Professor Andrew Serdy, Professor of Public International Law and Ocean Governance, University of Southampton – Written evidence (UNC0004)

UNCLOS: fit for purpose in the 21st century?
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Executive summary:

In response to the International Relations and Defence Committee inquiry on 'UNCLOS: fit for purpose in the 21st century?' evidence and policy recommendations are provided in relation to the following questions:

- Question 3: How is UNCLOS enforced and how successful is its enforcement? How successful is dispute resolution under UNCLOS?
- Question 6: What are the main challenges facing the effective implementation of UNCLOS in 2021? With a focus on:
  - Climate change and the impact it has had/will have on the structures and provisions of UNCLOS (including trading routes, maritime boundaries, and the status of island ocean states)
  - Regulation of access to economic resources, including on the deep seabed and in the water column, fishing, and the protection of resources such as undersea cables
- Question 7: In light of these challenges, is UNCLOS still fit for purpose? Can or should UNCLOS be renegotiated to better address these challenges?

The following recommendations are made:

- The United Kingdom [UK] should adopt a policy akin to that embraced in the recent Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, to minimise the potential negative consequences of sea-level rise on the location and extent of the UK's maritime zones. [Paragraph 3 below]
- Many UNCLOS-related issues can be resolved by achieving agreement among its parties on the interpretation of the existing text rather than seeking to renegotiate it. The UK Government should only put forward amendments when it is clear that this is not possible rather than adopting reform of UNCLOS as a goal for its own sake. To that end, the annual meetings of the States Parties should be used as a platform to discuss matters of substance, and the UK should revise its position on the lack of authority of these meetings to do so. [Paragraphs 6 and 7 below]

Response author:

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Question 3: How is UNCLOS enforced and how successful is its enforcement? How successful is dispute resolution under UNCLOS?

1. Enforcement is a weak point of all international law. If the term "successful" used in this question focuses on the ability to persuade or compel a delinquent country to return to compliance with its treaty and other obligations, then UNCLOS has relatively stronger tools for this than most of international law, which is marked by the absence of an international equivalent of a police force and the jurisdiction of international courts and tribunals being ultimately always founded on consent. The more or less compulsory dispute settlement mechanism of Part XV of UNCLOS is a considerable achievement and working reasonably well, despite the regrettable recent tendency of respondents not to appear and defend themselves. The low number of disputes since UNCLOS entered into force (not many more than 40, depending on how one counts them)[1] is a much better advertisement for the substantive rules of UNCLOS than the equivalent number of 600+ for the World Trade Organization which began at almost the same time. It suggests that UNCLOS rules are for the most part clear and realistic enough not to generate disputes at all, or when disputes do arise, they can be settled quickly before they become public through remedies being sought via litigation or arbitration under Part XV.

2. Within the institutional framework created by Part XV, though, the International Tribunal for the Law of the Sea is underused. Many observers consider that it should be the default mechanism under Article 287, rather than arbitration by tribunals constituted *ad hoc* under Annex VII. While there is much to be said for this view, it was considered during the negotiation of UNCLOS and discarded at that time as unacceptable to a number of delegations. The *status quo* is thus a classic illustration of the point long made by the negotiators, in response to various criticisms: its provisions are conceded not to be the best conceivable, just the best achievable at the time, so the same factors that led to the rejection of this policy option may well still persist.

Question 6: What are the main challenges facing the effective implementation of UNCLOS in 2021?

➔ Climate change:

3. The recent (August 2021) Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise is a sensible legal policy response for all coastal States, not just the 17 that adopted it, to the problem of sea-level rise. By freezing baselines and thus

[1] The website of the International Tribunal for the Law of the Sea (ITLOS), whose Statute forms Annex VI to UNCLOS, lists 29 cases to date, but some of these could be seen as double-counted. There is no central official record of the Annex VII arbitrations over the years, and their contribution to the total varies according to whether or not one counts separately those that are continuations of cases where provisional measures were first sought from ITLOS. The law of the sea cases heard by the International Court of Justice all reached it via routes other than UNCLOS Part XV, except the most recent *Somalia v. Kenya* judgment. As far as is known there have been no Annex VIII "special" arbitrations (though it cannot be excluded that this and the other forms of Part XV dispute settlement have been invoked in additional instances that have not become public because they were discontinued or settled – but the same applies to the WTO comparator).

the outer limits of the zones measured from them, as at the date of their notification to the UN Secretary-General satisfying the requirements of Article 16, it avoids the gradual diminution of the areas over which they currently exercise sovereignty and jurisdiction, even if the physical losses of territory are inevitable, while other States lose nothing by it.[2] The recommendable course for the UK would be to adopt a similar policy response to address the foreseeable consequences of sea-level rise on the extent of its maritime domain.

