

Climate Change, Maritime Law and Ocean Governance: Foreseeable Conflicts and Legal Remedies Conference

27-28 January 2022

Climate change is affecting all aspects of the international legal regime governing the oceans. Sea level rise and increased coastal erosion affect the baselines by reference to which the limits of maritime areas are measured. Temperature changes and acidification affect the distribution of living resources. Offshore development for renewable energy and food production will further increase the pressures on the marine environment.

The symposium included contributions on challenging legal questions arising from climate change and its impacts. The discussion took place over three panels, each providing an insightful analysis of such questions and the potential remedies to pressing problems.

Day 1 - 27 January 2022, Thursday		
Opening Address		
18:45 - 19:00 HKT	5:45 - 6:00 EST 6:45 - 7:00 AST 11:45 - 12:00 CET 10:45 - 11:00 GMT 20:45 - 21:00 AEST 23:45 - 00:00 NZDT	<p>Prof Cheng Han TAN Dean and Chair Professor <i>City University of Hong Kong, School of Law</i></p> <p>Prof Alexander LOKE <i>Director, Hong Kong Commercial and Maritime Law Centre</i> <i>City University of Hong Kong, School of Law</i></p> <p>Prof Michael TSIMPLIS <i>City University of Hong Kong, School of Law</i></p> <p>Dr Massimo LANDO <i>City University of Hong Kong, School of Law</i> <i>National University of Singapore, Centre for International Law</i></p>
Environmental Protection in the Courts		
19:00 - 19:30 HKT	6:00 - 6:30 EST 7:00 - 7:30 AST 12:00 - 12:30 CET 11:00 - 11:30 GMT 21:00 - 21:30 AEST 00:00 - 00:30 NZDT	<p>International Court Jurisprudence on Climate Change and Sustainable Development</p> <p>Dr Penelope RIDINGS <i>University of Auckland, Auckland Law School</i> <i>United Nations International Law Commission, Member-elect</i></p> <p>local time: 12:00AM - 12:30AM (HKT +5hrs)</p>

19:30 - 20:00 HKT	6:30 - 7:00 EST 7:30 - 8:00 AST 12:30 - 13:00 CET 11:30 - 12:00 GMT 21:30 - 22:00 AEST 00:30 - 1:00 NZDT	The Role of National and International Courts in Resolving Conflicts Between Climate Change and Economic Prof Benoît MAYER <i>Chinese University of Hong Kong, Faculty of Law</i> (HKT +0hr)
20:00 – 20:30 HKT	7:00 - 7:30 EST 8:00 - 8:30 AST 13:00 - 13:30 CET 12:00 - 12:30 GMT 22:00 - 22:30 AEST 1:00 - 1:30 NZDT	An Advisory Opinion on Climate Change Obligations Under International Law: a Realistic Prospect? Prof Richard BARNES <i>University of Lincoln, Lincoln Law School</i> local time: 12:00NN - 12:30PM (HKT -8hrs)
20:30 - 20:45 HKT	7:30 - 7:45 EST 8:30 - 8:45 AST 13:30 - 13:45 CET 12:30 - 12:45 GMT 22:30 - 22:45 AEST 1:30 - 1:45 NZDT	Break
Maritime Borders and the Death of States		
20:45 - 21:15 HKT	7:45 - 8:15 EST 8:45 - 9:15 AST 13:45 - 14:15 CET 12:45 - 13:15 GMT 22:45 - 23:15 AEST 1:45 - 2:15 NZDT	Climate Change and Migration Prof Seline TREVISANUT <i>Utrecht University, School of Law</i> local time: 1:45PM - 2:15PM (HKT -7hrs)
21:15 - 21:45 HKT	8:15 - 8:45 EST 9:15 - 9:45 AST 14:15 - 14:45 CET 13:15 - 13:45 GMT 23:15 - 23:45 AEST 2:15 - 2:45 NZDT	Shifting Baselines and Receding Zones Dr Massimo LANDO <i>City University of Hong Kong, School of Law</i> <i>National University of Singapore, Centre for International Law</i> (HKT +0hr)
21:45 - 22:15 HKT	8:45 - 9:15 EST 9:45 - 10:15 AST 14:45 - 15:15 CET 13:45 - 14:15 GMT 23:45 - 00:15 AEST 2:45 - 3:15 NZDT	Vulnerability of Small Island States Dr Patricia GALVÃO TELES <i>Autonomous University of Lisbon, Faculty of Law</i> <i>United Nations International Law Commission</i> local time: 8:45AM - 9:15AM (HKT -13hrs)
22:15 - 22:45 HKT	9:15 - 9:45 EST 10:15 - 10:45 AST 15:15 - 15:45 CET 14:15 - 14:45GMT 00:15 - 00:45 AEST 3:15 - 3:45 NZDT	New Technologies, Climate Change and the BBNJ Agreement Prof. Ronán LONG <i>World Maritime University, WMU-Sasakawa Global Ocean Institute</i> local time: 3:15- 3:45PM (HKT -7hrs)

