



**Stress Testing the Law of the Sea**  
*Dispute Resolution, Disasters and New Challenges*

Additional sponsor:



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**ABSTRACTS**

**Professor Vasco Becker-Weinberg**

**Moving forward after the South China Sea Arbitral Award**

The presentation will focus on the legal alternatives available to the relevant States following the South China Sea Arbitral Award issued on 12 July 2016. It will look at the legal issues at hand, as well as the current challenges facing States in order to move forward and avoid increasing hostilities and entrenching even further the existing deadlock situation.

**Charles L O Buder**

**The Significance and Potential Consequences of Classifying the Control of Information related to Hydrocarbon Resources in Maritime Areas as a Sovereign Right**

In its Order of 25 April 2015, the Special Chamber of the International Tribunal for the Law of the Sea formed to deal with the dispute over delimitation of the maritime boundary between Ghana and Cote d'Ivoire prescribed provisional measures consisting of, among others, an order that Ghana "take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Cote d'Ivoire". This provisional measure followed a finding by the Special Chamber that the existence of "the right to exclusive access to confidential information about its natural resources" within the continental shelf as a sovereign right of the coastal state is "plausible" and that the acquisition and use of such information "would create a risk of irreversible prejudice to the rights of Cote d'Ivoire should the Special Chamber find that it has rights over the disputed area. This presentation will discuss the significance and potential consequences of this decision for energy exploration in undelimited or disputed maritime areas.

**Pierre-Emmanuel Dupont**

**Contested sovereignty over territorial zones and the delimitation of maritime boundaries**

While it is undisputed that maritime rights derive from the coastal State's sovereignty over the land, a principle commonly summarized as 'the land dominates the sea', there may be situations where the issue of maritime entitlements arises with respect to coastal territory over which sovereignty is uncertain or disputed. There are current cases where the authorities of unrecognized States (or quasi-State entities) such as the TRNC, Somaliland, Western Sahara, etc., have claimed maritime zones. There are also various instances where disputed land territory is taken into consideration in the delimitation of maritime zones (and the drawing of baselines). In these contexts, what is the impact of the absence of uncontested sovereignty over the land on maritime entitlements? This presentation aims at reviewing contemporary State practice in certain of these cases, in order to assess the continuing relevance of the above-mentioned principle and its consequences, and discern what may be the basic applicable rules which should govern maritime delimitation in such zones.

**Professor Erik Franckx**

**The Defaulting Party Phenomenon in Arbitrations Set Up Under Annex VII of the United Nations Convention on the Law of the Sea.**

In recent years, the website of the Permanent Court of Arbitration indicates a sharp increase in cases brought under Annex VII of the United Nations Convention on the Law of the Sea (1982 Convention). This heightened activity would be cause for unbridled optimism among supporters of inter-state dispute settlement, were it not for a parallel development of considerable concern: the re-emergence of non-participation. After a lull of several decades, the defaulting party phenomenon has resurfaced in the form of the Russian Federation (RF) and the People's Republic of China (PRC), respondents in the Arctic Sunrise and Philippines v. PRC arbitrations respectively. After having clarified the exact relationship that exists between these two arbitrations and the Permanent Court of Arbitration, this paper will compare the PRC and RF approaches. For even though both states rejected the jurisdiction of the Arbitral Tribunal and refused to appear before it, they nevertheless expressed their legal positions outside the normal arbitral process differently. Shortly before the deadline for submission of a counter-memorial, the PRC presented a position paper on matters of jurisdiction of the Arbitral Tribunal. This country had its position paper containing developed legal arguments forwarded to members of the Tribunal. The RF took a similar initiative with respect to the merits of the case when this country presented its legal argumentation to the Arbitral Tribunal only days before the latter rendered its award on the merits. Since Ukraine has recently instituted arbitration proceedings against the RF under Annex VII of the 1982 Convention to assert its rights as the coastal state in maritime zones adjacent to Crimea in the Black Sea, Sea of Azov, and Kerch Strait, chances are real that the number of such defaulting party arbitrations will grow.

**Professor Maria Gavouneli**

**New environmental challenges: Updating Part XII of the Law of the Sea Convention**

Although Part XII of the Law of the Sea Convention remains the only comprehensive convention on the protection of the marine environment to date, the patina of time cannot hide gaps and deficiencies brought about by the continued proliferation of environmental treaties and emerging challenges, such as those relating to climate change. International courts and tribunals –most recently in the award on the South China Sea– have not shown so

far any particular reticence in specifying obligations and incorporating new standards into the venerable text. In this paper, I will attempt to explore the extent of such continuous incorporation of new rules, stretching the contractual limitations of the Convention and turning it into a living instrument.

