SMALL STATES CONFERENCE 2022

Trade, Investment and Small States

Introduction

Wilmer Cutler Pickering Hale and Dorr LLP, the Institute of Small and Micro States (ISMS) and the British Institute of International and Comparative Law (BIICL) hosted the annual Small States conference. The conference is the seventh in a series of conferences on issues relating to small states. The focus of the seventh conference was on Trade, Investment and Small States.

The Small States' conferences have brought to the fore issues and challenges that small states are facing and has made an impact in research development. In light of the recent health crisis, environmental challenges and technological advances, trade and investment and the needs of small states have to be reconsidered. The five panels featured different perspectives regarding the state of trade and investment from distinguished experts in diverse fields from multiple jurisdictions.,

The first panel set the scene on key issues of trade and investment, the unique challenges faced by small states, as well as how these challenges can be addressed using their cultural, historical and social realities. The second panel discussed the trade disruptors, including climate change, tax regulation, and WTO challenges, as well as technical solutions. The third panel discussed AI, data, the internet, e-commerce and how they interact with trade on a regional and international level. The fourth panel the role of trade and investment in mitigating the disastrous effects of climate change to small states, despite having contributed the least to greenhouse gas emissions. The fifth and final panel was on international dispute resolution both for investment disputes, as well as for trade.

Topic I—Trade and Investment in Small States (setting the scene)

Chair: **Michael Howe**—Counsel, Wilmer Hale

SUMMARY

This panel set the scene for trade and investment in small states. Ambassador Falemaka addressed the keynote speech and focused on trade and non-trade issues that impact the Pacific Island Developing States and how trade can have a role in building resilience in the regional market. The panel discussion started with Dr Tsotang Tsietsi, who focused on Lesotho as a landlocked least developed African small state, its vulnerabilities and market advantages, due to its unique landscape. Dr Helen Kavvadia discussed Luxembourg as a success story in terms of trade and foreign direct investment through the use of economic diplomacy. Dr Jordi Paniagua presented his research findings on a euro and its trade-induced welfare effects of the EMU. Finally, Ruth Teitelbaum presented her proposal for an ICSID trust fund for collective payment of future award debt.

Keynote

Ambassador Mere Falemaka—Permanent representative, Permanent Delegation of the Pacific Islands Forum to the United Nations, World Trade Organisation and Other International Organisations in Geneva.

Building resilience through trade in small states - a Pacific perspective

Ambassador Mere Falemaka began by stressing that Pacific states value discussions on small states policies due to the challenges they face. With particular reference to Small Island Developing States (SIDS), Ambassador Falemaka discussed the international mechanisms which are in place namely the Barbados Programme of Action; the Mauritius Strategy; and more recently the Samoa Pathway. These mechanisms have helped SIDS work together towards shaping governmental trade policy agendas. Further to these mechanisms, the Commonwealth plays an important role, as it is currently working on a "universal vulnerability index". On the WTO front, the small vulnerable states congress is trying to secure better rules on how SIDS can engage.

Within her role in the Pacific delegation in Geneva, Ambassador Falemaka represents the interests and priorities of Pacific WTO member states. These priorities include climate change, ocean sustainability, regional security, sustainable development, and COVID-19 recovery, which are endorsed by Pacific Island forum leaders in an effort towards a "resilient Pacific region of peace and security, social inclusion, and prosperity that ensures all Pacific peoples can lead free, healthy and productive lives". Thus, sustainability and development are at the core of the 2050 strategy. Ambassador Falemaka highlighted two perspectives in this regard: first, the trade challenges of the Pacific Island states and their responses to building resilience, and secondly the importance of a realistic assessment on where the Pacific is now - in the face of the multiple challenges affecting the world today - and whether economic resilience can be achievable.

Ambassador Falemaka identified three important challenges. Firstly, as small developing economies, Pacific Island countries are highly vulnerable to economic shocks. With a narrow range of exports and limited natural resources, they are subject to chronic and accelerating trade deficits. Secondly, there are geographic challenges due to the remoteness of the islands, which drive the trade costs upward. Finally, there is inability to benefit from economies of scale, since high wage costs, make them uncompetitive in the market.

While Pacific Island Countries (PICs) all produce similar goods, only 6 are WTO members. In spite of the challenges, "the Pacific Island countries embrace trade liberalisation and trade integration as a vehicle for economic growth and development, propelled by the establishment of the WTO". The Pacific's efforts to building resilience have included a globalisation strategy and regional integration, in order to support regional economic growth and stimulate domestic productions and attract investors collectively. These efforts have been institutionalised through a plethora of Agreements with neighbouring countries and regional instruments, as well as with the EU and WTO. The adoption of the Pacific Island Countries Trade Agreement, which came into force in 2003, is one example. Further, technical cooperation with Australia and New Zealand has taken place, including a trade technical assistance and capacity building package, as well as a labour mobility scheme.

Ambassador Falemaka then focused on the renewed call for trade integration due to what she describes as the “triple c” crisis – climate change, COVID-19 and conflicts – which have resulted in lack of food security and fuel crisis. More specifically, Pacific Island countries (PICs) have recently been increasingly vulnerable to more frequent and more severe weather events. Solomon Islands were given the first place in the World Risk Report of 2021, while other Pacific Island countries were also included in the list. A Category Five Cyclone 10.1 hit Fiji, which accounted for over 60% of the country's GDP in losses. This was one among many extreme weather disasters impacting the region. Further to the climate change considerations, PICs experienced a widespread economic crisis since the COVID-19 pandemic exposed their vulnerability arising from the over-dependence on international trade and tourism. Although many WTO members imposed trade restrictions on exports to safeguard domestic supplies, New Zealand and Australia continued to supply PICs with food and medical supplies.

Nonetheless, in future crises states may face severe disruption, and SIDS must create effective solutions in current negotiations with the WTO for future preparedness. This has also been brought in the fore by the current conflict in Ukraine, the food crisis and inflation. Finally, the “triple c” crises have placed countries and SIDS into a vicious cycle of indebtedness and of constant rebuilding from one disaster to the next, mainly affecting micro, small and medium enterprises in SIDS. These crises have placed them (and SIDS more broadly) on the margins of the multilateral trading system.

According to Ambassador Falemaka, questions arise for the suitability of the current world trading regime. Although many countries have been seeking to integrate to the WTO, the system itself marginalises them. Building resilience in SIDS cannot be achieved in isolation. There needs to be a holistic approach that integrates the SDG elements (economic, social and environment) together, with coordinated support, on a regional and multilateral level. PICs need support for their resilience-building efforts in order to become competitive in the market. Four areas are particularly noteworthy.

First, in terms of e-commerce, SIDS need to take advantage of the opportunities brought about by the digital economy, the need for which was exacerbated by the pandemic. Towards these efforts, the Pacific Regional E-commerce Strategy (2021) aims to build the capacity of the PICs in digital trade by addressing national gaps in digital infrastructure. Second, meeting the quality and standards requirements of overseas markets is critical. Thus, there is an initiative to improve the quality of Pacific exports. The regional quality infrastructure programme created quality standards and accreditation systems. The third area would be to create a mechanism to institutionalise and coordinate the work on trade facilitation across the region. Some countries are integrating efficient border processes and automated customs systems, supported by Australia and funded by the EU. The fourth area relates to services and orange economy. Although there is currently no capacity to materialise this initiative, it is on the regional agenda of the to develop the non-tourism sector. Concerning the need for green trade resources, Ambassador Falemaka highlighted that although PICs collectively contribute around 1% of greenhouse gas emissions, they are on the frontline of climate change, marking an urgency for international cooperation to shape WTO with environmentally friendly trade. WTO ministers recognise the important role that the WTO has in promoting the UN 2030 agenda and Sustainable Development Goals, while SIDS must engage actively in discussions on environmental issues.

“The Pacific Island forum leaders consider climate change as the single most important challenge and greatest existential threat to the Pacific”.

Panel Discussion

Dr Tsotang Tsietsi—Senior Lecturer, Department of Private Law at the National University of Lesotho

Trade and investment from the perspective of a small African state

The speaker focused on Lesotho, studying trade and investment as a landlocked Least Developed African Small State. Under strict terms, Lesotho does not fit the definition of a small state, since its population is just over 2 million (above the definition limit of 1.5 million persons). However, in her case study, Dr Tsietsi examines Lesotho as a small state with a relatively small market and its struggle to produce and to export competitively. These issues are rendered more difficult by the geographical location of a State. In times of crisis, such as the COVID-19, the economy of small states contracted by up to 7%, which is far more than larger states. Lesotho is a landlocked country, with a unique geographic location, since it is enclaved by South Africa. The socioeconomic conditions resemble a small state, with almost 50% of the country living in poverty, mostly experienced in the rural communities that make up 70% of the population. Life expectancy is low, at 59.6 years for females 51.7 years for males, and almost a quarter of the population (22.5%) is unemployed.

Dr Tsietsi examined how Lesotho can leverage trade and investment in order to tackle these socioeconomic conditions. Towards this aim, Lesotho has some advantages. Firstly, there is a high literacy and education rate, with UNESCO showing that the between 77% of the people aged 15-24 years of age are literate, due to free and compulsory primary education. According to Dr Tsietsi, literacy and education can be appealing for foreign direct investment. Although Lesotho is not very rich in natural resources, there is abundance of water, which gets exported to South Africa, as well as six diamond mines, which export around the world. Further, Lesotho has an advantageous landscape, since it has the highest and lowest altitude rates in the world, which contributes to the quality of produce, such as medical cannabis. In terms of market access, Lesotho has access to the Southern African Customs Union market, the Southern African Development Community market, the newly launched African continental free trade area, as well as the WTO.

> Domestic policies need reform, in order to improve the trade and the investment environment.

Despite the above advantages, Lesotho's foreign direct investment inflows remain low, making up of 1.24% of the GDP. High literacy rates do not lead to high skilled employment, leading to insecurity, particularly in the textile and garment industries, where there are no stable investments. This was exacerbated during COVID-19, where there was a decline in the global demand. The uncertainty has led investors to be attracted in footloose industries, which can be easily dismantled.

To attract investment, there are several areas of improvement. For instance, the industrial policy which expired in 2017 has not yet been reviewed or updated. The licencing system also needs more transparency and clarified rules. Further, the legal environment has gaps to be addressed, which would otherwise make Lesotho an unattractive jurisdiction for investment. The competition bill, for example has not been passed into law, which can affect investment prospects and could potentially regulate the smooth function of the market and competitors. Lesotho could also benefit from digital trade, provided that there are technological and legal advancements. This can also benefit from budget allocation, providing more emphasis on technical training and building of infrastructure, technology, as well as for research and development. Moreover, internal institutions monitoring corruption and financial crime must be better equipped, which would otherwise undermine investor confidence. Gender inequality is another major issue, which although has seen improvement, needs to be further addressed.

To mitigate these issues, Dr Tsietsi argues for regional harmonisation and cooperation. Lesotho can draw strategies and policies from neighbouring states, which reflect the values and best practice of the African Continental Free Trade Area. Participation in the region will help build better trading relationships within the African single market rather than the American market and the European markets, which have shown volatility. Last, but not least, Dr Tsietsi highlighted that the international outlook of small states should be improved. Small states do not have a strong voice in the international scene, which could only be remedied by joining forces in conversations and negotiations to promote their interests. For example, joining the LDC group in the WTO discussions would strengthen their voices and would result in more favourable outcomes.