➔ Access to economic resources:

4. The Article 76/Annex II process for determining the outer limit of continental shelves beyond 200 nautical miles from the baselines, which should be a purely technical exercise, is in many cases not working as well as it should. The process is blocked by the misconceived Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS), which has allowed disputant States in effect to veto each other's submissions to that body. As both a victim and a perpetrator of this undesirable practice, the UK has balanced interests and is thus well placed to drive efforts to seek a resolution to the impasse, but its attitude on the procedural point addressed under Q7 below has long stood in the way of this, and would need to be changed in order to move ahead.

Question 7: In light of these challenges, is UNCLOS still fit for purpose? Can or should UNCLOS be renegotiated to better address these challenges?

5. The difficulty in renegotiating any multilateral treaty stems from the contractual nature of treaties, despite them often serving a quasi-legislative function, since international law lacks an all-purpose legislature. The amending protocol, as a separate treaty in its own right, may take many years to come into force, and not all of the current parties would necessarily become party to it. As a result, as regards any issues that are the subject of amendments, there would be two parallel sets of rules (old and new) in operation at the same time among different pairs of States, which, depending on the issue, may be unconducive to the cause of legal certainty.

6. Apart from the amendment conference foreseen in Article 312, UNCLOS also offers a simplified procedure in Article 313. However, the latter procedure requires unanimity, which confines its suitability to wholly uncontroversial amendments. Neither procedure has ever been used to date. On many issues, reaching understandings among the States Parties on the implementation of the existing rules would be quicker and simpler if they can be reconciled with the existing text by flexible interpretation, such as the Article 16 baselines issue above. That said, it may be time to rethink the insistence ever since 1982 of the UK and many other States that the package deal that UNCLOS represents was so delicate that any

[2] The approach taken by the Declaration, making the freezing of the zone conditional on the Article 16 notification, usefully reinforces the incentive to comply with the obligation to notify, as if seas are rising, the longer a State waits to notify, the more land it will lose before further losses are belatedly averted by the freeze.

suggestion of amending it must be firmly rejected at the outset, lest it lead to an unravelling of the threads. It is no longer clear whether, almost 40 years on, this is still a real danger - it may be, but there is a case for the UK to take soundings as to whether a 4th UN Conference on the Law of the Sea would no longer be resisted in principle. However, this should only happen if the Government already has a clear idea of what amendments it would seek, and why. It would not be advisable for the executive arm of the UK Government to adopt reform of UNCLOS as a goal for its own sake, and only then to decide what changes are needed through a further consultation exercise to that end similar to this one, and it would be a mistake for a Parliamentary committee to encourage it to do so.

7. This is not to say, however, that complete inaction is called for. One positive step that the UK should take is to cease insisting that annual meetings of the States Parties have no authority to discuss matters of substance – one ought always to take arguments that "legally we can't do X" sceptically, as often they serve only to disguise the true position when that is "we don't want to do X". In the case of UNCLOS, that argument is wholly spurious because meetings of the States Parties themselves have no status; they are not an institution or organ created by UNCLOS with enumerated powers and responsibilities of the kind familiar from the Conference of the Parties of the United Nations Framework Convention on Climate Change and other environmental treaties, but for that very reason there is nothing to stop the parties gathered at such meetings from discussing whatever they wish. In particular, there is no rule of treaty law that requires parties to give themselves special permission to discuss the substance of a treaty, something they are free to do at any time.

8. In connection with this, it should also be noted that the UK is on record as being dissatisfied with the negative conclusion reached by the CLCS on its entitlement to a continental shelf beyond 200 miles generated by Ascension Island, believing this to rest on a mistaken interpretation of the relevant UNCLOS provision. Even though this argument is not particularly convincing, the only secure way to overturn the CLCS interpretation is for the UK to persuade the States Parties of the correctness of its alternative view, something that cannot happen as long as the UK adheres to its traditional stance on the lack of authority of the annual meetings.

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