**Kristina M. Gjerde**

**“Marine Conservation beyond Boundaries: Protecting Biodiversity in the High Seas and Seabed Area”**

The ocean is changing: the impacts of climate change on top of decades of unsustainable fishing, pollution and habitat degradation are altering the fundamental physics, chemistry and biology of the global ocean. This combined cocktail of stressors is creating a cascade of effects that are testing the laws, principles and approaches embodied in the 1982 UN Convention on the Law of the Sea. Nowhere is this more apparent than in the regime for the two-thirds of the ocean beyond national boundaries -the high seas and international seabed Area. This presentation will highlight the current challenges to sustaining marine biodiversity beyond national boundaries stemming from climate change, existing activities and their synergistic and cumulative impacts. It will question whether the current fragmented, silo-based and private-interest dominated regime is fit for purpose for leading us safely across increasing environmental challenges into the 22<sup>nd</sup> Century. It will describe the ongoing discussions at the United Nations to develop a legally binding international instrument under UNCLOS for the conservation and sustainable use of marine biodiversity beyond national jurisdiction. These negotiations –launched after a decade of “studying issues” relating to the conservation and sustainable use of marine biodiversity beyond national boundaries” --offer an opportunity to update and elaborate the provisions of UNCLOS to meet the challenges of the 21<sup>st</sup> and the 22<sup>nd</sup> century. The question remains however whether States will use this opportunity to develop the mechanisms necessary for an integrated ecosystem–based and precautionary approach to ocean governance, or will simply settle for a few minor touch-ups to the current fragmented governance regime that thwarts sustainable management of our common ocean.

**Bill Hayton**

**Emotion versus evidence in resolving the South China Sea disputes**

The heart of the South China Sea disputes is the official Chinese assertion that the rocks and reefs of the South China Sea have belonged to it ‘since ancient times’. This belief, inculcated through school textbooks and state media, underlies the sense of righteousness that characterises Chinese actions in the region. Versions of this ‘patriotic history’ have also distorted international analyses of the situation, particularly among lawyers, despite a lack of historical evidence for it. This paper will argue that no settlement in the South China Sea is sustainable so long as China’s sense of entitlement endures and that lawyers and other analysts need to be more sceptical of the arguments put forward in defence of national territorial claims.

**Nicholas A. Ioannides**

**Overlapping Claims in Undelimited Maritime Areas: Tensions and Trends in the Eastern Mediterranean Sea’.**

The desire to exploit offshore hydrocarbon deposits has driven States to assert maritime space beyond their territorial sea. However, prior to carrying out any hydrocarbon activities,

it is necessary for States to delimit their maritime space in a precise manner establishing a stable and safe environment for such operations. Nevertheless, maritime boundary delimitation is not an easy task given the divergent positions held by States with respect to delimitation methods and factors to be taken into account during negotiations. Albeit the 1982 United Nations Convention on the Law of the Sea (LOSC) does little to resolve delimitation disputes, Articles 74(3) and 83(3) LOSC impose an obligation on States to refrain from activities in an undelimited area which could put a final arrangement at risk. International courts and tribunals have endeavoured to construe these provisions, but the outcome is not satisfying. The above considerations apply to the Eastern Mediterranean (East Med) region, where geological surveys revealed vast offshore oil and gas deposits in the seabed and subsoil. Despite the fact that certain regional states have established a cooperation scheme, the hydrocarbon bonanza has also caused friction. In particular, Lebanon and Israel spar over a maritime area of 860 km<sup>2</sup>, while a more serious quandary occurred between Greece and Cyprus on the one hand and Turkey on the other with respect to a maritime area stretching from the Greek island of Rhodes to Cyprus. Consequently, the East Med is a unique case study and merits attention in light of the soaring involvement of international oil companies therein.

### **Frederick Kenney**

#### **Dispute Resolution and Dispute Avoidance: The IMO Experience.**

The presentation will address the relationship between the IMO treaty regime and UNCLOS, the different dispute resolution mechanisms within that regime and their usage, and will also, given the lack of significant disputes, discuss the ways in which the IMO member States avoid conflict through consensus building, devices within the treaties themselves, and other means.

### **Judith Levine**

#### **New Procedural Challenges in Recent PCA Law of the Sea Cases**

Drawing on insights gained from the PCA's administration of 13 UNCLOS disputes, Judith's intervention will discuss procedural challenges and solutions in recent law of the sea cases. She will focus on (1) proceeding in a situation of a non-participating respondent; (2) dealing with interested non-parties; and (3) facilitating the use of independent experts and site visits for better understanding of technical issues. Judith will also reflect on trends towards greater transparency in interstate arbitration and increased requests for the PCA to assist with dispute resolution methods alternative to arbitration.

