European or international level.

An important distinction was drawn by Professor Schurr between “direct” and “indirect” influence. “Direct” influence is where a state directly adopts or replicates the law of another state without any intermediary body, whereas “indirect” influence is where an international or supranational intermediate body organises the adoption of specific legal principles within a small state. Another distinction was made between chosen and forced influence. In some situations, a smaller state may deliberately permit the influence of a larger state upon its jurisdiction, while in other cases the influence may be less welcome. Where the influence is forced, there may be greater concern for the sovereignty of the small state, however sovereignty is not always under threat.

Finally, the question arose as to whether the influence of big states on small states is a one-way street. Professor Schurr concluded that this was not the case, giving the example of Liechtenstein’s company and trust legislation, which has been followed by many other jurisdictions around the world.

Finally, **Professor Baldur Thorhallsson**¹⁸ addressed the question of what makes an unsuccessful financial centre. He pointed to the failure of Iceland’s financial institutions a mere five years after their privatisation, and identified five main failings in the Icelandic context. Firstly, the small economy meant there was no backup for the financial institutions and the central bank could not help institutions when they faced external pressure. Secondly, there was lack of external assistance available. Thirdly, there existed ideological problems as the government did not set any limits for the expansion of the financial sector. Finally, there was a lack of resources and expertise. All of these factors contributed to the failure of the experiment and brought Iceland to its knees for a period of a few months. However, due to a strong infrastructure, the country is now flourishing again.

IV. Concluding Remarks

Professor Robert Volterra,¹⁹ in his concluding remarks on the first conference day, focused on the centrality of the rule of law and the ability of law to constrain power. Professor Volterra emphasised the importance of collectivity, multilateralism and the leverage and power of the neutrality of international courts and tribunals. He considered that small states are increasingly recognising that they can address power imbalances through the rule of law

¹⁸ Professor of Political Science and Jean Monnet Chair in European Studies at the Faculty of Political Science at the University of Iceland and Director of the Centre for Small State Studies at the University of Iceland. His presentation can be viewed at: <<https://www.youtube.com/watch?v=DcZ3D8wmWfc>>.

¹⁹ Professor at University College London and partner, Volterra Fietta. His concluding remarks can be found at: <https://www.youtube.com/watch?v=zmUl_hdDvr0>.

in international courts and tribunals. A small state is still a state, it is an entity that is chosen to be part of the club of nations, that club has rules and obligations and they cannot be avoided. In this context small states need to access the right lawyers, economists and other experts to represent and further their interests and constrain power through the rule of law.

DAY TWO: DISPUTE RESOLUTION AND SMALL STATES

I. Dispute Resolution Involving States

N Jansen Calamita²⁰ chaired a discussion on dispute resolution involving small states. Two main themes emerged in the presentation: firstly, the importance of the rule of law through international dispute resolution and secondly, the significance of enabling small states to operate on a level playing field. Ancillary to the latter, the importance of small states having access to the appropriate expertise and legal advice was also emphasised.

Stephen Fietta²¹ began the session with an introduction to small states and international dispute resolution. Unquestionably, small states have been active users of international dispute resolution mechanisms like the International Court of Justice (ICJ) and those provided by the UN Convention on the Law of the Sea (UNCLOS). Without the military, economic or political clout of their larger neighbours, international dispute resolution can be by far the most effective way forward when issues arise. More importantly, the peaceful settlement of disputes is a fundamental requirement of public international law. International dispute resolution mechanisms guarantee a level playing field between all states, especially where the subject matter of a dispute is sensitive, for example if it relates to nuclear non-proliferation, environmental protection, territorial sovereignty or maritime delimitation. A cursory review of ICJ and UNCLOS cases involving small states indicates that, notwithstanding their more limited budgets for pursuing legal proceedings, small states have enjoyed success (to various degrees) over their larger rivals in many of the cases they have taken to international dispute resolution mechanisms. *Mauritius (v UK)*,²² *Timor-Leste (v Australia)*,²³ *Djibouti (v France)*,²⁴ *Saint Vincent and the Grenadines (v Guinea-Bissau)*²⁵ and *Nauru (v Australia)*²⁶ are all pertinent examples. *Philippines v PRC* may soon prove to be another example of a relatively smaller and less powerful state resorting to international

²⁰ Director of the Investment Treaty Forum and Senior Research Fellow at BIICL (at the time of the conference).

