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House of Lords International Relations and Defence Committee

UNCLOS: Fit for purpose in the 21st century?

Summary

The major achievement of UNCLOS has been to stabilise claims to maritime jurisdiction and the Convention continues to provide a universal legal framework for use of the oceans, supported by the international community as a whole. The dispute settlement system has helped to maintain the integrity of the Convention, although there are some trends in the jurisprudence of courts and tribunals which raise questions about the scope of jurisdiction and the relationship between the Convention and other rules of international law. Indeed, the widespread support for the Convention cannot be taken for granted and it depends upon the continuing willingness of all states to cooperate to maintain the consensus that underpins the Convention. As such, states must proactively seek to resolve ongoing disputes about the meaning to be ascribed to key provisions of the Convention, including disagreements relating to the status of maritime features, the innocent passage of warships through the territorial sea, and the conduct of military exercises in the EEZ of other parts of the oceans. In addition, UNCLOS must adapt to reflect emerging challenges posed by climate change, particularly to ensure stability of maritime limits and boundaries in light of rising sea levels. Several legal gaps in the protection of the marine environment also need to be plugged, particularly the prevention, reduction or control of plastic pollution; the challenge of ocean acidification; the effective regulation of deep seabed mining; and the protection of marine biodiversity beyond national jurisdiction from cumulative impacts. In other fields of international regulation, progress towards strengthening the legal framework needs to be sustained. International fisheries law has already seen significant developments in decision-making and enforcement, although implementation of mechanisms to tackle overfishing requires further work at the regional level. Tackling carbon emissions of shipping demands improved cooperation through the IMO in order to agree more ambitious measures to reduce greenhouse gas emissions. Several treaties negotiated to address maritime security issues have received insufficient support in practice to date. As an independent coastal state and a participant in most relevant international organisations, the UK has opportunities to influence these key debates. However, it must demonstrate leadership by taking proactive steps at both the international and national level in order to set the pace for change. In order to sustain its leadership role in this field, the UK must also maintain its broader reputation for respecting the international rule of law.

Introduction

1. I am Professor of Environmental Law in the School of Law at the University of Edinburgh, where I have been teaching and researching the international law

of the sea for over 15 years. I have published a number of monographs and peer reviewed journal articles relating to the law of the sea. This submission addresses several questions raised by the inquiry, drawing upon my own relevant research in the field.

What have been the main successes and accomplishments of UNCLOS over the past 40 years?

2. The major achievement of UNCLOS has been to stabilise claims to maritime jurisdiction. Even those states which are not party to UNCLOS (such as the United States of America) largely accept its provisions as reflecting the relevant rules of customary international law. Whilst some differences of opinion remain over the interpretation and application of key aspects of the Convention (discussed below), there have been remarkably few unilateral claims to extend maritime jurisdiction beyond the system of maritime zones that are recognised in the Convention itself, in marked contrast to the situation following the first and second UN Conferences on the Law of the Sea, when unilateral claims continued to proliferate. As such, UNCLOS provides the basis for a universal legal framework for the oceans.

3. One of the most important characteristics of the law of the sea has been the emphasis on consensus decision-making. Consensus was central to the negotiation of UNCLOS between 1973 and 1982 and the need to maintain that consensus has been a key driver in developments in the law of the sea since the Convention was concluded.[1] The ongoing commitment to UNCLOS is confirmed year on year by the annual UN General Assembly Resolution on oceans and the law of the sea, where the international community reaffirms 'the unified character of the Convention and the vital importance of preserving its integrity' (e.g. UNGA Resolution 75/239 of 31 December 2020). Consensus has also been pursued through annual Meetings of the States Parties. This widespread support for the Convention cannot be taken for granted, however, and it depends upon the continuing willingness of the international community to cooperate to maintain the consensus that underpins the Convention. The UK Government's 'absolute commitment to upholding the UN Convention on the Law of the Sea in all its dimensions' (as recognised in the 2021 Integrated Review of Security, Defence and Foreign Policy) is thus welcome, but it must be backed by a willingness to engage with other relevant actors in order to resolve disputes where legitimate differences of opinion exist and to progress negotiations on common challenges.