### **Professor Ronan Long and Mariamalia Rodriguez Chaves**

#### **An Opportunity for Paradigm Change: Establishing a Normative Basis for Marine Ecological Restoration in Areas Beyond National Jurisdiction**

In this era of climate change, the ocean is threatened by ever increasing anthropogenic impacts. Ninety-nine percent of all the species that ever lived are now extinct. The law however continues to regulate uses of the marine environment and the exploitation of living and non-living resources under discrete regulatory regimes. In addition, many offshore activities are undertaken without due regard to their individual and cumulative impacts on the health and functioning of marine ecosystems and the resources that they support. Moreover, the law as currently framed is unsuitable for protecting and restoring degraded marine ecosystems. As a result, a great part of the world's biodiversity is threatened and the oceans' carrying capacity is close to or at its limit. At the same time, the ocean is resilient and

if appropriate action is taken to restore and avoid adverse impacts, the health and productivity of marine ecosystems can be replenished. Against this background, the paper reviews progress in the negotiation of a new international instrument on the protection of biodiversity in areas beyond national jurisdiction. The authors contend that missing from the discussion to date is a narrative on the emerging principle and science of ecological restoration with a view to achieving Targets 14.2 and 14.4 of the 2030 Agenda for Sustainable Development. Furthermore, they argue that the negotiations provides an unrivaled opportunity to rework the traditional paradigms on ocean governance with a view to ensuring that the new instrument has an unambiguous and strong normative focus on environmental recovery. Accordingly, the paper reviews the legal basis for restoration action in international and European law, the component elements that ought to be in the restoration agenda advanced by the putative implementation agreement, as well as providing a brief description of two case studies to test the hypothesis, namely: (i) the MERCES project, which is examining the scientific and legal basis to restore degraded and/or damaged marine ecosystems and habitats and the services they provide in European regional seas; (ii) as well as the research undertaken by one of the authors on the legal protection of biodiversity in the Costa Rica Thermal Dome (CRTD) in the Eastern Tropical Pacific. The paper concludes that in addition to the conservation and sustainable use of biodiversity, the architecture of the implementation agreement on biodiversity should be designed with a view to preventing, protecting and restoring marine ecosystems and the productivity of the ocean in the interest of the common good.

## **Stephen Minas**

### **The Sendai opportunity: Maritime access and cooperation for disaster relief**

Maritime access and the mobilization of maritime services have been important enablers of initial international responses to disasters in littoral states. However, this access has proved controversial in recent times, with objections to military participation and ongoing resistance to a responsibility to admit international disaster responders. This paper will examine the 2015 adoption of the Sendai Framework for Disaster Risk Reduction, as part of the Post-2015 Development Agenda, as an opportunity to strengthen protocols of maritime access and cooperation. The paper will survey the existing state of international law concerned with disaster relief before turning to the significance of the Sendai outcome. It will analyze the scope for oceans law and regional frameworks for maritime cooperation to contribute to emerging norms and processes of access and cooperation in disaster relief, as well as the contribution of other national and regional initiatives to implement the Sendai Framework. These regulatory developments will be considered in the context of East Asia, a region whose seas have repeatedly proved to be both the source of terrible disasters and the transit zone for vital emergency assistance.

## **Dr Alexandros X.M. Ntovas**

### **On Enrica Lexie and “...of any other person in the service of the ship”**

“The shipboard deployment of armed guards has been the most significant and effective counter-piracy development in the last few years. However, such personnel still operate outside a hard – and generally acceptable – international legal framework. Various by-laws and guidelines, as well as other interim recommendations and criteria, at the moment only constitute either soft-law or have been primarily developed by the private sector in the context of few flag-States domestic law. In the meantime, crucial questions in principle are still unsettled, as manifested for example in the ongoing litigation, on both national and international level, regarding the M/T Enrica Lexie incident. In this context, the presentation aims to reflect based on an a fortiori argument, including a dry approach from ashore, on the relationship between a merchant vessel – as a legal entity – and the privately contracted armed security personnel on board.