Dr Helen Kavvadia—Visiting Research Associate, University of Luxembourg

Economic diplomacy of Luxembourg in terms of trade and foreign direct Investment

Critical factors for the success of Luxembourg are its economic diplomacy, trade and FDI, as well as its strategy for political, economic, and social support.

Globalisation has intensified the interdependence while also stepping up competition, especially further to the multiple crises the world has been facing since 2008. On the other hand, the new geostrategic and geo-economic environment have weakened the support for global integration at its lowest level in the modern era. There are regional tensions as a result of more isolationist trends, for example between US and China. Small states are particularly challenged by being dependent on international trade and investment, seeking shelter very often in multilateral and regional clusters. Additionally, at national level, they scale up international cooperations in international trade and FDI, where economic diplomacy plays a role.

Dr Kavvadia gave an overview of Luxembourg as a state which uses economic diplomacy for boosting its economy and soft power in the European and international context. Luxembourg is a landlocked country among EU member states, which is of great significance in its economic being. It is a small country with 650,000 inhabitants, yet its economy is the most successful in the EU, with the highest GDP per capita. Thus, it is worth looking at it as a case study, not only for other small EU countries, but also for non-EU member states.

Luxembourg's political and economic diplomacy goals are achieved by political or other economic tools. There are many definitions about economic diplomacy, which describe it as a process of modern diplomatic activity in pursuit of economic security or service. Dr Kavvadia provides a definition that describes it as "a way to promote state objectives, economic policies and activities involving state and non-state actors".

The aim of the diplomacy is how to best mix and match these vectors, to include trade and investment. Economic diplomacy involves a "business end" and a "power play end" and goals and tools can be placed somewhere between these two, according to Okano-Heijmans' framework 2011.

In terms of trade, Luxembourg has evolved over the years, where exports are higher than imports. Further, it is not only the most open OECD economy, but it has been also a very resilient one. Imports can be particularly beneficial in resource acquisition, like talent, skilled labour force, energy, raw materials, and others that are put in production in order to achieve the export and the economic growth and the development of sophisticated supply chains.

Luxembourg has been mostly dealing with imports and exports with non-euro area countries. Since 2007, following the financial and sovereign financial crisis there was a collapse of the inward coming flows of FDI and, at the same time, there was a peak of outward flows of FDI, which is understandable, as the euro area was particularly hit at the time. It further facilitates tax-wise in an enabling environment for FDI and has managed to improve its attractiveness, even post-COVID. FDI is concentrated around clusters which are strategically selected for the evolution of its economic model and achieve innovation. These include eco-innovation, healthcare, technologies, ICT material technology, space technologies, automotive components, logistics and maritime transport.

FDI stems to a large extent also from non-euro area countries, like US, UK, Denmark, or Sweden, including big companies, but also smaller ones. According to Dr Kavvadia, Luxembourg, as a small wealthy country, aims for political advantages, rather than economic ones, in order to gain agency and positioning itself in different fora.

Luxembourg economic diplomacy has followed different waves and the development of the economic model of the country. The first wave was based on the secondary sector between 1936 and the 1980s, which was mainly steel and coal. The second wave started underperforming, so the country moved into the services and mainly the financial sector with 11% of employment have the lead role in its GDP. The third wave started in 2010 and is currently transitioning. Due to the financial sovereign debt crisis, the economy was vulnerable. Since then, there have been digitalisation efforts which have led Luxembourg to rank seventh on the European Innovation scoreboard.

The critical factors for the success of Luxembourg are economic diplomacy, trade and FDI as well as its strategy for political, economic and social support. These components are well-coordinated and well-communicated and in synergy with different economies. The economic growth has increased competitiveness and integration in global value chains and lead to stronger market share of the country. Luxembourg aims for political gains through trade and investment and its economic diplomacy for scaling up its soft power, its ability to get through attraction, rather than coalition or payments.

The Euro has good effect in terms of welfare, both on euro and non-euro countries.

Dr Jordi Paniagua—Professor, University of Valencia

Has the Euro Paid Off? A Study of the Trade-Induced Welfare Effects of the EMU

This presentation focused on the euro effects on small states in the European Union. Within the EU, there are several states, such as Cyprus, Malta and Latvia that joined the euro-zone. The impact can be assessed through an analysis of the effects on consumer prices, producer prices and GDP when these countries joined the euro. The question discussed is whether the euro helped economies develop, especially in the in the midst of an asymmetric economic crisis, like the one of 2007. The research (which is also presented in a paper) identified a trend whereby domestic trade declined, while trade within the Economic and Monetary Union (EMU) countries and non-EMU countries increased. This means that although most of the goods that are produced in a country are consumed within the country, the share of goods imported from other countries is on the rise and today we have approximately more than 25% of the value of goods in the euro zone which are being produced outside the euro zone.

The presentation focused on whether the introduction of the euro increased trade volumes by estimating the general equilibrium effects, not only for exports, but also for consumer prices, producer prices, and the GDP.

This was done by examining three counterfactual experiments. For the purposes of the first experiment, the world was divided into euro countries and non-euro countries in order to estimate the overall gains of trade of the EMU. Then, there is a comparison with the gains obtained by the peripheral member countries. Finally, there was an estimation of the gains from trade due to the trade creation effects with non-euro countries. As explained in the analysis, euro has a good effect in terms of welfare, both on euro and non-euro countries. Smaller countries, such as Malta, Cyprus, and peripheral countries, such as Austria, have benefited the most from the euro. The main conclusion of this paper is that the introduction of the euro was beneficial for both EU members and for the rest of the world, as it increased their welfare for both consumers and producers. However, it can be seen that it has increased the welfare of EU members mostly and more specifically for smaller states, more than larger states.

For the second counterfactual experiment Dr Paniagua used the example of a two-speed euro to highlight that the fact that policy recommendations, which are the best alternative from an economic perspective are not feasible in reality. A two-speed euro would have enhanced the welfare of the whole Europe, but the distributional differences between core and periphery countries would have prevented it from happening in reality. The second conclusion of the paper is that economic policy has to be grounded by reality.

The third counterfactual experiment eliminated the factor of the third country effect. This experiment showed that most of the GDP increase is driven by third country effects. This explains why the periphery enjoys higher welfare in this two-speed Euro. The countries which are benefiting the most from this are countries, such as Spain, Portugal, Ireland, Cyprus, Malta. Joining the euro means strong commitment for firstly currency stability, and secondly stability in the macroeconomic policies that govern these countries. Being members and adhering to the policies set by the European Central Bank sends a strong signal to the market, that they are committed to have economic stability and trustworthy monetary policy. For example, there is no way that these countries would devaluate the currency. The third conclusion made is that economic integration is about commitment to stay within the realms of the economic railroad of the EU.

The takeaways with some lessons learned from the study are the following. Applying state of the art economic analysis of the equilibrium effects of the euro area, enabled quantification of welfare in correlation with the euro. The results indicate that the euro has been successful at promoting economic growth and welfare on both consumers and producers, within and outside the eurozone. Further, the main policy message is that the euro has been one of the most successful experiments in economic growth, both for consumers and producers. However, a better economic design or phasing in the euro, like a two-speed euro, would have led to higher growth. Nonetheless a reality check should be in place to see if what the economists think, would be relevant in the real world. The third message would be that trade outside the EMU appears to be the primary driver of welfare effects.

Ruth Teitelbaum—Independent Arbitrator

An ICSID trust fund for collective payment of future award debt: aligning the goals of foreign investment, development and climate change policy

In the context of a global crisis, investment arbitration is facing a crisis of its own. It is often that state parties in investment disputes do not pay for the arbitration awards, which creates sovereign debt. Ruth Teitelbaum noted that if states can enter into treaties providing for mutual benefits, they can also be able to ensure, collectively, the future payment of arbitration awards. This presentation proposed that members of the International Centre for Settlement of Investment Disputes (ICSID) should collectively finance future arbitration awards and settlements.

> If states can enter into treaties providing for mutual benefits, they can also be able to ensure, collectively, the future payment of arbitration awards.

Sovereign debt resulting from non-payment of investment arbitration awards is a threat to peace and security, and therefore a shared burden among states. Investment arbitration is facing increased criticism over its legitimacy and fairness. ICSID awards owed by states are often not being paid voluntarily, in violation of the ICSID Convention. States include members of the EU, who not only resist payment, but are also hostile against the entire system of investment arbitration. The enforcement of unpaid awards in many instances can lead to economic warfare.

Creditors seeking an award debt eventually can seize assets, however, this creates a dangerous and unpredictable system, since the freezing of states' assets in domestic courts may result in sovereign default and can lead to the inability of governments to access capital markets, particularly for small and developing states. Recently, creditors seeking to enforce an ICSID award debt owed by Ecuador froze Luxembourg bank accounts used by Ecuador to make coupon payments associated with Ecuador sovereign bonds. This has placed Ecuador in risk of defaulting on its sovereign bond payments, which can pose the threat of a debt crisis in Ecuador. Moreover, creditors are capable of disrupting a country's trade and exports for years. This can be demonstrated by a debt enforcement case, where the creditors managed to interfere with oil exports of the Republic of Congo for several years, disrupting a critical multibillion dollar industry in Africa.

The idea of collective financing and burden sharing is not new to international tribunals and organisations, with the WTO being a prevailing example. The WTO model is based on the protection of cross-border trade and the idea that it can develop peaceful relations. WTO members contribute annual cash dues in proportion to each member share of international trade, based on trade and goods services. This shows there are 164 states of different size, economy, political structures, which are willing to act in solidarity to finance cross-border trade. Thus, there is no reason why the payment of ICSID awards could not be financed collectively. The ICSID fund could distribute claim proceeds every year on a *pari passu* basis. Guidance can be sought from other tribunals, such as the US victims of state-sponsored terrorism fund, administered by the US Treasury Department. It collects fees from sanctions when it penalises companies for violating US sanctions law and uses those funds to pay out victims of terrorism.

What distinguishes the proposed ICSID fund from the WTO collective annual dues model is that ICSID members would be allowed to pay the proportion of dues with debt in sovereign green bonds in order to support sustainable development investments. For example, the Republic of Chile issued 3.8 billion and sovereign green bonds in 2020. Small states, such as Fiji have also issued green bonds, which were used for rehabilitation following a Tropical Cyclone Winston. The International Bank for Reconstruction Development (IBRD), which is part of the World Bank group, is a major issuer of green bonds, having issued 14 billion since 2008. It would be appropriate that the IBRD guarantees the value of the ICSID members annual dues and pays out directly these awards to foreign investors. This would eliminate political backlash from the state paying out claims. There is a long history of ICSID members paying awards with sovereign bonds, such as in the case *Repsol v Argentina*.

The anticipated criticism for this proposal falls along two basic questions. First, if states do not face individual responsibility for the payment of damages, how will they ever learn their lesson? The second question is how does one prevent some states from taking advantage of the contributions of others?

The prospect of having to pay large damages award would deter states from future breaches of investment treaties. However, the argument disregards the way in which the relationship between a government and a foreign investor changes over time, since it fails to appreciate that those who pay for the debts and defaults of a state are not those in charge of decision-making. They are the taxpaying citizens of that state. Investment treaty arbitration disputes frequently arise due to shifting political agenda between different administrations, making it difficult to teach a lesson to a government that is not the same administration. Further, the administration involved in committing the violation is rarely the same as the one paying the debt, due to the lengthy proceedings. While countries rarely invoke the ‘odious debt doctrine’ as a defence under international law, there is a political perception that a debt from a previous administration is an odious debt. A state or Minister of Finance may face not only political unrest, but civil or criminal liability for payment of an award under domestic law. Countries, such as Colombia, have invoked corruption as a defence and nevertheless had to pay. Thus, an annual budget to be paid to ICSID and the IBRD every year, no matter which administration is in charge is a politically neutral act, which would escape political backlash of award payment.