Day 2 - 28 January 2022, Friday

Trading and Shipping Under Climate Change

9:00 - 9:30 HKT	20:00 - 20:30 EST (27 Jan) 21:00 - 21:30 AST (27 Jan) 2:00 - 2:30 CET 1:00 - 1:30 GMT 11:00 - 11:30 AEST 14:00 - 14:30 NZDT	Sustainable Shipping in the Arctic: A Matter Only for the Arctic States Prof. Aldo CHIRCOP <i>Dalhousie University, Schulich School of Law</i> local time: 27 Jan 9:00PM - 9:30PM (HKT -12hrs)
9:30 - 10:00 HKT	20:30 - 21:00 EST (27 Jan) 21:30 - 22:00 AST (27 Jan) 2:30 - 3:00 CET 1:30 - 2:00 GMT 11:30 - 12:00 AEST 14:30 - 15:00 NZDT	Shipping or Climate Change- A Dilemma for Low-lying Pacific Open Registries Prof. Craig FORREST <i>University of Queensland, T.C. Beirne School of Law</i> local time: 11:30PM - 12:00PM (HKT +2hrs)
10:00 - 10:30 HKT	21:00 - 21:30 EST (27 Jan) 22:00 - 22:30 AST (27 Jan) 3:00 - 3:30 CET 2:00 - 2:30 GMT 12:00 - 12:30 AEST 15:00 - 15:30 NZDT	Emission Reduction From Shipping: Policy and Regulatory Approaches Prof. Michael TSIMPLIS <i>City University of Hong Kong, School of Law</i> (HKT +0hr)
Closing Address		
10:30 - 10:45 HKT	21:30 - 21:45 EST (27 Jan) 22:30 - 22:45 AST (27 Jan) 3:30 - 3:45 CET 2:30 - 2:45 GMT 12:30 - 12:45 AEST 15:30 - 15:45 NZDT	Prof. Michael TSIMPLIS <i>City University of Hong Kong, School of Law</i> Dr. Massimo LANDO <i>City University of Hong Kong, School of Law</i> <i>National University of Singapore, Centre for International Law</i>

SESSION 1

International Court Jurisprudence on Climate Change and Sustainable Development

Dr. Penelope Ridings examined the ways international courts and tribunals approached sustainable development and considered the potential utility of applying this jurisprudence to reconcile conflicts between States when addressing first, impacts on climate change and second, ocean use in areas beyond national jurisdiction (ABNJ). Sustainable development, based on its three pillars of social, economic and environmental sustainability, was considered to be a useful concept for resolving contemporary problems. She noted that the link between sustainable development and ABNJ has been recognized within the context of negotiations for Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Dr. Ridings proceeded to carry out a thematic analysis of sustainable development based on the existing, rather sparse, jurisprudence. Despite the few decisions available in international jurisprudence, they can nonetheless help determine where the balance lies. However, a more proactive approach to embed sustainable development in approaches addressing climate change is required in order to make the principle more useful in practice.

Link to presentations,

<https://drive.google.com/file/d/10pihy8pxeFT-DsYxgd4tjfKRyGtUz3jS/view?usp=sharing>.

The Role of National and International Courts in Resolving Conflicts Between Climate Change and Economic Development

Dr. Benoît Mayer provided a critical analysis of national case law concerned with climate change. Observing that the classification of climate litigation is unclear and may involve various legal bases, the presentation focused on cases concerned with the issue whether a state performed its “fair share” in mitigating climate change. These cases are in reality about global cooperation. Thus they can be framed in national or international law terms. From the many cases that have been brought, only a few have been successful. One category of cases concerns the mitigation standards of States within international law. Four successful cases were considered in this context, namely *Urgenda v. the Netherlands* (Netherlands), *Milieudefensie v. Shell* (Netherlands), *Neubauer v. Germany* (Germany) and *Klimaatzaak v. Belgium* (Belgium). A second category of cases concerns compliance with national standards, their clarity and the introduction of greenhouse gas emissions in Environmental Impact Assessments. A third category of claims concerns disputes or advisory opinions based on international human rights. Several of them are pending or have not yet been initiated. With respect to first category Dr. Mayer observed that the legal basis is Art. 4(2) of the 2015 Paris Agreement, noting that the characterization of the Nationally Determined Contributions as voluntary is confusing as these are not voluntary with respect to their communication or their implementation but only to an extent with respect to their determination. Furthermore, Dr. Mayer commented on cases based on human rights pointing out that these are concerned with the rights of the individual rather than collective rights. Thus human rights treaties do not require collaboration between States with respect to climate change mitigation. Dr. Meyer further commented on the two ways of interpreting mitigation obligations, observing that *Urgenda* and *Milieudefensie* utilized exclusively descending reasoning and observed that the inaccuracies in determining the pathways of achieving the mitigation targets leads to judicial confusion and arbitrariness.

