

SMALL STATES CONFERENCE 2018

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 any certainty of disaster.'¹

This quote from the Samoan Prime Minister, the Hon Tuilaepa Sailele, speaking to a Sydney audience at the end of August captured the theme of the Environmental Dispute Resolution and Small States Conference 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, the former president of the New Zealand Law Commission, appellate court judge and former president of the Special Tribunal for Lebanon, chaired the keynote panel. He 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 these questions, **Eden Charles**, former ambassador of 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. In his view, small states therefore 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 the United Nations Convention on the Law of the Sea (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 is, 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 of the United Nations 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 is not surprising that small states play 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 challenges and opportunities for small states. The "ever-cumulating" effects of harmful human activities, the threat of climate change, the declining health of their coastlines, the loss of livelihoods and threats to territorial integrity can make it

¹ The Hon Tuilaepa Sailele, Prime Minister of Samoa, cited in Kate Lyons, 'World Leaders Who Deny Climate Change Should Go To Mental Hospital – Samoan PM' (*The Guardian*, 31 August 2018) <<https://www.theguardian.com/environment/2018/aug/31/world-leaders-who-deny-climate-change-should-go-to-mental-hospital-samoan-pm>>.

difficult for small states to mitigate environmental disputes through direct and systematic interaction among disputants. So far, two main ways of dispute settlement can be identified: either non-coercive diplomatic or political means or coercive and punitive means such as litigation.

In his keynote speech, **Lord Carnwath**, judge of the United Kingdom Supreme Court, questioned whether environmental dispute resolution was actually going to be evidence-based given the scientific uncertainty in relation to many environmental issues. The keynote explored whether the precautionary principle was a suitable response to the problem of uncertainty. A survey of the case law of various international courts and tribunals reveals that the precautionary principle in international law remains contested and unclear. In practice, investor-state arbitral tribunals might 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 Fatu Lefale**, contributor to the Intergovernmental Panel on Climate Change Nobel Peace Prize 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. Mr Lefale advocated that the international community's response to climate change must: (1) be guided by science; (2) involve legally binding global greenhouse gas 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; and (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, Dr Fischer advocated for a regional approach and for using existing governance systems to regulate the high seas so as to be able to respond to threats in a more targeted way.

How blockchain technology can boost climate action was the topic of a presentation by **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.

The procedures and laws that are available to protect the environment and address the impact of climate change was addressed by **Stuart Bruce** (senior associate, Wilmer Hale), **Monica Feria-Tinta** (barrister, Twenty Essex), **Dr Orsolya Toth** (assistant professor, University of Nottingham) and **Dr Alejandra Torres Camprubi** (associate, Foley Hoag). The panel concluded that placing some trust in, but also obligations on, corporations to behave in a sustainable manner and to safeguard the environment is one piece of the mosaic of actions that are required.

Stuart Bruce gave an overview of the different initiatives, such as the UN Global Compact, project financing standards, the UN Principles of Responsible Investment, the UN Principles on Sustainable Insurance, and the OECD Guidelines for Multinational Enterprises, that are aimed at making corporations good global environmental citizens.

Monica Feria-Tinta discussed two core foundational principles of environmental law: the polluter pays and the duty of states 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 caused by these emissions. One of the most interesting developments to date is the case of *Saul Luciano Lliuya v RWE* that is currently before the Higher Regional Court of Hamm in Germany. The case involves a claim for declaratory judgment and damages filed by a Peruvian farmer, Saul Lliuya, in a German court against RWE, Germany's largest electricity producer. In short, the grounds for the complaint are that RWE, having knowingly contributed to climate change by emitting substantial volumes of greenhouse gases, bears some measure of responsibility for the melting of mountain glaciers near Lliuya's town of Huaraz. In orders dismissing an argument from RWE challenging the validity Lliuya's claim in February 2018, the Court held that:³

...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, as victims of climate change or environmental degradation, small states can become unintended victims in disputes of much 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\$2 billion 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 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 small states, especially in the Pacific, have taken drastic measures to ensure their survival, such as buying land in other states.⁴

² See *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905.

³ See Order on the Defendant's Argument of 14 December 2017, *Saúl Ananías Luciano Lliuya v RWE AG* (Unofficial English translation) (Higher Regional Court of Hamm, 7 February 2018)

<<https://rwe.climatecase.org/sites/default/files/2022-10/07.02.2018%20Higher%20Regional%20Court%20of%20Hamm%20Order%20on%20the%20defendants%27%20argument%20of%20December%2014th%202017.pdf>>.

⁴ Being the decision by the government of Kiribati to purchase freehold land in Fiji.

Steven Finizio, partner at 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.

Professor Alberto Costi of Victoria University of Wellington revisited the question of whether lawyers and judges are able to use science. Drawing on Penehuro Lefale's and Lord Carnwath's contributions, Professor Costi especially drew attention to the capacity issues small states face regarding providing evidence. He suggested that for a 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 states and the global citizenry 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 at 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 at Twenty Essex, 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 being usurped by the previously mentioned "material contribution to the harm" test.

Scott MacDonald, principal of Ramboll Group, 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. He concluded that for planned future project activity, a quantitative risk assessment is a more appropriate method to assess risk.

Following the detailed discussion of the existing dispute resolution mechanisms regarding environmental degradation and climate change and their challenges, the conference focused on alternative ways of dispute resolution and options for preventing dispute resolution altogether.

In his keynote, **Graham Dunning QC**, barrister at Essex Court Chambers, explored whether 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 at Volterra Fietta, discussed the initiative for 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 of using international arbitration to resolve environmental disputes.

Dr Maria Banda, Graham Fellow at the University of Toronto, reminded the audience that transboundary environmental harm is a fact of life for many small states. While in theory international law provides a range of protections to states threatened or injured by transboundary environmental harm, in practice existing legal frameworks have provided very few effective remedies to small states and their citizens. 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 especially drew on recent developments in the Americas, where the Inter-American Court of Human Rights may have signalled a new era of international environmental responsibility.

Teresa Mackey, marine research fellow at the 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 ecologically and biologically unique and of 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 at Victoria University of Wellington, brought to the attention of the audience innovative legal measures for environmental protection. She addressed the 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. Ms Iorns 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 and abundance of species, 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 preparing the coastal populations for the changes that the future might bring.

Dr Troy Waterman, lecturer at the University of the West Indies (Cave Hill), discussed tourism development within the context of the 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 the idea that when the above is considered within the context of the dominant social paradigm; the new environmental paradigm; and the ethics of instrumentalism, the Caribbean might not be peculiar after all.

Dr Petra Butler, co-director of the Centre for Small States at Queen Mary University of London and professor at Victoria University of Wellington, recapped that the papers presented and discussions had 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, 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 could be a tool of activism when it came to the environment.

Sir David Baragwanath stressed the important role the judiciary can and should play regarding the resolution of environmental disputes and **Professor Ilan Kelman** of 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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