Regarding ‘teaching violating states a lesson’, why should a well-behaved state member of ICSID pay for the bad acts of another? States enter into investment treaties not only to attract foreign investment, but also because they want to ensure that their own nationals are treated fairly. From an investor perspective, the prospect of being guaranteed payment over time is attractive. Further, in the global community there is a reciprocal relationship between states, which inevitably pay a price for the consequences of wrongful acts of other nations. For example, Venezuela's debt crisis impacted the sovereign credit of its neighbours, like Colombia. In the environmental context, Pakistan says it's paying the price for other country's carbon emissions.

Every time a member of ICSID refuses to comply with its treaty obligation to pay an ICSID award, it has unjustly enriched itself from the foreign investment of a string of a state treaty partner, which erodes the value of ICSID membership. Small states that wish to demonstrate their commitment to the rule of law by joining ICSID lose the benefit of their membership and credit worthiness if they do not comply with it. Collective financing is not free, and for small countries that often find themselves on either end of a dispute, it would be a particularly significant contribution.

Potential unfairness could be addressed by encouraging or requiring mediation for six months as a condition of membership in this trust fund, or incentivising states for settlement. Further, the ICSID fund could impose an assessment on a particular member state for bringing an egregious number of claims, to mitigate the cost from other members of the fund. This would impose economic diplomatic pressure, because states would have an interest in not having their dues raised.

Finally, the UN and its institutions, including the World Bank and the IMF, have recognised the importance of restructuring sovereign debt following war and economic crisis. Climate change, war and inflation are creating a dangerous threat to the rule of law and to economic development, yet there is no recognition of the dangers that sovereign debt litigation poses in enforcing investment treaty arbitration awards.

Topic II—Trade Disruptors

Chair: **Dr Julinda Beqiraj**—Maurice Wohl Senior Fellow in European Law, British Institute of International and Comparative Law

SUMMARY

The second panel focused on main trade disruptors, and the technical solutions to mitigate them. The keynote speaker, The Honourable Alvin Boolell focused on the trade challenges that small- and microstates are facing, in terms of their capacity to negotiate trade agreements in a playing field that is no longer level.

In the panel discussion that followed, Professor Dr-Ing Katarina Adam proposed an innovative and transparent tool of blockchain technology which can ensure that donations for sea-level rise can reach the beneficiaries without third party involvement, and therefore reduce costs along the process. Dr Jan-Yves Remy discussed trade disruptors in the Caribbean and particularly how climate change has challenged trade agreements to accommodate the pursuit of sustainability. Lastly, Jivaan Bennett made an overview of how tax policy attracts or limits foreign direct investment in the Caribbean.

Small and microstates governments have to prepare for the worst within the current climate of the globalised world trade.

Keynote

Arvin Boolell—MP, Mauritius and Former Minister of Foreign Affairs

Small and microstates governments have to prepare for the worst within the current climate of the globalised world trade. The World Trade Organisation has become weak well before the COVID-19 pandemic, following the paralysis of the appellate body. Therefore, WTO members cannot seek redress for unfair trade, which leaves small states and smaller economies at a vulnerable state.

The African Union (AU) free trade agreement and the CARICOM are the first to be targeted, despite eligibility to special and differentiated treatment. The vulnerability index increases with the proliferation of bilateral and regional investment and trade treaties, since not all countries have the capacity to negotiate and make the most of trade agreements.

Although in the past many micro and small island developing states have used trade preferences to widen the economic base, the playing field unfortunately is no longer level, according to Honourable Boolell. In the midst of a financial crisis, superpowers and emerging powers are tolerating aid disruptions and the greed of multinationals. The political situation in the United States is one example, since President Donald Trump has launched a series of attacks to the trading system, victims of which are small island developing states. Big polluters' impact on the environment can lead all small island developing states to perish. The islands with sustainable trade and differential treatment should not be called upon to pay for polluters in the context of rising protectionism of multinationals taking advantage and depleting the struggling stock. In fact, there have been concerns that the highly remunerative marijuana corps are phasing out critical sugar cane.

Further, the tax haven that numerous small island states are offering, are not safe without substance. There have been calls for effective management of tax, which would result in blacklisting countries for alleged money laundering activities and financing of terrorism by the EU and grey listing by bodies like the Financial Action Task Force. Some islands have been removed from the lists since then, after trying to comply with the set recommendations.

"There is no room indeed for Kleptocracy. Proceeds from sale of sugar and other commodities to preferential market have been used to widen the economic base through investment in emerging sectors". For example, Mauritius, due to political vision and a great public-private partnership, has had a rising economy. In an environment where there are infrastructure gaps and excess regulatory red tape, rebalancing export and capturing new opportunities in existing and emerging markets are critical. A demand-based approach can be a short-term solution, provided that the investment and trade promotion strategies be coherently aligned with efforts the competitiveness of domestic producers. In the competition race, countries are restructuring their economic policies to provide incentives to attract foreign investors. Since the 2008 financial crisis, trade growth has had negative effects on the supply chain.

The vulnerability of small island developing states impacts their sovereignty, however perceived neo-colonialist tactics do not comply with the law, while a country's natural resources should not be weaponised.

Panel Discussion

Professor Dr-Ing Katarina Adam—Professor, HTW Berlin

Sea-level rise: a (technical) solution on how small island states overcome this threat

> In the charities' donations system, there is room for improved transparency, as well as for increased participation rights of donors.

Dr-Ing Adam presented an idea which was born during the last Small States Conference in 2019. The project would provide for a technical way to support small states through a blockchain system. In the charities' donations, there is room for improved transparency as well as for increased participation rights of the donors.

In the decentralised systems, there is more than just one central authority in deciding who is in charge of who should get the donations, or which project is worth donating to. Further, there is immutability, since in blockchain you cannot change or delete transactions. Once something is registered in the blockchain, this cannot be manipulated, and if one tries to, it is instantly visible. How can we create a governance system in this field? With a blockchain solution, users can create a governance system and decide what kind of governance they would like to follow, using a consensus algorithm. Any transaction needs to be agreed upon, whether it is a proposal for a project or whether there is an amount of money for donation to a specific project. This fully transparent system records instantly any donation amount, and uploads simultaneously to all participants in the consensus mechanism who are validating the transaction. Thus, all participants have the exact same copy, which means that in terms of safety, a good organised blockchain cannot be hacked, since all participants would need to be hacked simultaneously, which would be improbable.

Smart contracts as a feature facilitate transactions and ensure their validity. These contracts are programmable by code and can only perform the actions they are designed for, making them immutable. This in turn validates blockchain autonomy, since no third party is involved. The trigger would be enough to kick off the process as soon as it is needed. Further, contracts can be customised, according to the participants' needs. Last, but not least, within the concept of the Decentralized Automated Organization, participants can define the governance rules. In the specific charity blockchain, participants would be handed over so called voting tokens, which gives the right to decide for which project and which the amount of money will be used.

The technical side of the project is already well under way with a first mock version available, while the business plans and legal implications will be developed in the future.

Dr Jan Yves Remy—Director, Shridath Ramphal Centre for International Trade Law, Policy and Services, University of the West Indies

Trade disruptors in the Caribbean

Climate change is a reality which is affecting trading patterns.

Dr Remy gave a presentation with a focus on trade disruptors, and in particular how it impacts the Caribbean, and in particular small island developing states. Her presentation focussed on climate change and on sustainability challenges. How has trade changed to accommodate new realities and paradigms?

There are different ways in which trade has changed: in terms of the articulation of rules adaptability to changes being ushered in by climate change exigencies is essential. There is a shift in thinking less in terms of market access or trade liberalisation, and more on the tit for tat approach to concessions and exchanges of concessions. Sustainable trade is essential to a cohesive approach to development. The IPCC has termed this as sustainable climate development pathway process, looking at mitigation and adaptation to support sustainable development for all. This model has already infiltrated fisheries negotiations, which are no longer just about trade distortions, but also consider long term viability.

Dr Remy thinks that it is essential to bring new approaches in the front and centre of trade agreements and thinking of climate change linkages with the FAO bodies and the WTO. This would contribute to the common good, as opposed to simply suggesting a forum for negotiations and exchanges. Conceptually, this development is in the works, as some developing countries are leading discussions on the circular economy. The countries which are invested in the process are also thinking about the blue economy, biodiversity, the circular economy, which are tied to climate change. This shows disruption (both positive and negative) as we are confronted with a choice to think about whether the WTO is fit for purpose in terms of financing and investments. The dysfunctional WTO Appellate Body has taken away the ability of states to take their case before an impartial body. In the absence of it, small states cannot ensure that bigger economies are fulfilling their international obligations; they have much less than a toolbox and bargaining power.

Why is climate change disruptive? Climate change is a reality which is affecting trading patterns. Climate change has created changes in the land use, as well as in agriculture. Further, even in terms of tourism, coral bleaching and fisheries have had a detrimental effect on the economy. Extreme weather patterns, including hurricanes and storms can deplete a country's GDP in less than two hours.

The WTO therefore needs to provide opportunities for CARICOM countries to mitigate their losses, even though they are the least contributing to gas emissions.

Further, Dr Remy argues that the vulnerability index should be a determining factor of receiving differential treatment, compared to the US-backed GDP per capita factors. Objective criteria should include vulnerability and climate change, in order to transform the agenda.

Among different recommendations, such as greater awareness on climate change, Dr Remy thinks that technology, such as blockchain or e-commerce can reinvigorate trade opportunities for small island developing states. It would also be beneficial to think more broadly how the WTO intersects with regional trade priorities and industrial policy. The green economy, blue economy, climate change strategy and technology should be promoted as priorities. How can small states monitor and participate in the international standard setting, for these areas? These discussions should be invested on to provide basis for determining the emissions not just in terms of the production, but also in terms of the consumption of some of these products which have carbon. Thus, there needs to be dedication to empower a professional body to monitor emissions.

Jivaan Bennett—Head of Linklaters Caribbean Group

Post-crisis taxation in small states: a Caribbean case study

Caribbean tax policy in the post health crisis era is of vital importance.

In a climate of global inflation, soaring energy prices and political turmoil, the Caribbean is undergoing “a long festering boil” followed by “a short, sharp jab”, according to Jivaan Benett. The GDP for a number of jurisdictions significantly decreased during the period of 2020 to 2021, due to COVID-19 in the Caribbean and Latin America, given the dependence on tourism Caribbean States. However, the second and perhaps more prolonged crisis the long festering boil, which arguably has not reached its peak, will follow the international tax law and tax policy.

Among different issues faced by the Caribbean which contribute to the crisis, are the blacklisting of many small states, the lack of information sharing on tax, as well as the lack of compliance with the Foreign Account Tax Compliance Act (FATCA) in the banking sector in the Caribbean. Finally, the OECD pillars, proposed by the OECD, have introduced a minimum corporation tax for some of the largest multinationals, namely those with an annual turnover of 750 million euros or more.