Link to presentations,

<https://drive.google.com/file/d/1Tm8j2e-u9v0RBhADaUeVVkxXFtBq6IRd/view?usp=sharing>.

An Advisory Opinion on Climate Change Obligations Under International Law: a Realistic Prospect?

Prof. Richard Barnes considered in his talk the possibility of applying for an advisory opinion on Climate Change obligations before the International Tribunal for the Law of the Sea or before the International An advisory opinion will provide a significant contribution to the law on climate change because it will have a legal effect for all States and will enable most States to participate to its proceedings. An advisory opinion from the ICJ in particular will address a full range of questions in international law while an advisory opinion from ITLOS will be restricted to the interpretation and application of the United Nations Convention on the Law of the Sea. Prof. Barnes noted though that the ICJ procedural requirements are more demanding than those for ITLOS. In addition to the legal scope of the questions asked and the procedural differences, it was further argued that consideration should be given to what type of question would be useful in guiding climate change law and international relations as some of the questions that could be asked, for example mitigation efforts, have primarily political rather than legal character.

Link to presentations,

https://drive.google.com/file/d/1oUrZS_ka4mPsIZv1X1PN_WOw7RhkAA7q/view?usp=sharing

SESSION 2

Climate Change and Migration

Prof. Seline Trevisanut explored issues of migration at sea. In the first part of her presentation, she tracked the historical evolution of the legal concept of “border” in international law, highlighting the distinction between the fluidity of borders in the past (for example by reference to the concept of “bon voisinage”) and contrasting it to the rigidity of borders in the present (starting at the end of the 19th century). Prof. Trevisanut then focused on the legal status of migration in international law, stressing the lawfulness of it and the centrality of the sea in migratory flows. She considered some recent suggestions for the “de-territorialisation” of borders and border control, arguing that there is a link between the location of a border and the place where border control action takes place—in other words, the border follows the action. Prof. Trevisanut closed her presentation with some thoughts on maritime borders in the Anthropocene, suggesting that the race to sovereignty over natural resources will likely increase tensions in relation to mass displacement of populations which will require adapting the current legal framework, for instance by creating what she termed “participatory rights”.

Link to presentations,

https://drive.google.com/file/d/1pkJmQZagsZQm1Zembnus_Z3FpBaymTGb/view?usp=sharing.

Shifting Baselines and Receding Maritime Zones

Dr. Massimo Lando spoke of the dilemma of the impact of shifting baselines on the establishment of maritime boundaries, with particular emphasis on boundaries in the EEZ and continental shelf. Dr. Lando focused on the argument, made by some in the scholarly literature, that maritime boundaries shift automatically as a result of coastline changes over time. In his presentation, he outlined some criticism of this view. First, he set out the problematic legal basis under UNCLOS and customary international law: while some scholars have suggested that Art. 15 of UNCLOS could be a legal basis for fluctuating boundaries, Dr. Lando argued that this view was unpersuasive. Second, he considered the application by international courts and tribunals of the three-stage delimitation process, arguing that such a process is ill-suited to delimiting fluctuating boundaries. Third, Dr. Lando explored the practical difficulties of “updating” fluctuating boundaries.

Link to zoom presentations,

https://drive.google.com/file/d/1xJV3_Y3VtcpXormuDSFS8DzZVeOa88Nq/view?usp=sharing.

Vulnerability of Small Island States

Dr. Patrícia Galvão Teles spoke in a personal capacity, and not as a member of the International Law Commission (ILC) or as a representative of the Portuguese government. She started out by paraphrasing Mark Twain and stating that news about the death of States are exaggerated. She relied on the IPCC reports to link climate change to sea-level rise, which have obvious impact on the future of low-lying small island States. The possibility is for 650 million people, who currently live in such small island States, to face displacement as a result of sea-level rise. Such impacts will also be felt in some coastal mega-cities. Dr. Galvão Teles spoke of the work of the ILA and ILC on sea-level rise, touching on certain possible issues that are expected to be covered in the forthcoming ILC reports. She also emphasised that international law is not proactive, but reactive, which means that, in matters of climate change and sea-level rise, it appears likely that the law will have to play catch-up with physical changes in the environment.