²¹ Partner, Fietta International Law. His presentation can viewed at:

<<https://www.youtube.com/watch?v=z7EheksgEv4>>.

²² *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (2015) 31 RIAA 359.

²³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [2015] ICJ Rep 556.

²⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177.

²⁵ *The "Juno Trader" Case (Saint Vincent and the Grenadines v Guinea-Bissau)* (Prompt Release, Judgment of 18 December 2004) ITLOS Reports 2004, 17.

²⁶ *Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240.

dispute resolution as a means of achieving an outcome that would otherwise have been unachievable. The relative success of small states in such fora may help explain the growing popularity of those mechanisms among these states, the most recent example being the Marshall Islands, which has brought proceedings at the ICJ against India, Pakistan and the UK.

Brian McGarry²⁷ examined cost efficiency in state-to-state dispute resolution. Rising dispute resolution costs are a barrier to access to justice for small states. While cost-saving measures have taken on systemic importance to parties and institutions in international dispute resolution involving private parties, they have surfaced in more varied ways in state-to-state dispute resolution. Utilising examples from practice, three such paths can be identified. The first is the establishment of trust funds by state-to-state dispute resolution institutions such as the International Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration, for dispersing grants to applicant states on an ad hoc basis.

Second, while the use of UN-affiliated fora in state-to-state disputes offers obvious cost savings vis-à-vis arbitration as regards the operational expenses of the adjudicative body and registry, states nevertheless remain responsible for their legal costs and may seek a number of means to defray these expenses. These range from exclusive reliance on government lawyers to other approaches raising distinct third-party funding concerns, from funding through regional organisations to the involvement of private industries which may have an interest in the resolution of boundary disputes.

Finally, in state-to-state arbitration a number of approaches have been utilised to reduce tribunal fees and operational expenses. Consent to these methods raises tactical questions for the parties. These methods include those borrowed from arbitration involving private parties, such as foreclosing certain procedural options through terms of reference, as well as uniquely state-to-state approaches, such as the mutatis mutandis application to three-member tribunals of procedural rules intended for five-member tribunals (e.g. under the UN Convention on the Law of the Sea). Applied in combination, these approaches to cost-efficiency demonstrate both the varying procedural dynamics applicable to dispute resolution between sovereigns, as well as the abiding need to innovate feasible forms of state-to-state dispute resolution in order to preserve international peace and security.

²⁷ Lecturer in the University of Geneva's LLM in International Dispute Resolution. His contribution can be found at: <<https://www.youtube.com/watch?v=ieghIS3wz2w>> and has since been published in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 319.

Dr Lauge Poulsen²⁸ addressed the topic of the politics of investment treaties in small (developing) states. The majority of small states are parties to at least a couple of investment treaties, a notable exception being PICs. A great number of these small states have been subject to arbitration claims under investment treaties. The focus of the discussion was on *how* and (to a lesser extent) *why* states, including developing states, sign up to these agreements. It is inherently surprising that governments are willing to restrain their regulatory autonomy, expose themselves to disputes and delegate the resolution of these dispute to private lawyers who practice as arbitrators. The question was posed of whether there had always been an appreciation by states of the nature of these agreements and the potential liabilities attached to them, especially by small and/or developing states. However, the lack of understanding was not limited to small states, since even larger states may not fully understand the implications of entering into investment treaties.

Dominic Roughton²⁹ picked up where Steven Fietta had left off, to deal with a broader range of problems faced by small states in dispute resolution. Mr Roughton discussed the following issues: investment disputes, how to deal with disputes and how to avoid trouble, before finally making some concluding remarks in relation to dispute resolution for small states. As had been stressed by other presenters, one of the principal constraints upon smaller states is a lack of resources. Larger states and investors may be represented by large international law firms and may also be advised by well-known academic and professional advisers. The importance of effective legal representation cannot be emphasised enough, nor can the need to ensure that the negotiating/litigating team is not “outmatched” by the other side. However, it is also important to remind small states to anticipate difficulties and to avoid disputes in the first place.