Caribbean tax policies on the one hand need to drive economic growth, yet on the other hand need to provide payment to the state for public services. Also, policy should ensure that there is equity. Further, tax also has a political impact, which can also contribute significantly to the downfall of regimes, like the Boston Tea Party, the poll tax, or the Roman Empire tax. Caribbean tax policy in the post health crisis era is of vital importance, not only because it touches on the financial survival of a number of our jurisdictions, but also it plays into that need for equity and for ensuring that we have societal cohesion within our jurisdictions.

Based on this background information, two questions arise this far. First, the presenter looked at which are the tax reforms and the legal risks that exist for small states, and specifically, Caribbean jurisdictions. Second, trade disruptors, and possible easy wins for Caribbean States were discussed. The final question is what can states do to ensure that they position themselves from tax policy perspective.

Although the Caribbean region is staffed with qualified tax authorities, there has been expansive reading of the legislation leading to unsustainable audits. Investors have tolerated this in the past, since this is a cost that business must bear, and one which is still at less cost than more developed states. However, tolerance is wearing thin in the current economic climate. Investors are not as eager to invest when faced with dubious practices from tax authorities. Yet, some Caribbean jurisdictions are taking an aggressive approach and have implemented unfavourable tax policies.

Caribbean states are bond by international obligations, bilateral investment treaties, double tax treaties, regional law and the single market treaty. Recently, there has been a spike in bilateral investment treaty disputes, with many of these interlinked to tax measures tax measures that were implemented post financial crisis. With the post-pandemic crisis, small states are going to deploy new tax measures, which will serve as warning to investors.

Double tax treaties may be used by investors in small states to challenge some of the dark tax measures that are in place. One example is the group loss relief, under which, the entire group acts as one economic unit, such that if it is one subsidiary makes profits, but the other makes losses, they can group their losses so that overall, you look at the tax position in relation to that group profits. Some Caribbean jurisdictions still take the position that if the parent company is outside of the jurisdiction, even though both subsidiaries are within the jurisdiction, they will not allow group loss relief. However this is in breach of the non-discrimination clause in a number of OECD model double tax treaties.

The final risk is around single market arrangements in the Caribbean, which are governed by the Treaty of Chaguaramas, similar to Treaty of Maastricht and the TFEU. It took the EU a number of decades to recognise that fundamental freedoms have an impact on direct taxation. In the Caribbean, no case addressing direct taxes has ever been brought. However, small states need to be mindful of whether their direct tax policies potentially breach some of these international obligations that they have signed. It is bad enough to be maintaining tax policies that are particularly harmful to international investors, even worse when it is their own regional neighbours.

The speaker concluded with setting out recommendations in terms of reforms expected for the Caribbean. If states wish to foster growth in trade and investment, legal, administrative and policy reforms are necessary. Firstly, the law needs to be updated, since some jurisdictions still have colonial-era legislation. For example, there are no provisions on capital allowances for intangibles, since the outdated legislation provides only for tangible allowances. This is no longer relevant in a technological era. Further, some states in the Caribbean still rely on company legislation based on the 1980s Canadian legislation. An example is the LLP, a limited liability partnership that combines the best of limited liability in a company context with tax transparency of a partnership.

In terms of the administrative changes, Jivaan Bennett argues for a more customer-oriented approach. Much like in the UK HMRC, there are customer relationship managers to ensure the correct structure of affairs, the Caribbean could benefit from capacity building in this respect. With the decline in tax authority training, younger tax auditors are unable to develop their skills. At a policy level, there is increased cooperation on regional taxes to ensure that tax leakage is minimised, not advocating necessarily for harmonisation of indirect taxes such as VAT which exists within the EU. Nonetheless, information sharing is something that could potentially help the region. Finally, it would be useful to embed ESG considerations into the tax system, to ensure that processes are carried out in a sustainable way.

Topic III—AI, Data, the Internet, E-commerce and Trade

Chair: Professor **Spyros Maniatis**—Director, British Institute of International and Comparative Law

SUMMARY

The third panel treated the big role that AI, data, the internet are playing in the trade and e-commerce. The keynote speaker, Professor Kelsey discussed the need for Pacific Island States to adopt e-commerce strategies, to create trade agreements suiting their unique challenges and digital-related commitments in the Pacific. Paul Baker focused on multilateral treaty negotiations on e-commerce and the role of small states' development objectives. Dr Edwini Kessi dealt with small island states and how they can benefit from agreements, such as the PACER Plus and the WTO. Last, but not least, Dr Sara Migliorini presented on how different states approach AI regulation, as well as the implications for small states and foreign direct investment.

Keynote

Professor Jane Kelsey—Professor Emeritus, University of Auckland

Digital dependency or digital self-determination for small island states in the 21st century?

New and continuing development challenges are being faced by small states, including public debt and recession, inflation and food and energy crises, and the continuing digital divide. Focusing on the latter, Pacific Island countries adopt binding and enforceable commitments on e-commerce in a potentially very broad raft of free trade agreements. To set the scene for the presentation, Professor Kelsey provided context.

Firstly, the technological and digital evolution is not occurring on the level playing field. In the digital ecosystem, most tech companies as based in the US and to some extent in China. This creates an unavoidable dependency of SIDS, which also run the risk of being digitally colonised by the big tech companies, which have no interest in their well-being. Secondly, geopolitical battles are underway between the US and China, with the digital technologies, infrastructure and regulatory frameworks and control over data. With China's infrastructure initiatives in the Solomon Islands, the Biden administration has turned to the Pacific Island leaders with promises of partnerships, support for infrastructure, transportation, cyber security capacities and digital infrastructure. Thirdly, there is an increasing use of free trade agreements to develop the exporting of the preferred models of each of those countries. These rules can include unrestricted relocation of data, no requirement that offshore operators have a local presence, etc. Fourthly, SIDS are dependent on donor funding by the rulemaking states for their digital development. This risks them becoming subject to potentially incompatible and competing regulatory frameworks, all of which they are expected to implement. This resembles colonial history, dependency and vulnerability towards superpowers. Finally, some developing countries and some international organisations have been contesting these models. Rwanda and India, for example have been developing localised digital regimes on indigenous data sovereignty and data governance.

The Pacific e-commerce strategy is portrayed to be a catalyst for sustainable development. This includes, promotion of digital marketplaces dominated by the big tech, support to the private sector for regional e-commerce market, and incentivising the development of export markets by private sector operators. Further, there are proposals that are already being implemented to train forum countries negotiators for future digital trade agreements, e-commerce provisions and FTAs.

The UNCTAD Digital Economy Report 2021 has been playing an important contrasting role. On the one hand, it has been developing digital readiness strategies along the lines of the Pacific e-commerce strategy. On the other hand, the digital economy report from 2021 issued a warning that developing countries need to be able to drive their own development in the digital sphere, not limited by a new dependency that is also undermining their ability to develop their own data and data flows strategy and exercise digital sovereignty.

The UNCTAD issued a report on South-South Digital Cooperation, which emphasised the need for developing countries to firstly develop their digital infrastructure and incorporate a new component on digitalisation in their existing policies. They also emphasise the need to look holistically at cross-border data flows which are not just economic but also include a non-economic perspective. The UNCTAD Trade and Development Report in 2018 issued a warning that contemporary trade agreements seek deep integration by going beyond trade restrictions at the border but are also producing welfare-reducing outcomes.

The first recommendation was that the E-commerce Strategy and roadmap and the Pacific Aid for Trade Strategy need to be revisited to form part of a holistic digital development strategy. The second recommendation proposes that the strategy needs to be informed by principles of cooperation and relationships with other developing countries who are facing similar challenges to ensure that digitalization meets the needs of the people's communities and governments, as well as economies. The third recommendation is reconceiving e-commerce, outside of the narrow lens of commerce and trade rules. Fourthly, competing superpowers of the US and its allies, and China must refrain from pressuring Pacific Island Countries to adopt the digital regimes of either of them. Fifth, the revised strategy needs to establish Pacific control over data as a priority and as means to assert and implement regional data sovereignty. The sixth of the recommendations was that regulatory cooperation should draw on experiences from countries and regions in the Global South, such as Rwanda in India. Seventh, donors need to stop pressing their agendas onto Pacific Island countries. The eighth recommendation in digital-related commitments by Pacific Island countries in PACER-Plus need to be revisited. Nine, a regional digital governance and implementation mechanism needs to be developed independently of the Pacific Island Forum Secretariat, which has sponsored this agenda and has started with a regional digital ministers committee. Finally, they need to launch a scoping study to examine options for a holistic digital development strategy based on the Pacific's needs, values and aspirations.

Panel Discussion

Paul Baker—CEO, International Economics Consulting Ltd

The implications of potential multilateral rules on e-commerce for small states' development objectives

Paul Baker focused on e-commerce and digital trade, and particularly how it is being negotiated at the multilateral level. The importance of e-commerce is to bridge enterprises in small, isolated countries, that can actually reach larger audiences across the world, something that was not possible through traditional trade routes. Being based in Mauritius, a small island state, Paul Baker highlights the industry engages in e-commerce as a means to expand the economy. Thus, parts of the growth in Mauritius can be attributed to e-commerce. E-commerce enables firms to create alliances and joint ventures, it enables a level of cooperation thanks to the technology, that would not make it possible to collaborate across jurisdictions. E-commerce has introduced new sectors to the economy, new products, for example, 3D printing, new types of services and business models, without sunk costs in accessing new markets.

Negotiations pertaining to e-commerce are not new in multilateral trade. Initial discussion occurred at the WTO Second Ministerial conference (1998) with the adoption of a WTO work programme for electronic commerce. There was a conclusion in the most recent Ministerial Conference in June 2022, with agreement on the extension of the customs duties' moratorium.

There are four negotiating areas of the discussions taking place in Geneva, which impact small states. The first area is tariffs on electronic transmissions. Countries that are net demanders of these types of services are wishing to tax them, the main proponents of which are New Zealand, EU, US and others, they would like to keep that moratorium going for as long as possible, because currently there are no tariffs that are applied on electronic transmissions. Other countries such as South Africa and India are very much against this idea since they would like the flexibility of being able to apply tariffs if they so wish. One of the arguments made for the elimination of these tariffs is that a lot of physical goods which have also had tariffs have now been moved into this digital sphere, for example music, or cinema. However, this might result in loss of revenue, which can be significantly large for the economy, and particularly for small states which do not have a tax base. Most benefit will accrue to developed countries at the expense of developing countries. On the other hand, there are some industries and small states that would benefit from a continuation of this. In some niche sectors, such as 3d designs, analytics, consulting, and others, these are facilitated through the free flow of transmissions without any tariffs. Thus, tariffs can limit the access to knowledge from overseas because it will be more costly to obtain it.

The second core area is looking at data protection and privacy concerns. Particularly the EU being quite heavy-handed in terms of trying to roll out its own framework, has had the first mover advantage. This can create a trust system of data protection and e-commerce. However, the heavy punitive damages for non-compliance and the requirement for non-EU member states to comply for information exchange make it difficult to transact with the EU, due major business cost for small states. Perhaps a multilateral treaty would be useful, but nonetheless different countries have different views on the issue. According to UNCTAD in Africa, for example, less than half of all the countries have the appropriate data protection legislation in place. On the other hand, many countries are ignoring this area for data protection, which is affecting their own citizens as well, since the private sector can use their data in whichever way they want.