Link to zoom presentations,

https://drive.google.com/file/d/1G_zr4ghwxQSZ6GVxip9jJuC3X3vv3hQx/view?usp=sharing.

New Technologies, Climate Change and the BBNJ Agreement

Prof. Ronán Long focused on the on-going negotiations of the BBNJ agreement. He developed a hypothesis that new technologies are exposing certain fundamental weaknesses in the rules on marine scientific research and technology transfer set out in Parts XIII and XIV of UNCLOS. This problem partly stems from the fact that UNCLOS was adopted in 1982, while technological development has made giant leaps forward since then. For instance, UNCLOS does not contain clear rules concerning the deployment of devices operating autonomously, without support from a research vessel. Prof. Long also highlighted some disparity in the technological capacities between Global North and Global South States. Prof. Long made four proposals for the BBNJ negotiations: first, to define “marine technology”; second, to include in the future agreement a rule of reference to link the agreement itself with other legal instruments governing the use of marine technology; third, to include, within the mandate of institutions created by the agreement, oversight in relation to marine technology; fourth, to set up a clearing-house mechanism by way of an open-access web-based platform.

Link to zoom presentations,

https://drive.google.com/file/d/131Bx_bLYfZLj4yYpMF5FAdWVe0I43JN8/view?usp=sharing.

SESSION 3

Shipping or Climate Change – A Dilemma for Low-lying Pacific Open Registries

Prof. Craig Forrest gave an insightful look at the dilemma many small Pacific Island States face with respect to the conflict between the operation of their ship registers and their vulnerability to climate change. The talk focused on the Marshall Islands — a successful and good quality ship register involving many tankers as well as vessels participating in oil and gas exploration and exploitation. The set-up of the Marshall Islands register was contracted out to private entities operating from the USA very soon after the Marshall Islands achieved independence. The agreement delegates significant powers to the conglomerate running the register including the representation of the register at the IMO and the implementation of the internationally agreed shipping regulations. This arrangement which still obtains today is the basis of the aforementioned conflict and it is difficult to resolve as the agreement is subject to US law and jurisdiction.

Link to zoom presentations,

<https://drive.google.com/file/d/1rKtpIg9PIwIQ2QGJ6VoKBbEJhOiXgsUu/view?usp=sharing>.

Sustainable Shipping in the Arctic: A Matter Only for the Arctic States?

Prof. Aldo Chircop argued that the Arctic navigation is not solely a matter of the Arctic States but, through the application of various maritime and environmental treaties, a matter of concern for all States. Thus obligations are imposed on ships sailing in the Arctic Ocean but important obligations are also imposed on coastal States with respect to reception facilities, safety of navigation, search and rescue, and contingency planning for shipping accidents. There are matters which require attention in the Arctic. First, the connection of indigenous people with ice and the marine environment is an issue with which Arctic shipping will have to adapt to. Second, the gradual improvement of ships does not mean that the environmental problems they pose, particularly for the Arctic region, have been solved. This is a matter of concern for the Arctic States. Climate change is especially challenging for indigenous people who are losing their habitat while the increase of shipping in the Arctic is likely to adversely affect several aspects of the ecosystems including underwater noise.

Link to zoom presentations,

https://drive.google.com/file/d/16I6uWhQpGzdh95IDGKdMqz2Bn_7yAYGD/view?usp=sharing.

Emissions Reduction from Shipping: Policy and Regulatory Approaches

Prof. Mikis Tsimplis presented an overview of the negotiations at the IMO for the reduction of emissions from international shipping. The established IMO arrangements — namely the protection of existing ships from regulatory intervention, the prioritization of the operational needs of shipping over environmental concerns and the uniform application of international regulations to ships appear to form background where the chances of agreeing emission reductions are small. The agreed short-term measures are inefficient and the discussion of market based measures seems to be pushed by the industry towards a tax per ton of emitted CO₂. The inclusion of ships under the EU-Emissions Trading System is promising to be more efficient in pushing the IMO negotiations in a direction more consistent with the 2015 Paris Agreement.

Link to zoom presentations,

https://drive.google.com/file/d/1ji-k4or6688fMd_sKyenQd_E0ESqDJk-/view?usp=sharing.