II. A New Dispute Resolution Mechanism for Small States

Gary Born³⁰ keynote speech focused on international commercial dispute resolution for commercial parties in small states. From the outset he emphasised the importance of accessible and efficient international commercial dispute resolution. Dispute resolution promotes productive economic enterprises, which in turn provide employment and tax revenue and thereby revenues for social services. During the last half-century both small

²⁸ Senior Lecturer in International Political Economy at University College London. His contribution can be viewed at: <<https://www.youtube.com/watch?v=x80VwNF4Kgs>>.

²⁹ Partner, Herbert Smith Freehills, London. His contribution can be viewed at: <<https://www.youtube.com/watch?v=5FIUCRxcN3Y>>.

³⁰ Managing partner, international arbitration group, Wilmer Cutler Pickering Hale and Dorr LLP. The keynote speech can viewed at <<https://www.youtube.com/watch?v=DBj1LcmjZTs&t=3s>> and has since been published in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 221.

and large states have given thought to the most effective and appropriate mechanisms for resolving international commercial disputes. In this context, the two cornerstone instruments are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law for International Arbitration.

These two instruments operate in tandem. The New York Convention guarantees the international enforceability and validity of international commercial arbitration agreements. All 156 contracting states must recognise international arbitration agreements, which results in mandatory arbitration where there is an arbitration agreement in place without resort to litigation. The New York Convention also requires that contracting states recognise and enforce arbitral awards. However, there is no convention that allows for the same enforceability of judgments from national courts. The New York Convention gives businesses confidence by ensuring they have an available forum wherein they can seek an enforceable resolution of their dispute and providing a means of ensuring that all states can reap the benefits of international commerce. Among the many advantages of international arbitration over other forms of dispute resolution are the freedom to select expert and informed arbitrators, flexibility of procedure and the potential for neutrality.

The key question, however, is what more can be done in the context of international commercial dispute resolution? The New York Convention is accepted as a positive development, however, what further steps can be taken to provide a better means for international commercial dispute resolution?

Drawing on the concept of a bilateral investment treaty, the development of bilateral *arbitration* treaties (BATs) was suggested. Where two states sign a BAT, arbitration will be the default dispute resolution mechanism for international commercial disputes. Contracting commercial parties would remain free to opt out of the BAT and, for example, choose international litigation to resolve any potential disputes. Mr Born addressed some of the criticisms that have been levelled against the BAT proposal. Firstly, there is the issue of what the arbitration would look like in the absence of an agreement to arbitrate between the parties. States could include procedural regularity in the BAT, for example the arbitration rules applicable and the location of the arbitration. These rules would apply by default but could be modified or varied by the contracting parties. States could also choose to regulate some things outside of the BAT, for example, they could make specific exclusions for public policy issues. Despite denying access to the courts in the absence of express choice, Mr Born was explicit that a BAT is not a denial of access to justice. In the international context, access to the courts is not necessarily access to justice. Access to court processes inevitably entails access to at least two courts. This requires two sets of legal advice and risks parallel proceedings. More significantly, without the equivalent of the New York Convention, there is no guaranteed enforceability of judgments.

So far, the proposal for BATs is untested. However, the same could have been said about the New York Convention in the 1950s. Fear of the unknown is not a sufficient deterrent. States must continue to ask themselves what the best, most efficient and most effective default forum is.

During the question session, Mr Born was asked whether including a BAT in regional trade agreements could be more effective than bilateral arrangements to avoid the proliferation of BATs. He agreed that at least in some regions of the world, there would be obvious efficiencies to be gained from regional arrangements or multilateral arbitration treaties. Mr Born also addressed the concern that removing cases from the courts could stifle or stunt the development of the common law, responding that disputes between commercial parties are not a tool for the development of the law and efficient dispute resolution should not be sacrificed for this reason. The topic of BATs was later revisited in the presentation by Jack Graves (see below).

III. International B2B Dispute Resolution

The final session was on the broad topic of international B2B (business to business) dispute resolution. The presentations were divided into three topics: international litigation, international arbitration and international mediation.

1) International Litigation

Justice Winston Anderson³¹ examined international litigation, specifically the CCJ and its contribution to regional integration. The CCJ has been labelled a *sui generis* institution by commentators and jurists,³² particularly as it relates to its hybrid jurisdictional system. In its original jurisdiction, the Court functions as an international tribunal with compulsory and exclusive jurisdiction to apply rules of international law in interpreting and applying the provisions of the RTC. In the exercise of this jurisdiction, “the Court is perceived as the institutional centrepiece of the CSME which aspires to the creation of a single economic space superimposed on autonomous political jurisdictions in order to approximate in fact, if not in law, a single economy from the economies of many member states.”³³ In its appellate jurisdiction, the CCJ functions as a final appellate court for both civil and criminal matters of municipal regional courts. To date, Barbados, Guyana, Belize and Dominica have made the necessary constitutional changes to accede to the Court’s appellate jurisdiction.