The third area is looking at cross-border data flow and data localisation policies. These include 1) Data Privacy, 2) Cyber Security, 3) Law Enforcement, 4) Protectionism, and 5) Levelling the playing field to match compliance requirements for non-digital players. Data deposits are desirable by authorities who would like that the data on their citizens is being kept locally so that they will not be used or tampered with by foreign countries. Some countries are already trying to develop their own data centres, such as Ghana. This tries to safeguard their own business, because it would be very hard to compete with the Amazon and Microsoft cloud computing services. There are concerns, however, to have data stored in such countries than it would be in Silicon Valley in terms of the data leaks. In many developing countries, the compliance costs tend to be very high in comparison to more advanced countries. There were some studies that were looking at a more restrictive approach to data flows, how much would it affect country's exports. In the case of the EU, it would affect around 4% of their exports and 1% of the GDP, amounting to a loss of around 1.3 trillion euros for the EU. The issue for small states is if they want to go down the data localsation route, they need to strengthen their legal and regulatory frameworks.

The fourth and last issue, is looking at electronic authentication. International and intergovernmental organisations, such as UNCITRAL or the Commonwealth Secretariat have developed model laws that provide a platform for small states to enact their own law(s) regarding all aspects of e-commerce, including authentication. These include: UNCITRAL Model Law on Electronic Commerce (1996), UNCITRAL Model Law on Electronic Signatures (2001), United Nations Convention on the Use of Electronic Communications in International Contracts (2005), Commonwealth Model Law on Electronic Transactions and generally the Commonwealth digital Economy Framework.

There is a whole range of areas that need to be reconsidered because if where we started to introduce stronger potential sanctions, the provisions are not respected. The community needs to be sure that they can implement the agreements. Small states need to leverage the opportunities provided by predictable global trade rules and disciplines of e-commerce. Further, they need to identify feasible objectives and to have the right level of ambition in the negotiations, while pushing for special and differential treatment.

Dr Edwini Kessi—Agriculture and Commodities Division, the World Trade Organization

PACER Plus and how the WTO agreements achieved during the Twelfth Ministerial Conference could benefit small-island states

Dr Kessi discussed the interface between regionalism, and multilateralism, and how that impact small island states, the WTO and the dedicated work programme small island states have been pushing for. Initially, it was about having recognition because of their unique challenges, for example, the Pacific Island countries' location, high transportation costs and lack of investment complicate full integration into the multilateral trading system.

However, the recently adopted work programme at the twelfth Ministerial Conference does not give support to small islands to a full extent, even though it reaffirms the commitment to the work programme, and highlights some of the challenges in reducing trade costs. In the Pacific, trade costs include transportation, due to their geographical isolation. Although Article 9 of the WTO agreement developing countries can subsidise transportation costs, they remain exceptionally high and thus only very few Pacific Island countries can export.

Further to the remoteness and transportation cost, there are challenges to attracting investment. Efforts were made at PACER plus to persuade Australian and New Zealand policy makers to encourage companies to invest in the Pacific, but it has proved to be very difficult task, since they cannot dictate companies where to invest. This issue is not unique to the Pacific, since other SIDS are facing similar problems. Dr Kessi identifies a reluctance of members to provide positive responses, therefore regional trade agreements, such as PACER plus, can complement WTO liberalisation. Under the WTO, it is difficult for SIDS to have dedicated outcomes, in regional trade agreements however, SIDS can benefit from unity in negotiations and promoting their agenda to the WTO.

With the Geneva package agreements which were adopted at the recently concluded twelfth Ministerial Conference, SIDS would be benefited from the trade and health decision, which basically relaxes the provisions of the TRIPS agreement. Currently, there is a deadline to decide whether this will be extended to therapeutics and diagnosis, due to COVID-19. This would be a significant boost for SIDS, as we have seen in the Pacific that Australia and New Zealand helping in the supply of vaccines. In light of the WTO declaration, it shows willingness to ensure that vaccines are available, as well as contributions towards future preparedness. Members agreed to impose export restrictions spirally; targeted, proportionate, transparent and temporary, to avoid having restrictions on PPE and vaccine supply at the height of the pandemic. Thus, having this declaration together with the decision on the TRIPS Agreement, would help address the vaccine inequity, as previously seen.

There were two further decisions on agriculture, which were also in the interest of PICs and some developing states. The first agreement was not to impose export restrictions on food by the World Food Programme for humanitarian purposes. If, for example, there is a hurricane in a PIC, then the World Food Programme, will facilitate them as a result of the decision not to impose export restrictions. In the event of a country's own food security being at risk, then that country can impose export restrictions. The second agreement was on food insecurity. However, no real progress on agriculture has been made.

It is important to adopt disciplines on trade distorting domestic support. A number of developing countries tend to have high tariffs in order to protect their farmers. On the one hand, the EU has always had concerns about market access, because it argues market access for agriculture should not only be for agriculture, but also industrial products. There isn't a lot of consensus on market access, since on the other hand, the position of the United States is that they want to see parallel treatment of domestic support, and market access.

A number of developing countries believe that this is a sector of great importance to them. However, there has not been engagement from the developed countries. Linking to the previous discussion on restriction agreements, there was a win for the PICs in fisheries, as access fees were carved out of the subsidies agreement, which is yet to enter into force.

Despite the progress, there are challenges small island states face on a macro level. With PACER Plus, there are guarantees due to free market access to Australia and New Zealand, which is not the case in the WTO, since PICs are not part of the negotiation for market fees. Agriculture may be slightly ahead because there is some discussion but there is no agreed tariff reduction formula. At the moment, negotiations are focusing on domestic support rather than market access. Further, even if agreements are in place for goods and services trade, countries that do not produce cannot benefit from e-commerce nor through traditional means. PACER Plus is trying to address the issue from supply side constraints which prevent them from participating actively in the multilateral trading system. If PACER Plus is to be successful, will depend on how Australia and New Zealand assist PICs to address their supply side constraints so that they can increase their exports of goods and services.

The fact that PACER plus as a trade instrument is more beneficial for the PICs in terms of responding to their unique challenges does not mean that WTO has not supported them at all. However, efforts much broader, but in terms of strategy, Dr Kessi believes that PICs should pursue both trade agreements with Australia and New Zealand and with the European Union to give them immediate market access and help them to attract investment into critical sectors of their economies.

Dr Sara Migliorini—Assistant Professor of Global Legal Studies, University of Macau

The choices of small states in AI regulation

The presentation of Dr Migliorini focused on the regulations on Artificial Intelligence, form a small state point of view. This was examined in three manners. Firstly, the visualisation of regulating AI, secondly, the mapping national regulation in the absence of international consensus, and finally the comparison between the approaches of a small and a bigger state.

There is a global regulatory space for AI technology in the accelerating advances of technology. In this metaphorical space, there are different actors have steaks, the willingness and the tools to regulate it. Actors on an international level, as well as in the national level are slowly starting to legislate. However, the private sector plays an important role in indicating to governments how AI can be regulated. Although the private sector usually participates as a stakeholder in the legislative process, there is an interesting willingness to contribute to the regulation and ethical guidelines, as an attempt to have legitimacy in the regulatory space.

On the international level there is a striking contrast between the advancement of technology and regulation. At the moment there are guidelines and principles, which have no real impact, such as the OECD Recommendation of the Council on Artificial Intelligence (2019) and the UNESCO Recommendation on the Ethics of Artificial Intelligence (2021).

Dr Migliorini selected 15 jurisdictions for which AI is important at the economic and societal level. Data on these indicators was taken from the AI 2022 Stanford Index Report (the '2022 Index'). There are three different indexes, the private investment, the numbers of start-ups funded, and the job postings in the field of AI. Out of the jurisdictions with major economic stakes on AI, many of them have introduced regulation, with EU countries being the jurisdiction that is trying the most to regulate AI horizontally with a heavy compliance framework. Among the jurisdictions that are classified as non-regulating AI, most of them can be defined as small states, for example, New Zealand, but also Israel and Switzerland. The choice not to regulate attracts investment. For example, Switzerland made a deliberate choice not to regulate AI, because of the market, which has numerous important start-ups. Nonetheless, there is discussion to create a framework, following the example of the EU and China.

The jurisdictions that decided to regulate have a preference for either self-regulation or top-down regulation. The big players are in a position to regulate, not only because they are a powerful state on the international arena, but also because of institutional reasons. The small states that decide to regulate, are mostly opting for self-regulation. The example of Singapore is almost at the other end of the spectrum of the EU. Although Singapore has many investments, they approach this with guidance regarding data, AI technology, and a checklist of best practices. This approach provides for a framework, bit also helps guide and restrict the scope of possible litigation.

In the absence of international consensus, there is legal pluralism, and different jurisdictions have different approaches in the regulatory space. Trade agreements can have a role in introducing regulation. Biggest states, especially the EU and China, have the potential to set global regulatory standards, since most of the technology comes from either China or from the US, but with a strong compliance with EU standards.

With many different states taking their own way of regulating AI, the regulatory landscape is patchy, the presentation concludes that size does not seem to matter when it comes to the possibility of deploying some influence on the shaping of global regulatory standards for AI. In different ways, some small jurisdictions have the potential to acquire an important role in the AI regulatory space.

Topic IV—Climate Change: Trade & Investment

Chair: **Ruth Teitelbaum**—Independent Arbitrator

The fourth panel concerned with international arbitration's ability to adapt to the impact of climate change on cross-border commercial relationships, and to consider the unique challenges that climate change and international arbitration disputes have on smaller states. Dr Sergio Alonso Garcia Long put forward a case for using punitive damages to remediate environmental mass torts in investment arbitration proceedings. The second speaker Pranay Lekhi discussed the parameters of adapting investment law to climate change.

Dr Sergio Alonso Garcia Long—Pontificia Universidad Católica del Perú

Punitive damages for environmental mass torts in LATAM Problems and perspectives in international arbitration

Dr Garcia Long provided the Latin American perspective on the subject, regarding generally trade and investment in climate change circumstances and specifically to address two questions. Firstly he discussed about the adequacy of International law for small states regarding environmental matters. Secondly, he presented on how the international market can improve in favour of small states.

There is general assumption that national laws in in Latin America are not well suited to prevent environmental disasters or pollution and consequently, to reduce the effects of climate change. This is paradoxical, since Latin American countries have more natural resources, but weak environmental laws, political instability and corrupt justice systems. One might suspect that a country rich in natural resources would care to protect their limited and vital resources. Dr Garcia Long argues that the regulation should not be focused solely on the letter of the law, but also to focus on honouring obligations and respecting the environment in the first place. Foreign investors and polluters might provide remedies for the harm, but this in no way restores the status quo before the harm.

There is a weakness in the law concerning environmental harm and the privatisation of public enforcement. In the Latin American region, private companies often hire national police or troops as private security. This has a legal impact in damages, as private companies allege that states are directly liable for the harm, which leads to an immunity in favour of private companies. Another weakness in the system is the political instability experienced across Latin America, which led to the withdrawal from international treaties and dispute forums, as well as forcing renegotiation of contracts. This leads to a decline in direct foreign investment. Finally, a third weakness is that the justice systems do not always run smoothly, due to corruption. While one might think that the legislation which attaches criminal charges might work as a deterrent, corruption levels make the law toothless.

Dr Garcia Long proposes contract under International Arbitration as a possible solution, identifying weakness in national laws. Parties could adhere to international law instruments and agree that environmental violations will constitute a breach of contract. The contract can include reference to an international mechanism which can resolve the environmental dispute. This proposal can help small states have bargaining power over environmental matters in punitive damages. This would provide a sanction which allows the recovery of extra compensatory damages, which can in turn have a deterrence effect. The punitive damages do not only concern individuals, but they are also viewed as a systemic remedy to the wider society. Much like the movie Erin Brockovich, Dr Garcia Long pointed out that punitive damages can amount to an astronomical amount of money from which the directly and indirectly affected can be compensated.