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

4. One of the main challenges that arises in relation to UNCLOS is disagreement about how key provisions of the Convention should be interpreted and applied in practice. Such disagreements pertain, inter alia, to the ability of maritime features (e.g. small islands or similar rocky outcrops) to generate maritime claims, the rights of passage of warships and vessels carrying hazardous substances (e.g. nuclear material) through territorial seas, and the legality of conducting military exercises and related activities in the Exclusive Economic Zone of other states. None of these disagreements are new and

[1] See J Harrison, *Making the Law of the Sea* (CUP 2011) 284-289.

they are often reflected in declarations made by states when signing or ratifying the Convention. At the same time, such disagreements are not purely academic and they can lead to direct confrontation at sea, as vividly demonstrated by the June 2021 incident in the Black Sea involving HMS Defender. It is vital that further discussion and diplomatic engagement on the interpretation and application of the relevant provisions of UNCLOS takes place, in order to avoid future incidents which may lead to more serious conflict. The example of US-USSR negotiations towards the 1989 Joint Statement on a Uniform Interpretation of Rules of International Law Governing Innocent Passage provides a useful historic precedent for such an initiative. Further resort could also be made to dispute settlement proceedings, when that option is available. Alternatively, legal questions could be submitted for an advisory opinion.

5. The current legal framework for maritime jurisdiction is also under pressure from certain physical changes caused by climate change, notably sea-level rise and its impacts on coasts and other territorial features that are used to generate maritime entitlements. Given that maritime limits and boundaries are vital for promoting stability in maritime relations, it is important that the law evolves to take into account such challenges. This is an issue that is currently under active discussion at the International Law Commission, which has already highlighted significant developments in state practice. Ultimately, states will have to respond to any recommendations from the International Law Commission, in a way that balances the need for stability and security in the law of the sea with the objective of promoting equity in responding to climate change. Serious consideration also needs to be given to the mechanism of giving effect to any change, avoiding if possible a formal amendment to the Convention in order to preserve the integrity of UNCLOS.[2]
6. Another major effect of rising CO_2 emissions has been an increased uptake in this gas by the oceans, causing ocean acidification. This is a worldwide problem, but its severity varies on a regional basis. Ocean acidification is particularly problematic for coral reefs, which depend upon calcifying organisms for their main structures and formations. Ocean acidification may also have direct impacts on many of the shellfish species, on which the UK fishing fleet increasingly relies. Aquaculture interests will also be affected. Despite the severity of the threat, ocean acidification has received little legal response at the international level and it has been argued that 'ultimately states must ascribe as much political importance to tackling ocean acidification as they have done to climate change.'[3] Given that the main driver of ocean acidification is CO_2 emissions, there is a strong argument that the international climate change regime should address the issue of ocean acidification by demanding that emission reduction plans target CO_2. In practice, this means that states cannot simply prioritise other more potent greenhouse gases (such as methane) as a short-term measure to tackle climate change.
7. Another major gap in the UNCLOS framework relates to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (BBNJ). Negotiations are underway at the United Nations in order to address this

[2] For discussion of previous changes to the Convention framework using decisions of the parties, see J Harrison, *Making the Law of the Sea* (CUP 2011) 75-82.
[3] J Harrison, *Saving the Oceans through Law* (OUP 2017) 254.

issue, although they have inevitably been delayed by Covid-19 and they have been somewhat overshadowed by the current focus on climate change at COP 26. It is vital that states return to the topic of BBNJ with appropriate vigour when the negotiations restart in 2022. The United Kingdom could play a key role in fostering consensus in these discussions, which will be vital if any resulting agreement is to be successful. Furthermore, the ongoing global negotiations should not prevent continued efforts to take steps to tackle threats to biodiversity (both within and beyond national jurisdiction) through other competent international organisations and the UK should use its leverage within relevant organisations to drive forward this agenda. This should include pushing for ambitious biodiversity targets in the post-2020 Global Biodiversity Framework, due to be adopted under the Convention on Biological Diversity in 2022. States should ensure that these targets promote meaningful protection for marine ecosystems, ideally including a separate target for the establishment of strictly protected marine protected areas where no extractive activities are permitted.[4]

What are the other important international agreements and treaties complementing UNCLOS?

8. When considering the effectiveness of UNCLOS, it is important to recognise that it is not a stand-alone instrument. UNCLOS has been described as an 'umbrella' convention, in the sense that it sets out the basic framework for states to exercise jurisdiction over most activities at sea, but it does not contain the detailed rules to govern those activities. Indeed, UNCLOS expressly calls for the negotiation of additional instruments through other international institutions to give effect to its provisions, particularly when it comes to fisheries, the protection of the marine environment and deep seabed mining.