³¹ Judge of the Caribbean Court of Justice. His presentation can be viewed at:

<<https://www.youtube.com/watch?v=ErDtWFdMh9Y&t=2s>> and has since been published in Petra Butler, Eva Lein and Rhonson Salim (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018) 303.

³² Duke Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence* (Ian Randle 2004) 42.

³³ Ibid.

In this jurisdiction, the Court seeks to “fulfil two dreams for the Caribbean Region by uniting them in one judicial system – the long-sought need for a final appellate court to replace the Privy Council, a respected tribunal of colonial memory, and the establishment of an international court to ensure effective implementation of the Treaty.”³⁴

It has to be noted that Article 223 of the RTC encourages international commercial arbitration. Case law has also been supportive of the use of international arbitration. In relation to enforcement of arbitral awards, there are some unsettled issues upon which the United States Supreme Court is expected to opine in the near future. The decision in *Belize v Belize Social Development Ltd* is awaited with interest.³⁵

Barbara Dohmann³⁶ discussed the International Civil and Commercial Court of Qatar. Qatar is a good example of the difficulties in defining a small state. Geographically, Qatar is undoubtedly a small state. However, when its economic influence is taken into account that classification may be doubted.

The Qatar International Court first appointed judges in 2006, and its first cases were heard in 2009. Before this point the Court had to establish itself and its procedures. A new law for 2016 has been approved to provide an opt-in provision. Article 7 very broadly provides that any civil or commercial claim be brought before the Court if the parties to the claim agree. This applies wherever in the world the parties are located. The only exception to this is if there is already a final judgment between the parties from another court, in which case the Court will not deal with the matter. The new law also proposes to create a dispute resolution authority in Qatar, which will, inter alia, have the task of promoting arbitration as a form of alternative dispute resolution. Later in her presentation, Ms Dohmann discussed the essential elements of procedure and functioning of the Court. In particular, she discussed the new powers available to the Court in relation to arbitration. Ms Dohmann finished her presentation with a discussion of the right of audience. The Court has taken steps to ensure that the Court is also open to foreign practitioners. This ensures that, in most circumstances, parties can bring counsel from their own country to represent them.

Finally, **Alex Layton**³⁷ addressed the jurisdictional bases adopted by common law traditions and considered questions of recognition and enforcement and compared these matters with the 2005 Hague Choice of Court Convention. Many small states are home to very

³⁴ Desiree Bernard, 'The Caribbean Court of Justice: A New Judicial Experience' (2009) 37(2) Int'l J Leg Info 219.

³⁵ See the website of the US Supreme Court in regard to the status of proceedings:
<<https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-830.htm>>.

³⁶ Queen's Counsel, Blackstone Chambers, London and Judge of the Civil and Commercial Court, Qatar. Her presentation can be viewed at: <<https://www.youtube.com/watch?v=s32LxszlPKU>>.

³⁷ Queen's Counsel, Twenty Essex, London. His presentation can be viewed at:
<https://www.youtube.com/watch?v=tz-A_W70EaU>.

sophisticated international companies. It is therefore not surprising that in many cases, more sophisticated rules have been introduced into the courts of those countries. The direct rules of jurisdiction under the 2005 Hague Choice of Court Convention will lead to much more universal recognition and enforcement of decisions made by courts, which would benefit small states.

2) International Arbitration

Desley Horton's³⁸ presentation on international commercial arbitration in PICs was divided into three key areas for discussion. The starting point was a discussion of the use of arbitration in the Pacific. The next part of the presentation focused on the options that commercial parties currently have for resolving their disputes, comparing these to arbitration. The final part of Ms Horton's presentation considered some of the challenges that may be faced in broadening the use of international commercial arbitration. Ms Horton stressed that PICs are not homogenous and are spread over a large area. In addition, as was stressed by other speakers, intra-regional trade in the area is not large. However, the Pacific is an outward looking area and exports from the area are growing.