In Latin America, usually, punitive damages are not recognised by law. There have been a few cases in Argentina, where under consumer law there were punitive damages. However, this can be circumvented by inserting a special clause in the contract in case of environmental harm, or through the arbitration clause. There have been discussions on whether international arbitrators can grant punitive damages in international disputes, even if the law does not recognise it. In European and Latin American countries, the arbitral award of punitive damages cannot be enforced, simply because it is not included in the civil law. However, some commentators argue that it is possible for national courts to enforce the punitive damages, since there has been case law in several jurisdictions that punitive damages did not go against public order per se. Examples include Switzerland in 1989, Greece in 1999, Spain in 2001, France in 2010, and recently, Italy in 2017. Nonetheless, Dr Garcia Long argues for courts to enforce punitive damages, as arbitrators think of enforceability when issuing an award.

Pranay Lekhi—Associate, International Arbitration, Allen & Overy LLP

Adapting Investment Law to Climate Change Goals – A Big Issue for Small States

Pranay Lekhi's presentation discussed adapting investment law to climate change goals of small states, while maintaining their unique development goals. The presentation went about the topic in three dimensions. Firstly, there was a description of the unique characteristics of small states' climate change and investment law. Secondly, the ongoing conflict between climate change obligations and investment protection obligations were discussed. Finally, the speaker addressed the ways forward, for small states investment disputes' management, which conflict with their climate change obligations, as well as the way forward for the investment law in general, towards being more accommodating to climate change goals.

Aside from their inherent vulnerability, small states are facing climate change, even though they collectively contribute less than 1% in greenhouse gas emissions. According to the IPCC report and the ILC report on sea level rise, it is estimated that the global mean of sea level rise could be between 26-98 centimetres. This implies that 680 million people who live in coastal areas, which is 28% of the world's population, would be vulnerable to an existential crisis. SIDS are further vulnerable to exogenous shocks and unique challenges and which have exacerbated since COVID-19. Since tourism makes important contributions to SIDS GDP, they suffered a greater contraction than bigger economies.

Irrespective of the debate around whether investment treaties increase foreign direct investment flows or growth in general, it is evident that small states participate in international investment law. In light of these unique development challenges, it would be indicative to see the commitment of small states national investment goals. Since the establishment of the Forum of Small States at the United Nations in 1992, members have multiplied, with a number of them often being respondents to international investment disputes. For instance, the Czech Republic has infamously been a respondent state in over 40 investment disputes.

Pranay Lekhi conceptualises the interaction between two regimes by imagining both investment law and international environmental law to be "**two trains that are on parallel tracks but to the same destination**". On one hand, small states try to balance of the climate change obligations, which affect them disproportionately, and on the other hand, they are aiming to be more attractive destinations for foreign investment, since net importers of foreign investment want protections for their nationals to avoid the possibility of the use of guerrilla tactics and corruption. Investment treaties included norms and principles like fair and equitable treatment, which is a loosely worded obligation. In investment treaty arbitration, there have been many different interpretations of vague norms, however, over time, these obligations on each end became more sophisticated and more nuanced. For example, fair and equitable treatment protects everything from legitimate expectations, procedural propriety due process, as well as the obligation of host states to provide a stable and predictable framework. On the environmental law side, there are accelerated efforts, compared to the past, with the introduction of international treaties and their implementation. For example, the European Union has set as a legal objective to achieve climate neutrality by 2050.

The nature of the collision between the two regimes is not the case of states pursuing investment objectives that harm the environment. Rather, states pursue multiple objectives which can be both beneficial and harmful for the environment. For instance, they can use positive incentives for technology transfers, which could assist small states but at the same time, small states in the hope of becoming more attractive destinations for foreign investment may also reduce environmental regulations. These measures can be seen as both a shield and a sword. Climate change obligations have been enforced as a shield in the case of facilitating investments in renewable energy sectors. They have also been used as a sword with negative policy, mostly seen in the cases of energy transition policies. For instance, the coal phase out has caused a multitude of investment claims. For example, Romania, passed an incentive scheme which led to an investment claim after it was rolled back. Thus, climate change policy being very successful can lead to economic disequilibrium in the host state.

This situation is not unique to investment law. For instance, in the recent cases of *Burlington v Ecuador* and *Perenco v Ecuador*, the respondent's policy on oil and gas created many profits for the investor, which led them to create a windfall tax to bring them back in line. Ecuador lost the claim but was able to succeed on their counterclaim which reduced their damages. Further, a number of disputes have arisen as a consequence of states adopting their energy transition measures. In the recent case of *Westmoreland Coal Company v Canada*, although the tribunal declined jurisdiction, the case was brought by an investor against the energy transition policy, which planned to phase out greenhouse gas emissions.

Pranay Lekhi believes that the current structure of international investment law allows the interests of small states being represented. Firstly, there is a tendency of some tribunals to recognise the state's regulatory powers a lot more than others. One example, of this is expropriation claims, where under police powers doctrine states are allowed to undertake action for the public benefit, such as for the environment, and not have to pay compensation. Another example is the state's regulatory power is the margin of appreciation doctrine, which was taken from the European Court of Human Rights. Some investment tribunals have said that it is equally applicable to investment arbitrations, however, there are other tribunals that disagree.

Secondly, states are being recognised the obligation for investments to be in accordance with the host state's laws. Some tribunals have held that a breach of the domestic law would be an issue of jurisdiction, which would lead to them not exercising the jurisdiction over the claim itself. In the context of energy transition, this obligation is only relevant at the time the investment is made, so subsequent regulatory changes would not be captured.

The third gateway is the case of necessity under customary international law, as well as public emergency clauses which are also common in a number of bilateral investment treaties. In the context of small states who are facing an existential crisis because of climate change, it is observed that tribunals are more receptive to the idea that small states have taken measures as a matter of public emergency, which gives them leeway to argue their case.

Finally, while the previous three strategies focused on the small states defence in investment disputes, it is important to note that states can rely on the domestic law obligations as counterclaims against the investors. However, these counterclaims also suffer from many procedural defects. Counterclaims require consent between the parties, and it is only the ICSID convention currently that explicitly permits counterclaims at the treaty level.

The current structure of investment law provides some possibilities for small states to articulate their unique problems. In its modernization process, there are twofold implications. The first deals with the modernization of the treaties themselves, to accommodate environmental obligations, such as GATT style general exception for environmental measures. The second strategy of modernization is the increasing use of articulation of obligations for investors in investment treaties. The 2016 Morocco-Nigeria investment treaty, for instance, in article 14.3 provides for the precaution principle being applicable to investors, and not to a state, as this is usually the case. Finally, the modernization of the Energy Charter treaty, is a very long-standing modernization process, which in principle will allow contracting state parties to opt out of the protections that it offers for energy transition and fossil fuel related investments, and also to phase out the protection for already existing fossil fuel investments. Nonetheless, this is a slow and complicated process and thus, it would be important for environmental law to be systematically integrated with international investment law. Further, there is the issue of intertemporality, which requires treaties to be interpreted in the manner in which the law stood at the time that the treaties came into force.

Pranay Lekhi concluded with the aforementioned train analogy, where "if a systematic integration process is undertaken, instead of there being two trains on parallel tracks, it will be one train with two engines that might lead to sustainable development".

Topic V—International Dispute Resolution

Chair: **Dr Campbell McLachlan KC**—Professor, Victoria University of Wellington

Over the course of the seven small states conferences, international dispute resolution has been a recurring topic, with one of these conferences being entirely devoted to dispute resolution. The final panel discussion was on the crosscutting theme of international dispute resolution and small states. Steven Finizio, addressed the keynote speech on the reform efforts in the current dispute resolution process, with a special focus on the merits and criticisms for the proposal for a new multilateral investment arbitration court. Katherine Connolly described the WTO dispute resolution mechanism, its current crisis and the potential challenges for small states. Alberto Pecoraro dealt with the deep-sea mining disputes and how common heritage of humankind is regulated. Robert Houston discussed the regime integration and how the elements of environmental protection, business and human rights, and investment protection are addressed in the sustainable investment facilitation and cooperation agreement for the Gambia. Dr Scott Sheeran talked about the challenges for small states for participating in international dispute resolution, due to the lack of funding. Finally, Dr Florian Kremslehner discussed the practical implications of enforcing awards in small and microstates.

Keynote

Steven Finizio—Partner, Wilmer Hale

International Dispute Resolution has evolved in the past years. With investor-state arbitration being the epicentre of criticism, there have been concrete reform efforts. Criticism, reform and modernization are loaded terms, which in the context of the aforementioned Energy Charter treaty imply that criticisms are valid. However, a key element which is missing in the current arguments is a well-rounded consideration of all stakeholders' interests and the benefits of the current system. Further, the conversation lacks in empirical evidence to make accurate objective judgments about the current system and the proposed changes. It is essential, therefore, to firstly locate key issues that arise in connection with investor state dispute resolution, in order to subsequently shape the system.

Investor state dispute resolution involve investment agreements concluded either bilaterally or multilaterally, between states, which generally contain substantive protections that contracting states guarantee to investors, including arbitration clauses that allow an investor to bring claims against the host state for violations of the substantive protections in the treaty. It is estimated that there are 3000 investment treaties in force at the moment, with small states being members of both multilateral as well as bits are bilateral investment treaties. These treaties became particularly popular in the 90s to attract new investments, while protecting the investor based on the assumption that the investors do not trust local processes. Thus, the treaty mechanism offers parties the option to resort to arbitration in an international context to step out of the local process and be guaranteed justice.

This model has come under heavy criticism, usually portraying them as "secret and private tribunals, awarding astronomical damages against developing states". One frequent example cited is the $5 billion award ordered against Pakistan in 2019, coincided with Pakistan receiving a five $5 billion bailout from the IMF. Further criticisms include the lack of transparency in the process, a lack of consistency and predictability in decisions, the independence of arbitrators, and the chilling effect on state regulatory powers, as well as the high legal fees and administrative costs. These have led some states to publicly opt out of some aspects of the current system. Brazil and Pakistan are taking different approaches, pushing to narrow the protections and to require investors to use local courts. Although they are not small states, they are in a position to try to make the changes that smaller states could not do.

The speaker focused on two ongoing rules revision processes. Firstly, the UNCITRAL Working Group III process and secondly the various efforts to change both multilateral and bilateral treaties. The largest UNCITRAL working group that existed, Working Group III, began a process of considering reform of the investor state dispute settlement system, with a broad mandate to identify concerns with the investor state dispute resolution process procedure, and to develop recommendations to the main UNCITRAL body. The efforts need to be adopted into either new treaties, or treaties which amend current treaties, which will take time.

One of the headline changes is a proposal to establish a multilateral investment court, as a permanent international institution that would be composed of a first instance court and an appellate tribunal with full time permanent adjudicators. With the EU member-states being active proponents, the system would move from parties' getting to pick the decision-makers, to a centralised system with procedural framework and permanent adjudicators. However, it remains to be seen whether this court will be created, since there is strong opposition from US, Russia, Iran, and other countries. Nonetheless, the proponents for the court suggest that it would provide for enhanced transparency, and independence and consistency of adjudicator decisions, as well as reduced cost and legitimacy of the process.

