

CLIMA – The Climate Show episode 24

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Transcript

00:00:04 Linnéa Nordlander

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change.

00:00:09 Linnéa Nordlander

This podcast is brought to you by the University of Copenhagen.

00:00:16 Beatriz Martinez

Hi. We are Beatriz Martinez, Linnéa Nordlander, and Alessandro Monti. And we are your hosts at the climate show.

00:00:26 Beatriz Martinez

In today's episode, we are discussing the relationship between climate change and ocean law with Professor David Freestone, who is founding editor of the International Journal of Marine and Coastal Law, and Executive Secretary of the Sargasso Sea Commission. He is also a visiting scholar and professorial lecturer at the George Washington University. School of Law and former Deputy General counsel at the World Bank.

00:00:48 Alessandro Monti

Tune in, as we deep dive into the critical connection between climate change and our planet's oceans, warming waters, threatening marine life, and rising sea levels threatening coastal communities are just some of the issues to be tackled by the law.

00:01:03 Linnéa Nordlander

Among other topics, we discussed the recent advisory opinion by the International Tribunal for the Law of the Sea, which addresses the obligations of states to prevent harm from climate change related impacts on the ocean. The advisory opinion marks a significant step in clarifying state responsibilities and tackling climate change and protecting marine ecosystem.

00:01:21 Beatriz Martinez

This and more is the focus of today's episode, where we explore the crucial role that our oceans play in the fight against climate change.

00:01:37 Beatriz Martinez

It is a great honor to welcome Professor David Freestone to the climate show. David, we are thrilled to have you here in Copenhagen. Thank you for accepting the role of keynote at our international conference: Interact international lawmaking actors in shipping and climate change.

00:01:52 Beatriz Martinez

Thank you as well for joining us in this episode.

00:01:55 Beatriz Martinez

And we're going to talk about the Nexus between ocean and climate welcome.

00:02:00 David Freestone

Well, thank you very much. I'm delighted to be here.

00:02:03 Beatriz Martinez

So David, as a first question for you, could you start by giving our listeners a brief overview about how climate change is affecting the ocean and where are the most pressing challenges in your view?

00:02:15 David Freestone

Yeah. OK. Well, thank you. And I said it's nice to be here and to talk about these issues.

00:02:21 David Freestone

I mean the jumping off point for this must be the 2019 Intergovernmental Panel on Climate Change report on the oceans and the cryosphere and changing climate.

00:02:30 David Freestone

And it's a terrible story. I mean, it's a really depressing read and it talks about increasing acidification. It talks about increasing warming. It talks about increased heating events, localized heating events. And this is against the overall background of predictions of sea level rise.

00:02:50 David Freestone

Which are now over a meter by 20.100.

00:02:55 David Freestone

And it even talks about for the first time, I think in an IPCC report talks about the policy implications of that by 2050, some of the small islands will be almost uninhabitable in the Pacific, the low-lying islands. So, there is that. There's also increased risk of hurricanes, which the warmer water will impact. We have in the background, you know the melting of the ice caps, which could add another meter to the predictions of sea-levels. This is not a good story, and you know it's quite clearly the result of human anthropogenic emissions, which come from all sectors but including shipping.

00:03:32 Beatriz Martinez

And what legal frameworks, what legal tools do we have to address these challenges, the one that you just mentioned.

00:03:39 David Freestone

This is like international law making 101 or there is a lot of stuff to cover. The traditional response to that is treaty making, but we already have a long-standing, 30 years of the UN Convention on Framework Convention on Climate Change and its instruments, the Kyoto Protocol.

00:03:59 David Freestone

Paris Agreement and there are other methods that we have used which are international conferences.

00:04:05 David Freestone

And if you like the reports of distinguished committees, the work of the International Law Association, the International Law Commission.

00:04:16 David Freestone

And then I would come to advisory opinions of international courts and tribunals, but we've pretty well tried most of those, some in the Framework Convention has now since 1992, it's been regularly meeting and it has not been up to the challenge and the Paris Agreement, even if states agree to meet their commitments under the Paris agreements, their unilaterally determined contributions, we are still way short of the one of the aspirations of the Paris Agreement, which are to keep the temperature.

00:04:47 David Freestone

Below 1.5°C from preindustrial times and as an aspiration, but to limit it to two degrees on the current projections. I am told that the projection is by the end of it on the current emissions under the nationally determined contributions. If people even keep states, even keep to.

00:05:05 David Freestone

Those limits will be above 2.8, which is a world a very different world from the one we live in. All they think that by with a with a 2° centigrade, 99% of all coral reefs will disappear. And we are looking at a very acidic.

00:05:27 David Freestone

ocean so many of the species that we are now familiar with will may not be able to survive and nor will we. I mean, we have to take that really seriously. I think it's an existential threat.