Arbitration is used by some businesses in the Pacific, and in many PICs alternative dispute resolution forms part of customary law. Unfortunately, information about how often commercial arbitration is used is lacking. Current arbitration practices in the Pacific are mostly domestic and typically involve a government party. Arbitration is frequently used where mediation has failed. Examples of the types of disputes where arbitration is currently used include customary land disputes, labour and employment disputes and the granting of investment authorisation.

Ms Horton then considered the mechanisms that commercial parties currently use to resolve disputes. The first option is domestic litigation. However, there are problems with this mechanism, including that domestic litigation is not attractive to foreign investors as well as possible rule of law issues. Another option is international litigation. There is frequently a preference to resort to the courts of larger countries such as Australia and New Zealand, however, there is a danger of home country bias and enforceability of judgments may not always be straightforward. Mediation is another option, however, there is limited information on the use of mediation in PICs.

Ms Horton reiterated and developed upon the advantages of arbitration that had been laid down by Gary Born in his keynote speech. Encouraging and facilitating foreign investment was emphasised as a key advantage of arbitration. Other advantages mentioned were neutrality of the forum, ability to select the tribunal, speed and flexibility. In the Pacific

³⁸ Senior Associate, Wilmer Cutler Pickering Hale and Dorr LLP. Her presentation can be viewed at: <https://www.youtube.com/watch?v=Mfj22tFg_kc>.

context, the flexibility to choose substantive law is particularly valuable for foreign investors who may be concerned about the applicability of customary law. Customary law is enshrined in a number of Pacific constitutions. The enforceability of arbitral awards under the New York Convention was recalled.

Finally, Ms Horton discussed the challenges of increased use of arbitration that PICs face. These include the need to modify existing legal frameworks or implement new ones, a lack of familiarity with arbitral practice and procedure in the legal community and the need for support from the business community. Ms Horton concluded that the goal should be to ensure a more certain and predictable legal framework for foreign investors.

Conway Blake³⁹ argued that commercial arbitration can oil the wheels of trade and strengthen rule of law in Commonwealth Caribbean states. Historically, there was ambivalence to international arbitration in the Commonwealth Caribbean, and even today many Caribbean states retain colonial arbitration legislation, which are no longer fit for purpose. The attitude of Commonwealth Caribbean states has also been reflective of this ambivalence. The reasons for this ambivalence are in particular the perception that arbitration is foreign and dominated by a few elites in the west. This perception makes it difficult to promote arbitration in Commonwealth Caribbean countries. Another factor is that the development of the modern arbitration framework occurred before many Commonwealth Caribbean states achieved independence. Similarly, the common law has traditionally had some scepticism towards agreements that oust the jurisdiction of courts. However, there has recently been a move away from ambivalence in recognition of the promise of arbitration. Arbitration holds out a promise to small states of increased foreign direct investment. There is a hope for economic development and advancement, and legislative reforms are under foot in many jurisdictions. In many small states there are moves to reform arbitration statutes to be consistent with the UNCITRAL Model Law. There is also an increasing focus on the potential of developing arbitral centres, for example in the Bahamas.

Professor Jack Graves⁴⁰ continued on from Gary Born's keynote speech by discussing the concept of BATs. The BAT is a new and revolutionary idea that has emerged through a confluence of ideas. First, Professor Graves himself suggested the idea of default arbitration. Gary Born developed this into the mechanism of the BAT. Later in 2014, Petra Butler and Campbell Herbert considered how the BAT could be particularly beneficial for MSMEs. Available evidence as well as anecdotal evidence suggests that the preferred international dispute resolution mechanism of well-informed and well-resourced business

³⁹Associate, Debevoise and Plimpton LLP. His presentation can be viewed at: <<https://www.youtube.com/watch?v=rLjLbZQFXBI&t=901s>>.

⁴⁰ Professor, Touro College Law Centre and Director Digital Legal Education. His presentation can be viewed at: <https://www.youtube.com/watch?v=eX-iDB_HfpA>.

parties is international arbitration. However, international litigation is currently the default mechanism if parties do not explicitly choose a dispute resolution mechanism. Professor Graves argued that governments would not be ceding any sovereignty by signing up to a BAT, which simply allows business parties to resolve their disputes most efficiently.