Critics suggest this is an overly ambitious process, which in reality can create bias by tilting the balance against investors, particularly by allowing adjudicators to only be appointed by states. This would in turn challenge the key value of international arbitration, party autonomy. There may be issues then about the enforceability of awards, as in the current system there is the New York convention and ICSID convention that parties rely on. Questions arise as to the funding of the court since a permanent institution would be costly to operate.

The impact of a new multilateral investment court on small states could be positive, since there would be efficient processes which can be tailored to their economies. The idea of selective representation would create issues for small states, since they would have issues obtaining representation. The advisory centre will enhance and create efficiencies, but also add quality to the submissions being made in cases. Small states can be facilitated in building the capacity of their representatives. Thus, this system is meant to assist states in understanding their obligations and then responding to claims. In terms of small states, the advisory centre proposal envisions a preferential system which grants the least developed and developing states preference in terms of the services. This would be achieved by having regional offices that engages in education and capacity-building process, sensitive to regional and cultural concerns. This system would need a user fee, depending on the state's capacity and level of development. Critics point out that instead of introducing a new system, existing efforts from institutions working on capacity building could be better coordinated.

The third reform is to introduce an increase to the capacity of structural use of mediation in the process, which was discussed by the panel, and thus the speaker did not elaborate.

New approaches to regional and multilateral investment treaties, and in bilateral investment treaties were highlighted. Among those, the speaker highlighted the need for more attention to the African continent. Notable efforts include the draft Pan African Investment Code, which is being used to help African states rewrite their and negotiate their investment treaties, as well as the African Continental Free Trade Area Investment Protocol, both of which are pushing for the idea of identifying and protecting States interest in sustainability

To conclude, the speaker highlighted two effective ways in which reforms can take place. The first is the language used in new model BITs and some of the multilateral agreements. This can be the most effective way to reform the current system, because it is going into the substantive rights rather than procedural issues. This requires a level of empirical research to inform investment treaties and encourage direct investment. The second would be the making sure that other benefits from investment protection treaties are not overlooked, such as protecting the rule of law. The example of Pakistan is often cited in the question the legitimacy of investment arbitration. On the one hand, this system endorses a private tribunal issue an award that could constitute a major portion of a state's GDP. On the other hand, states should be held accountable for their actions, as if they are liable for misconduct, they might start respecting the rule of law.

Panel Discussion

Katherine Connolly—Senior Managing Associate, Sidley Austin

WTO dispute resolution

Kathrine Connolly discussed the system of dispute resolution within the WTO. She started by setting out the background on WTO dispute settlement. The presenter moved on to provide an overview of small states participation and the barriers they have encountered. Finally, there was a description of the WTO dispute settlement system crisis and what that means for small states.

The key difference between WTO dispute settlement and investment arbitration is that it is exclusively state to state. It is a treaty-based in which only states can bring claims, with automatic jurisdiction and binding panel reports. This form of dispute settlement is unique, as there is very high rate of compliance. Despite states overall hesitation to give up aspects of their sovereignty to an international dispute settlement, they have been reasonably willing to submit themselves to the compulsory jurisdiction of the WTO system, with some current exceptions. The WTO system used to be very robust, which can be demonstrated from the fact that it has been actively used, with around 600 disputes since the mid-90s and 350 reports. Its character is permanent, with arguably a level of transparency. It has a hybrid system in the way that the adjudicators are appointed, it has an ad hoc panel and until recently, it had a standing appellate body.

With the introduction of the modern WTO dispute settlement system under the dispute settlement understanding (DSU), the old non-binding system under the GATT was replaced. The idea behind the modern replacement system is that the rule of law would apply across the board to all states big and small, equal before the court, without big economies being dominant. This was achieved in some respects, however, in practice there were some issues. The key issue involved small state participation, with big players in trading flows being the most frequent users of the system, such as US, EU and Canada. Although there is a reasonable amount of participation from developing countries, small and least developed states very rarely use the system. The reason behand this include firstly capacity issues. With international litigation being complex, lengthy, difficult, expensive, it often involves an enormous amount of funding and resources. For example, the submission of evidence requires scientific and economic analysis. The Advisory Centre on World Trade Organization Law (ACWL) is a pro bono institution providing legal advice. It has been reasonably effective and widely used, however, it has not really tipped the balance with small and least developed states. When talking about capacity issues, it does not solely mean in acting as respondent parties, thus the question is whether small states can use the system to bring a claim.

Thus, there is a barrier to accessing the system would involve the inability of states to having the capacity to identify the trade flow problems in the industry. The solution does not involve just having legal representation, it rather starts with identifying where the factual issues on the ground are that are causing issues that could be addressed by WTO claim.

The second big barrier to entry is the remedies that are available under the WTO system, which does not have compensation or retrospective remedies. The only remedy available if a claim succeeds is prospective trade retaliation rights. Typically, it is relatively rare that countries have needed to take recourse to retaliation, usually countries will just comply. The issue with that is that if the opposing state does not comply, the available remedy is to suspend an equivalent number of concessions for the trade flows for the opposing state.

For instance, Antigua requested consultation against United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Communication from Antigua and Barbuda. A small country like Antigua, going against a big market like the United States is not going to make a big difference to its economy if Antigua suspended US trade. In fact, it would probably damage Antiguan economy. This shows that the WTO system inherently does not give leverage to small states. A way around this, which realistically the prospects of success are relatively low, but academically speaking, it could lead to the possibility of collective retaliation. If a block of small states brings a claim, it is only technically made by one state, while the group can exercise collective block power to increase the leverage that retaliation might have.

The appellate body crisis was triggered when the Trump administration began blocking appointments of judges to the appellate body, so it no longer has enough members to hear disputes. That means that panel proceedings can still go forward, but it is not possible for the losing party to appeal. The WTO dispute settlement regime is currently risking losing its binding nature. This would lead to the pre-WTO era, ie the GATT area, where the legal findings of a tribunal were non-binding. Non-binding dispute settlement resolution is always going to be worse for smaller countries. Binding dispute settlement gives legal leverage and an option of retaliation under the WTO dispute settlement regime.

A pertinent issue facing the world to date are the different responses states have taken regarding the climate crisis. Some states have included trade-restrictive measures as a response in order to try and to influence production activities overseas, including a restriction of market access. The debate on the use of unilateral trade measures for environmental purposes is controversial. As other speakers pointed out, the climate crisis is one that needs to urgently be addressed. However, measures like the Carbon Border Adjustment Mechanism (CBAM) raise real concerns about the extent to which cooperation has been incorporated into the design of those measures. The WTO dispute settlement is a forum that examines whether or not these measures are truly having a have an environmental objective, or whether they are tainted by protectionism, or just shifting the cost of production overseas.

Alberto Pecoraro—Doctoral Researcher, University of Hull

Regulating the common heritage of humankind: disputes between deep sea mining contractors and sponsoring states

One of the main innovations of the UNCLOS regime was the regulation of deep seabed activities. Within the convention, these were labelled as a common heritage of mankind. This entailed that they were governed by the international seabed authority, taking control away from individual states. Minerals were only exploited after this international seabed authority granted a contract.

Currently, there are about 31 contracts granted. To acquire such a contract, enterprises must be sponsored by their state of control or nationality. This sponsorship can have significant legal consequences. As a starting point, this would mean that states would be bound to ensure that the common heritage of mankind's status is respected. It would lead states to supposedly guarantee a sustainable and equal share of resources within the area. To guarantee this, states might need to alter the existing framework.

Yet, there are several limitations for states to do so on a national and international level. The international seabed authority would protect existing commitments by securing tenure, as found in article 153, paragraph 6. UNCLOS also does not allow for unilateral variations of rules applicable to mining projects, setting it apart from other national mining regulations. Renegotiation is possible in this sense, but there is no obligation to agree. Lastly, termination is only possible in the case of a violation of the fundamental agreement. Whereas there is an ability to change the regulations, applying these changes to prior contracts is currently challenging. A possible solution could be for agreements to include adhering to new regulations. This is, however, not to say that contractors are free to do whatever they want. We can see explicit regulations on non-discrimination, proportionality, reasonableness, necessity, uniform treatment, and so forth that provide guarantees and an applicable legal framework.

Outside of these international rules, there are also national rules. Reference can be made to the practice of the pacific island states. Here some regulations limit the ability of states to change their terms of sponsorship. All the Deep seabed mining statutes of this region provide that national authorities should act according to rules of proportionality, of the necessity of reasonableness, in other words, what they call the best regulatory practice. In addition, they also refer to both the cross and general standards of international law, a language that might bring international investment into the framework of these national legislations.

For example, one Sponsorship Agreement between the Republic of Nauru and NORI has clauses incorporating the totality of the international investment law within the contract. This represents a possible trend of the convergence of international investment law and UNCLOS and the definition of common heritage influenced by international investment law. And in this regard, it might be expedient in the future to look at the experience of international investment law on offshore mining to interpret and apply provisions often cross. However, of course, this must be done while being mindful of the peculiar legal nature of the International Seabed, the International Seabed as the common heritage of humankind

Robert Houston—Senior Associate, K&L Gates Straits Law LLC

Regime integration in practice: bringing together environmental protection, business and human rights, and investment protection in the sustainable investment facilitation and cooperation agreement for the Gambia

Picking up the discussion of reform of the investor-State dispute settlement (ISDS) architecture, both in UNCITRAL Working Group III and around the world, States are reconsidering international investment law and policy in light of decades of practice. The presentation went about different discussion points. First, the legal issues and investor obligations based. Secondly, treaty modelling. Thirdly, the regime interaction and in particular the SIFCA model.

Starting from the legal issues, the first being the reform of ISDS, which was extensively dealt with by the keynote speaker. There is a strong push for change and reform, however questions arise as to the appropriateness of the different approaches to the international investment agreements which brings uncertainty in the current discussions of how the future landscape should look.

The second issue concerns the push for protection under human rights. The UN guiding principles on business and human rights in particular have three pillars; state duty to protect human rights; the corporate responsibility to protect human rights; and access to remedy. The objective of the general principles is articulated not just in terms of enhancing the standards, "it means something for real people achieving tangible results, and to contribute to a socially sustainable globalisation".

The speaker moved on to explain the practical aspects of the principles, in terms of the foundational and the operational articles. The regime for Business and Human Rights guiding principle makes states responsible to protect against human rights abuse within their territory and or jurisdiction by third parties, including business enterprises. This involves setting policy, legislation, regulations and adjudication to prevent abuse. Further, states must set expectations that all businesses domiciled in their territories, and jurisdictions to respect human rights throughout their operations. Operationally, this means that states are supposed to ensure that laws and policies governing the creation and ongoing operation of business enterprises do not constrain, but rather enable business respect for human rights.

Guiding principle nine, interestingly, states are also asked to maintain adequate domestic policy space to meet their human rights obligations, for instance, through investment treaties or contracts. Thus, the terms of investor state dispute settlement, the negotiators envisaged regulatory space to make business and human rights progressively realised. Guiding principle eleven sets a provision for corporations to avoid infringing the human rights of others. While guiding principle fifteen in order for enterprises to respect Business and Human Rights, they should have policies and processes appropriate to their size and circumstances. In concrete terms, this means policy commitments, due diligence processes, and processes enabling remediation.

Moving to the treaty modelling section of the presentation, Robert Houston was involved with government the Ministry of Trade of the Gambia to develop a new framework that brings together

Business and Human Rights, in part that concerns the change in the ISDS system, and also vice versa, trying to use the ISDS system to start to further realise and enforce business and human rights norms. The Sustainable Investment Facilitation Cooperation Agreement (SIFCA) was the product.