00:05:39 Beatriz Martinez

We. Also have been following the recent advisory opinion by the International Tribunal for the Law of the Sea and you have been quite involved in in that process. What do you think about the significance of this advisory opinion for climate change and what the key issues it addressed?

00:05:54 David Freestone

Yeah. Yes. Well, I've, I have done a lot of work I have done in the past, has been working with small islands. I was at the beginning of my career. I was the adviser to the Governor of Antigua and Barbuda, supported by the Commonwealth security in the 80s when we actually, even before the climate convention, was negotiated before the famous 1992 Rio Meeting. So I was actively involved in the setting up of the coasts, the Commission on small island states on and climate change, international and climate change, and I've I am very closely involved with the Government of Antigua and also being able to was able to help with the Recruitment of the Government of Tuvalu to be the Co chair, the first signatories and the Co-chairs of, of or we what we are calling Cosis which brought the opinion and I'm great privilege to be a member of the Committee of Legal Experts, very distinguished group, who, who helped with the drafting of this of this proposal back in in 2021, so that's. And the agenda really is that given the failure of the other systems, particularly the, the Framework Convention, the UNFCCC to reach really commitments and to enforce commitments which are going to actually make a difference, a substantial difference. To this Nightmare scenario which I was just like laying out another course perhaps, is to use the law of the Sea Convention and that was really the idea of a late colleague and friend and Professor Alan Boyle from University of Edinburgh, who had, for has for many years, been arguing that the Prohibitions on the emissions of atmospheric emissions in the frame of in sorry, in the Law of the Sea Convention, which were designed in the 70s really to address things like Sulphur dioxide, nitrous oxide, things of that kind, not greenhouse gas emissions. But they are sufficiently broadly drafted to include Greenhouse gases. And so that was basically the question that was put.

00:07:59 David Freestone

That wasn't the question about liability, but international being such. If we say that.

00:08:05 David Freestone

If an international tribunal.

00:08:07 David Freestone

Not that that states have obligations, obviously liabilities result from that. So that was the question that was put a very broad question about state. What are the state obligations under the law of Sea Convention. You know there's a well known criminal law aphorism I think from was it the other.

00:08:27 David Freestone

Novelists love.

00:08:28 David Freestone

Which is. So you should never ask a question you don't know the answer to, and we sort of if you.

00:08:33 David Freestone

Alan Boyles analysis. We know what the answer was. It's quite clear that article one of the in the definition of pollution of the marine environment includes emissions of greenhouse gases, which is light is say what the what? The tribunal agreed unanimously to be the.

00:08:52 David Freestone

Case.

00:08:52

Umm.

00:08:54 Beatriz Martinez

In your keynote in our conference, you also talk about the potential implications that this advisory opinion could have for the regulation of greenhouse gas emissions from shipping. Could you unpack this a little bit for us.

00:09:07 David Freestone

Yeah, surely I might. First of all, I mean, I'm not an expert on maritime law, but I do follow the particularly the greenhouse gas issues in the IMO.

00:09:21 David Freestone

We were quite.

00:09:22 David Freestone

Surprised in the sense that the argument that the, the main opposition argument to the, to the case that the law of the Sea Convention would be the applicable laws to apply in relation to greenhouse gas emissions is.

00:09:36 David Freestone

There is already an existing regime. The Framework Convention on Climate Change, which you could take a specialist legal regime which could perhaps take priority. The *lex specialis*, as it would be called.

00:09:48 David Freestone

And we were delighted because that was one of our fears was that that was the line, particularly the line of a number of developed countries, took in their submissions to the court and we were delighted that the Court unanimously rejected that. And one of the things they flagged was that these parallel regimes did not cap. They didn't trump the obligations of the law of the sea.

00:10:08 David Freestone

Convention, so they mention.

00:10:11 David Freestone

The Framework Convention and climate change, but they also specifically mentioned the International Civil Aviation Organization they specifically mentioned IMO they specifically mentioned Annex 6 of the of the MARPOL Treaty as well, which covers emissions of from vessels so the implications of it are quite clear, as they say later, as they later in on, in their opinion, they say that these obligations which they allow to which they lay out, which will involve the reduction of emissions of greenhouse gases include.

00:10:45 David Freestone

Those which are emitted by the state actors themselves, but also those under their authority. So that means vessels and they mentioned this specifically vessels flying their flags and of their nationality. So it has very severe implications, I might say a little bit about what the threshold for this is which is quite.

00:11:06 David Freestone

Quite, quite important, I think we'd argued in our submissions that.

00:11:12 David Freestone

It was no good saying taking as a benchmark for specific performance of an obligation and nationally determined contribution under the Framework Convention, because many of these contributions are not, they're not legally binding anyway, but also many of them are completely inadequate and that we had argued that that what should be used as the benchmark for this.