## **Professor Nilufer Oral**

### **Climate change and protection of the oceans under international law**

In 2016 the IPCC Panel decided to prepare a special report on climate change and the oceans and the cryosphere. The importance of the oceans for regulating the climate is well documented, as are the multiple threats to the health of the oceans, including the adverse impacts of climate change, especially ocean acidification. The Paris Agreement on Climate Change was adopted by consensus in Paris in 2015. It charts the roadmap that is to be followed by States to mitigate and adapt to climate change. While the preamble of the Paris Agreement makes reference to oceans, does the Agreement provide the necessary foundation for states to address the growing and potentially irreversible impacts of climate change on the oceans and its living resources? The 1982 UNCLOS is recognized as the “Constitution for the oceans”, but does it provide the legal tools for the international community to address the threats to the marine environment from climate change? This paper will examine the existing climate change regime and UNCLOS in relation to protection of the oceans against climate change.

**Dr Kate Parlett**

**Jurisdiction of Part XV tribunals under UNCLOS: some recent developments**

Over the last five years, there has been increasing use of the compulsory dispute settlement procedures under Part XV of the UN Convention on the Law of the Sea. In a number of cases, the jurisdiction of these tribunals has been contested, most recently by the United Kingdom in the case brought by Mauritius concerning the Chagos Archipelago, and by China in the case brought by the Philippines relating to the South China Sea.

This paper will give an introduction to some of the challenging questions of the scope of jurisdiction of Part XV tribunals, focussing in particular on three issues:

- \* first, the extent of a tribunal's jurisdiction to decide incidental issues;
- \* secondly, the impact of the reference to other rules of international law in the applicable law provision (Article 293) on the scope of a Part XV tribunal's jurisdiction; and
- thirdly, the jurisdictional implications of renvoi references in other provisions of UNCLOS (notably Article 2(3) relating to the territorial sea, and Article 56(2) concerning the exclusive economic zone).

**Dr Richard Schofield**

**British policy towards LTE's and artificial islands in the 'Wild West' of the early 1950s**

Ostensibly, the PCA's (China-Philippines) ruling of 12 July 2016 aimed partially to elaborate a clearer and more detailed prescription of what states can and cannot do with small, uninhabited insular features than that detailed in UNCLOS's infamously vague and threadbare Article 121. We are talking here about the July 2016 ruling's specification that any such claimed feature needs to have the capacity to sustain either a stable community of people or economic activity that is non-extractive in its natural state. This was, of course, effectively pronouncing on recent decades of controversial state practice in both claiming jurisdictional zones for tiny insular features and in substantially expanding the footprint of any such features by artificial means. But lest anyone gets the impression that such activities are essentially recent phenomena, this article reflects upon British colonial policy and practice towards artificial islands and LTEs in what could be likened to a 'Wild West' of the early 1950s - where the policies of this leading maritime power needed to be formulated, adapted and refined in the face of fast-changing international legal norms and pressing regional concerns. Its consideration of the entitlement of artificial islands in the Persian Gulf during the early 1950s and the question of whether low-tide elevations could be occupied a few years later in the Caribbean region are examined in this light. The story reminds us that these issues have been around for a long time, that states have long behaved in an opportunistic manner and that recent developments have historical parallels.

**Andrew Shearer**

**Geopolitics versus the rule of law: Which will prevail in the South China Sea?**

The arbitral award is an inflexion point for the long-running South China Sea dispute and potentially for the wider Asia Pacific region. It will test whether the region's future will rest on principles such as the rule of law, peaceful resolution of disputes and freedom of navigation that have underpinned half a century of remarkable prosperity or will be characterized by coercion, instability, and the risk of miscalculation and conflict. China has rejected the tribunal outcome; how the Philippines and other claimants respond will be crucial, as will the roles of the United States, other regional powers, and Europe.

**Professor Anastasia Telesetsky**

**Weathering the 21st century: The Need for Hazard Based Legal Frameworks to Advance the Law of the Sea**

The drafters of UNCLOS contemplated the potential for coastal and ocean disasters when they provided provisions for marine contingency planning. While States have continued to systematically strengthen contingency planning for maritime accidents, almost no legal attention has been given under the Law of the Sea instruments to a broader set of ocean-related disasters that loom in the 21st century. The combination of more ocean-related phenomena such as intensification of tropical storms, sea level rise and ocean acidification with the existence of exposed and vulnerable coastal communities creates the conditions for human insecurity. A lack of coping capacity may undermine core objectives of UNCLOS including the provision of sustainable marine resources. In response to changing oceans, this presentation emphasizes the need for States both individually and regionally to invest in the creation of multi-sector hazard based legal frameworks capable of addressing both the immediate needs of short-term disaster relief and long-term community adaptation. Using the example of tropical storms in the Pacific, this presentation will offer one example of how a regional hazard-based legal framework might be designed as part of the implementation of the Law of the Sea.