The SIFCA model was created by reference to a number of materials, some of the more progressive international investment agreements and FTAs that have developed treaty language for parties to decide on their treaty. The objectives of the SIFCA were to introduce the investors business and human rights obligations as a shield for host states. This was done by reducing power imbalances in investor state dispute settlement between the developing states, small states and investors. Finally, the idea was to promote a more equal sharing of risks and benefits.

This is a draft model bilateral investment treaty, although it's looking very strongly as if the government of the Gambia is preparing to look at this very closely and seriously in the near future. One of the key innovations is that investor is required to make a declaration of compliance, both with the SIFCA, but also with the UN guiding principles. Further, the investor must make a certain representation about the investors record in the past years with respect to the UN Guiding principles. If that representation is not truthful, as the tribunal determines in the course of the proceedings, then the tribunal is directed to find that the investors claims are inadmissible, and therefore may not proceed against the host state.

Arbitration is available under the SIFCA through either at the ICSID rules or for the first time that the Hague rules on business and human rights arbitration will have received state consent for investment treaty disputes. Deposits are paid by the investor in this model, while compensation and arbitral awards is dependent upon compliance with UN guiding principles. Thus, in commencing arbitration, investors also consent on the one hand to recognise human rights, environmental protection, sustainability and investment protection. On the other hand, jurisdiction is expressly extended to third party claims against the investor, by natural persons who have suffered the violation of internationally recognised human rights.

The presenter moved on to compare the SIFCA to traditional international investment agreements (IIA). Under the traditional IIAs, traditionally, the primary focus is the investment protection. However, the SIFCA framework integrates both investment protection and business and human rights. The SIFCA does not provide for a toothless framework, since in a case of expropriation, it can be brought to a tribunal. Traditional IIAs also look for key beneficiaries or foreign investor, however, in SIFCA framework, the idea is to reduce that power imbalance to the extent that it might exist. Finally, the SIFCA framework, promotes sustainable development in order to mitigate risks of being disproportionately borne by host states, particularly in the case of LDCs or small states.

Dr Scott Sheeran—Barrister, International Legal Counsel, Diplomatic Adviser, UAE

International dispute resolution funding

There is a dichotomy in the ISDS, where investors seek the protection, yet small developing states do not wish to expose themselves to the risks and the resource implications. The PACER Plus after eight years of intensive negotiations was concluded, containing no provisions on ISDS. However, small states in the Pacific Region seek sustainable foreign investment. Questions arise on the possibilities of effective dispute resolution that will help both parties and can support investment. There is an overall investment gap and a dispute resolution challenge. This presentation made, firstly, a few highlights on the context, secondly, made reference to the key interests for both sides, and thirdly, referred to some areas to explore on a possible way forward.

To put everything into context, Dr Sheeran made an overview of some facts which arise from reports made for the region. The International Finance Corporation report on the South Pacific indicated that 24% of the population have access to the electricity grid. It also indicated that the infrastructure investment gap in the South Pacific Islands by 2030 is about $46 billion dollars US. There is an overlap between the areas of investment needed and the areas in which there is likely investor caution due to an absence of ISDS. One of these areas is investments on infrastructure, including airports, seaports, renewable energy generation, water and sanitation, which would enable a productive economy. The second area is agriculture, aquaculture, food processing and manufacture. These industries require land and property rights, capital improvements and security of tenure. However, 80% of the land and the Pacific is custom owned and subject to custom leases, which lead to low utilisation of land and the actual owner cannot be identified.

The issues for PACER plus and for the Pacific is not the vehicle for dispute resolution, the issue is the dispute resolution model. The ISDS model cannot be the model for the South Pacific, there needs to be a different set of approach, suited to the region, reflecting what a lot of people in the region would call the Pacific way. Further, there are concerns that dispute resolution may shield investors from social responsibility or local laws, largely already addressed in the PACER plus agreement. There are issues around lack of political support from domestic communities for dispute resolution, given its reputation on the financial and political risks to the state and the burden of costs.

A critical issue is not only the lack of expertise domestically, but it is also the culture of dispute resolution and adversarial litigation. The highly formalised rules of evidence is not a culture of small island Pacific states. Further, there are very few government lawyers, who will be overwhelmed by the number and length of the potential proceedings. Other issues include inconsistency in perceptions that ISDS, security of land tenure, labour mobility enforceability of awards and dispute resolution costs.

Dr Sheeran cannot see a way forward, particularly because a modification of the classic SIDS model would not be accepted in the South Pacific. It would be worth looking within the region to see an exercise of maximising benefits and minimising risk, to create a bespoke model which could work for both sides. This can be achieved in a number of ways.

Firstly, narrowing the scope of investors only to those who need it. Second, focusing on reconciliation and mediation rather than adversarial legal rights determination. This process could be inquisitorial, a greater role for the panel, more flexible rules of evidence, the ability for a panel of mediators to make proposals to give assessments, and much more inclusive style, familiar to people in the Pacific. Further, a greater simplicity and focus, short submissions, more flexible rules on evidence, would allow smaller claims for processes to reach their terminal point with a lot less resource put into them. Finally, known and trusted panel members from the region or with regional knowledge would be desired. Panellists, who are nationals of the region or have worked regionally understand the issues fast, but knowing and trusting these people could reduce the risk for the small island developing states before they accept the system.

PACER plus was not meant to be the end of a conversation about dispute resolution and sustainable foreign investment in the South Pacific. There is an opportunity to see what can be developed that is bespoke for the region and will attract the kind of support from both sides. In a country like New Zealand, there are investors who would not be interested in that, but also there are investors who will be. Thinking about the Pacific way and being open minded to a dialogue that can start with Pacific officials and investors and funded by Australia and New Zealand.

Dr Florian Kremslehner—Partner, DORDA

Enforcement in small and microstates

Dr Kremslehner addressed the practical challenges of enforcing awards rendered in commercial and treaty arbitrations against small and microstates. Monetizing awards can be difficult for small states, either in commercial arbitration awards, or awards in treaty arbitration, further to the fact that they might not want to admit they have lost the case. Thus, investment arbitrations are a political issue in smaller states. Nonetheless, even when state wants to pay an award, this may become a political issue because the payment must be considered in the budget of the state, which means that a minister could potentially cut off cut this amount of the budget. On the award creditor side, enforcing awards is maybe even more complicated against smaller states because they have less visible and less tangible assets. Typically, that would not refer to small states like Liechtenstein, where the prince alone could pay from his own funds.

The legal environment, in which all this discussion is embedded was discussed. The New York Convention 1958 provides for enforcement of arbitral awards in accordance with the respective rules of the enforcement state. The corresponding article in ICSID Convention provides for award enforced in the same way as national judgements of the enforcement state. The fundamental difference between the two is that in ICSID awards no exequatur proceedings are necessary, one can simply bring to the local court to be granted enforcement.

This privilege does not apply to awards rendered under ICSID Additional Facility Rules, to which the New York Convention applies. This means that the there is an exception to the exception, in which if there is an executable additional facility vote, it can provide a chance to enforce it under the New York convention. However, many smaller states have made use of the commercial reservation under the New York Convention. This limits the number of jurisdictions in which such awards can be enforced.

The rules allocating jurisdiction for enforcement proceedings are not harmonised, not even within Europe. The National enforcement laws are diverse and there is a high level of uncertainty whether enforcement orders issued in one state will be recognised in any other state. Claimant states involved, even if it does not have any assets of the debtor state in its territory, it may be helpful in granting diplomatic protection to the successful claimant. The respondent state which does not comply with the board and probably is not prepared to enforce it with it in its own courts either, since especially smaller states, it is not very easy to convince the judiciary, that an award must be enforced against its own state. This exercise involves doctrines of sovereign and diplomatic immunity, as well as comparative, public and private international law, which differ in substance and in application. Thus, states need to think about selecting the enforcement jurisdiction prior to the proceedings.

In a recent case respondent state simply refused to accept service via diplomatic channels, which is a clear violation of international law. Another route to the enforcement proceedings would be through the assets of the debtor state. There was an example given to illustrate this. Assume the asset is located in the respondent state and the creditor is some instrumentality of the respondent state and the respondent state has entered into a licence agreement with a counterpart in one of the enforcement states. The question is if this is an obligation on the private law that can be in the jurisdiction of the courts by the Civil Courts. Can the courts in the enforcement state actually order the respondent state not to dispose of assets? There are difficult questions and unresolved issues in the enforcement of awards.

Recommendations could include creating a register of state traditional debt, so that every other creditor of the state knows how much is unpaid, which is not issued in bonds. Further an international system of enforcement by convention or by harmonisation of procedural laws would be useful. Finally, there could be a development of an international legal instrument that allows to attach public law claims under international law before a public international law body.

Dr Nadja Alexander—Professor, Singapore Management University

The Singapore Convention - holding its promise for small states?

When we think about mainstream forms of mediation and different cultural practices, such as the Pacific way, do not match. There is a lot of scope within current domestic regulatory systems that exist in many small states and also in the Pacific, to incorporate the cultural space. Currently, there is an increasing activity in practice, but also in policymaking and structures around mediation.

Some of the small states which have mediation provisions in some of their treaties include Qatar, Bahrain, Brunei Darussalam and Mauritius, with some of them having singed the Singapore Convention. Qatar and Fiji are the only two who have so far ratified the Singapore convention, which offers a direct enforcement mechanism for international mediated settlements of a commercial nature and has the potential to apply to mediated outcomes arising from investor state disputes.

The aforementioned Working Group III not only refers to ISDS reform and also to mediation, amongst other things in that scope. Along with the Singapore convention, the Model law, the old model law on international commercial conciliation has been amended at the same time as the Singapore convention was drafted. Mediation rules apply not just to investor state disputes, but increasingly to cross-border commercial mediations.

The Singapore International Dispute Resolution Academy (SIDRA) ran a survey on mediation as mixed mode dispute resolution arbitration and litigation there is a clear increase in the use of contractual referrals to cross border mediation, either in the form of mixed mode mediation, or standalone mediation. Where cross border mediation is used for commercial disputes, this will include also investor state disputes of a commercial nature.

There is a high user satisfaction forum for mediation based on experience. These relate particularly to issues like cost and speed, preservation of business relationship, indirect costs to clients. Culturally, mediation-like processes are preferred cultures many small states, with many of them having fairly comprehensive regulation on commercial mediation.

Montenegro, Bhutan, among other states, in 2017 modelled their legislation on the UNCITRAL model law on international commercial mediation, while others have independent mediation regulation. In the Pacific, within that domestic regulation, there cultural norms of mediating disputes can have a place and not just in family matters, certainly also in commercial and investment-related matters.

The Singapore Convention offers a very minimalist, direct enforcement mechanism for International Settlement Agreements resulting from mediation, which can be used as a sword or a shield. A mediated settlement agreement will produce a settlement agreement signed by the parties, which can also be concluded online. In international commercial mediation there is no definition of "commercial", but the Model law provides for a very broad definition intended to cover investor state mediated settlements that are commercial in nature or aspects of those settlements that are commercial in nature. A mediated settlement agreements that can be enforced as a court order, or mediation within arbitration that are recorded as unenforceable arbitral awards, they will not fall under the Singapore convention.

Finally, there are two reservations available, and one of them, relevant to investor state dispute settlement is that states may declare a reservation that the convention does not apply to the state or does not apply to government agencies. If they do that, then clearly, investor state matters will not fall within the scope of mediation procedures. However, they then have the capacity to opt-in to the convention when they wish to do so.