00:11:33 David Freestone

Should be the criteria the science criteria set out in the IPCC, and that was wholeheartedly endorsed by the court, by the tribunal, by all 21 members of the tribunal. Unanimous, very. It's only the second unanimous rendered opinion of the of the tribunal or anything. So it's a very momentous and very, very authoritative statement and what they.

00:11:59 David Freestone

Said was that.

00:12:00 David Freestone

1.5 was the target that that the IPCC set before really seriously.

00:12:09 David Freestone

Adverse impacts would start to kick in

00:12:11 David Freestone

Here. So that's going to be the test and they said that they used what they call the precautionary approach much, much to my distress because I'm very much an endorser of the precautionary principle, but it effectively doesn't make any difference in this instance. What they said is a precautionary approach would say that where the threat is very severe.

00:12:31 David Freestone

As it is in the case of sea level rise, in the case of ocean warming.

00:12:34 David Freestone

It's a damage to the marine environment, then the standard of due diligence required of states is stricter.

00:12:42 David Freestone

So we know that emissions of carbon particles from burning of bunker fuels, for example, have a major impact on the snow-covered areas because it stops the process by which the sun is reflected off the white of the ice.

00:12:59 Beatriz Martinez

Well, you are also the Executive secretary of the Sargasso Sea Commission, which works through existing regional, sectoral, and international organizations to explore measures to conserve the Sargasso Sea. And I don't want to miss the opportunity to ask you about this initiative.

00:13:14 David Freestone

Alright, thank you. Yes, well you need the whole podcast on this thing. So I mean it's you know, so this has been my obsession for the last decade, so I guess I see as a high seas area around the islands of Bermuda in the North Atlantic, the North Atlantic Gyre, and it's distinguished by the fact that it has this distinctive seaweed, floating seaweed, hollow pelagic, which means it never comes in contact with the ground at all

00:13:43 David Freestone

We call it the golden floating rainforest of the North Atlantic? Because it is a amazing venue for biodiversity. It has endemic species which only live in the sargassum, which are adapted to living in this floating the ecosystem.

00:14:01 David Freestone

It's important for the lifestyles of a large number of creatures like turtles, for example, at the very early stages they get off the beaches in the Florida for example, then they disappear and from the islands of the Caribbean for about 5-6 years. And many people, these famous lost years and many of them spend those years in this harboring.

00:14:21 David Freestone

Environment of the sargassum mats whereas which they can eat and which also slight microenvironment slightly warmer etcetera until they get to a stage where they can look after themselves.

00:14:32 David Freestone

So turtles and also this is true of a number of other species as well. So you can find if you shake through. So I guess you'll find very small Marlin and tunas etcetera. So fish spawn in this areas of being a friendly area. And of course when you've got small fish born, you get bigger fish as well. And so that.

00:14:51 David Freestone

That's it's a very important biodiversity era, for reasons we have no understanding of at all. The Sargasso Sea is also an area where the European in the American Anguilla deals Anguilla, Anguilla, and Anguilla.

00:15:06 David Freestone

Migrate from fresh and brackish waters in the continents of Europe and the Americas, and from the Big Islands and the Caribbean into this area, and spawn and die.

00:15:18 David Freestone

We have no idea why this is a journey of three 4000 miles can be up to that, and then the small leptocephalus echo cause that little leaves find their way back to the coast of the Baltic. So you know relevant. So for you, for you here in Copenhagen and the Mediterranean.

00:15:39 David Freestone

And the other rivers, the major rivers in Europe and of course the same also in the Americas.

00:15:43 David Freestone

Where they're much valued, but they've been particularly valued by the by agriculture trade in East Asia, where they're being captured as very small glass eels very early stage and shipped, usually illegally, because it's now banned by sites for European eel.

00:16:02 David Freestone

To big farms rather than back re exported for the sushi train. And it's a billion dollar industry with a lot of bad actors. Now, why am I interested in the Sargasso Sea? Well, I became interested in the biodiversity after I started. And the reason we were interested in because we're looking for an area. And so I'm working with ICN International Union for the Conservation of Nature on this.

00:16:23 David Freestone

An area which was a House of visibility, which is a high profile area which would be a good example of an area of the high seas which needed to be protected and that was in the context of the discussions which have been going on for more than 15 nearly two decades, really in the UN on what's called biodiversity in areas for national jurisdiction.

00:16:44 Beatriz Martinez

So thank you ever so much for today's interview. We look forward to further collaboration with you in the future and follow your research and to our audience. We

hope you enjoyed this episode of the Climate Show and see you soon in our next episode.

00:17:03 Beatriz Martinez

Thank you for listening to this episode. If you would like to read more about Professor Freestone's work, check out the information in the show notes. Stay tuned for our next episode.