A BAT would provide a superior default rule. In many cases businesspeople consciously do not want to talk about disputes at the time of contracting. A default rule is crucial for parties who negotiate their own contracts, in particular MSMEs. One of the biggest challenges of ad hoc arbitration is the appointment of a tribunal. The framework provided within a BAT is of crucial importance. The UNCITRAL Arbitration Rules are fit for purpose and are already used for the Inter-American Convention, and the Permanent Court of Arbitration can provide efficient and effect access to an appointing authority if necessary.

Professor Graves also continued on from Gary Born's discussion of the criticisms that have been levelled at the idea of BATs. On the issue of the lack of party consent, he suggested the notion of a presumption of consent. Similarly, constructive consent can also be gleaned from states' consent to enter into a BAT.

In the context of MSMEs, there are opportunities to make the process easy, quick and even more cost-effective. In this regard, there are opportunities through the effective use of online resources and technology. Professor Graves discussed ideas such as desktop arbitration, arguing that effective and affordable technology is currently availability to support real-time online arbitration. For example, procedures could be introduced allowing parties to choose or invoke the use of online arbitration if the claim in question is under a certain amount. This could allow for accessible and affordable access to justice for MSMEs.

3) International Mediation

The final two speakers addressed international commercial mediation in small states. **Geoff Sharp**⁴¹ used his presentation to lay down a case for mediation in small states. Mediation has a high success rate in terms of the proportion of cases in which an agreement is reached between the parties. Mediation can address cost barriers. The most fundamental advantage of mediation for small businesses and small states is that parties to a mediation can retain and maintain control throughout the mediation process. For small businesses, a mediation clause in commercial contracts is a "no-brainer". Mediation can eliminate perceptions of weakness where a dispute has arisen and in this way levels the playing field. Similarly, and crucially for small businesses, mediation processes can preserve relationships.

⁴¹ Mediator, Brick Court Chambers, London and Clifton Chambers, Wellington. His presentation can be viewed at <<https://www.youtube.com/watch?v=seuj0E1x4Cg>>.

Michel Kallipetis⁴² continued this discussion and suggested five reasons why all states, and particularly small states, should seriously consider mediation. Firstly, and as suggested by Geoff Sharp, unlike litigation and arbitration, mediation is not a spectator sport for the parties. Secondly, not only can parties choose their mediator, they can also talk to them beforehand and determine what the mediator knows and the expertise they have and tell their mediator things in confidence. Thirdly, there is a cost advantage, in that parties are more likely to settle without the need for further dispute resolution and therefore save on costs. Fourthly, mediation can be adapted to meet the needs and wishes of the parties. Finally, parties fashion the agreement themselves, and where parties have actually agreed on an outcome, it is more likely to be enforceable.

IV. Conclusions

The final panel of **James Bridgeman**, **Dr Edwini Kessie**, **Elizabeth Bakibinga-Gaswaga**,⁴³ **Nadja Alexander**⁴⁴ and **Timothy Lemay**⁴⁵ focused on ideas for the future. It was concluded that the silos of dispute resolution should be broken down to allow informed and effective access to a range of dispute resolution mechanisms, and that the range of mechanisms available should be seen as complementary processes.⁴⁶

Several key themes arose in the presentations and discussions about small states during the conference. Firstly, there were issues of definition. Even though the definition of a small state as a state with a population of less than 1.5 million is used by, inter alia, the World Bank and the Commonwealth Secretariat, it is contested. There are many other factors which can contribute to the appropriate categorisation of states as “small”. A second theme was the importance of effective access to justice, expertise and legal representation for small states and entities located therein. Access to effective justice can level the playing field between states, between entities or between entities and states. Moreover, effective access to justice with effectual representation can strengthen the rule of law and facilitate economic integration and development.

⁴² Queen’s Counsel, Quadrant Chambers, London. His presentation can be viewed at: <https://www.youtube.com/watch?v=Ocp4z9Xr_Ns>.

⁴³ Legal Adviser, Rule of Law Division, Commonwealth Secretariat.

⁴⁴ Director of the Singapore International Dispute Resolution Academy.

⁴⁵ Principal Legal Officer and Head of the Legislative Branch of the International Trade Law Division/Office of Legal Affairs, UNCITRAL Secretariat.

⁴⁶ The final panel discussion can be viewed at: <<https://www.youtube.com/watch?v=BVtDNkFwgcl>>.