**Professor Robert Volterra**

**Arbitrating Maritime Disputes: Evolving approaches to maritime features and third party interests in UNCLOS arbitration**

The ICJ has long been the preferred adjudicative mechanism for resolving maritime disputes between States. However, several arbitral awards handed down in the last two decades have contributed significantly to the understanding of key UNCLOS provisions. Focusing on the Eritrea/Yemen, Barbados/Trinidad and Tobago and South China Sea awards, this presentation compares the treatment of maritime features and third parties under UNCLOS by the respective tribunals. Comparing these awards suggests that tribunals are becoming more robust in their treatment of maritime features and third parties. The status of maritime features under Arts 13 and 121 of UNCLOS— whether characterised as a low-tide elevation, a rock or an island – has considerable significance both in terms of sovereignty and the delimitation of any maritime boundary between the disputing States. However, in both Eritrea/Yemen and Barbados/Trinidad and Tobago, the tribunals gave only cursory consideration to the status of the disputed features. By contrast, in the South China Sea Award this issue formed the very substance of much of the dispute. The Tribunal likewise scrutinised more closely the extensive historical and technical evidence presented by the Philippines; a fact which equally reflects the increased technological capabilities of modern arbitral tribunals. The tribunals' approach to the treatment of third parties has also evolved considerably. In Eritrea/Yemen the Tribunal was exceptionally cautious to adopt a delimitation line that stopped well short of any possible overlapping claim. And yet the South China Sea Tribunal went on to recognise the existence of other claims to the South China Sea and still find that it had jurisdiction as Malaysia and Vietnam's interests did not form the very subject matter of the dispute.



**Dr Paul von Mühlendahl**

**“Recent Trends in Public International Law and their Impact on the Law of the Sea”**

The law of the sea is not isolated from evolutions affecting public international law, which, in turn, are impacted by current events and how States and other actors respond to them. Recent trends that have had or will have an impact on the law of the sea include – but are in no way limited to – (i) an greater willingness to tackle climate change, culminating in the adoption of the Paris Agreement in December 2015, (ii) growing human flows by sea, including of internationally protected persons, in particular in the Mediterranean, (iii) a bigger role played by private actors, in particular by multinational companies and their increased recourse to investor-State arbitration, (iv) resurgent tensions in Eastern Europe, especially since the Crimean crisis and Crimea’s absorption by the Russian Federation, (v) China’s renewed assertiveness in the South China Sea, notably through the expansion of its footprint on existing land features, and (vi) the legitimacy crisis in the European Union (EU), resulting inter alia in the (more than likely) future withdrawal of the United Kingdom from the EU. The purpose of this presentation is to describe and analyze the interactions between these evolutions and the law of the sea, emphasizing those developments that push the current legal regime to its limits, or maybe sometimes even beyond.

**Mubarak Waseem**

**ITLOS at Twenty: The Contribution of Provisional Measures to the Regime of the Law of the Sea**

After twenty years of operation, the International Tribunal for the Law of the Sea has heard applications for provisional measures in nine of its twenty-five cases, an impressive number for a court that will in a few weeks mature from its teenage years. In acting as the provider of provisional measures both for cases before the Tribunal, and for cases before arbitration in accordance with Part XV of the United Nations Convention on the Law of the Sea, it has developed a burgeoning body of jurisprudence. The object of this piece is to explore the contribution of that jurisprudence to the development of the regime of the law of the sea. In doing so, it will proceed in three sections. The first section will assess the theory and purpose of the paradigmatic concept of provisional measures in international law, including the function of an international court or tribunal’s provisional measures jurisdiction. The second section will contrast this paradigmatic concept with the relevant provisions in the Tribunal’s constituent documents, with a focus on the Convention. The Tribunal’s provisional measures jurisdiction differs in some important and novel aspects from the paradigmatic concept. Thirdly, and finally, this piece will assess the Tribunal’s provisional measures jurisprudence, noting where it has contributed in a novel way to the development of the law of the sea, and where opportunities remain. It will also discuss what the function of the Tribunal is, in light of this developing body of jurisprudence.

**Professor Keyuan Zou**

**Controversial Issues in the Development of the International Law of the Sea**

It is recalled that the United Nations Convention on the Law of the Sea (LOSC) has come into force for more than two decades. However, there are still remaining issues, some left over by the Third United Nations Conference on the Law of the Sea, such as innocent passage for warships, and some emerging in the course of its implementation, such as generic resources on the high seas. This presentation selects four areas for discussion including straight baselines, regime of islands, military activities in the EEZ, and maritime historic rights. By

discussing these issues, it is suggested that there be a review conference for the LOSC in the near future.