Agreements relating to Fisheries Conservation and Management

9. Fisheries is a prominent issue in maritime affairs and it has been at the root of numerous disputes at the international level, as will be evident given current tensions that have arisen in UK-EU relations as a result of disputes over implementation of the fisheries provisions of the Trade and Cooperation Agreement.

10. In the field of fisheries, UNCLOS establishes a basic duty to cooperate and it directly calls upon states to set up regional or sub-regional fisheries management organisations (RFMOs) to that end (e.g. Articles 63, 64, and 118). It is these organisations which provide the principal machinery for states and other relevant fishing entities (e.g. Taiwan) to agree on the detailed rules required to manage shared fish stocks. The 1995 United Nations Stradling and Highly Migratory Fish Stocks Agreement (UNFSA) gives even greater weight to the role of these bodies as it requires parties to ensure that their vessels comply with international fisheries conservation and management measures adopted through regional or sub-regional institutions, if they are to fish on the high seas (e.g. Article 8(3)). This important obligation has significantly strengthened the legal framework for fisheries on the high seas, although its effectiveness depends upon the quality of the

[4] See J Harrison, 'Strictly Protected Marine Protected Areas: International Policy and National Practice', *Saving our Seas through Law Policy Briefing No. 5* (2021).

international regulations that are adopted, as well as means of enforcing them. Even though conservation and management measures are often required to be 'based upon the best scientific evidence available' and to 'apply the precautionary approach' (UNFSA, Articles 5(b)-(c)), RFMOs still have a large degree of discretion to determine the precise contents of such measures and negotiations are often highly political. Moreover, even once agreement has been reached, members are often permitted to opt out of management measures. Removing the right to object may be desirable from the perspective of fisheries conservation, but it comes into tension with the consent-based system of international law-making. Nevertheless, recent developments in international fisheries law to control the invocation of opt-out procedures, by requiring states to give reasons for opting out and allowing independent scrutiny of such reasons, are to be welcomed as pragmatic steps to address this challenge.[5] Some RFMOs have also strengthened their compliance mechanisms to ensure greater scrutiny of national action to implement conservation and management measures, including in some cases the possibility of sanctions for states who repeatedly fail to comply. The use of regular independent performance reviews has also placed RFMOs under greater scrutiny, but further progress is needed in implementing the results of those reviews.

11. Progress on strengthening international fisheries governance is not universal and overfishing remains a problem in some parts of the world, including close to home. There are several examples in the North-East Atlantic of failed management given the lack of agreement on basic issues such as principles for the distribution of total allowable catches. As a result, unilateral quotas are regularly set by fishing states for key shared stocks, such as mackerel, blue whiting and herring, leading to total catches exceeding the scientific advice.[6] In contrast, management of deep sea stocks in the region is subject to longer term and more precautionary decision-making and it must be recognised that NEAFC has also made taken considerable steps to harmonise its management activities with broader conservation initiatives in the region, particularly through its designation of closed areas. Nevertheless, the NEAFC performance review has highlighted a number of key issues that present an obstacle to sustainable fisheries management in the North-East Atlantic. As a member of NEAFC, the UK can play a prominent role in pushing forward this agenda. The UK also has membership of other RFMOs[7] and so it has an opportunity to influence debates on sustainable fisheries around the world. Some direct steps could be taken to support reform. For example, the UK has signed but not yet ratified the 2019 Protocol to the International Convention for the Conservation of Atlantic Tunas, which would go some way to strengthening the institutional framework of the International Commission on the Conservation of Atlantic Tunas.

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[5] J Harrison, *Saving our Oceans through Law* (OUP 2017) 183-184; J Harrison, 'Exceptions in Multilateral Environmental Agreements', in L Bartels and F Paddeu (eds), *Exceptions in International Law* (OUP 2020) 328.

[6] For a discussion of mackerel, see J Harrison, *Fisheries Governance after Brexit* (SPICe Briefing 21-74, 27 October 2021) 17.

[7] As well as NEAFC, the UK is a member of the International Commission on the Conservation of Atlantic Tunas, the Indian Ocean Tuna Commission, the North-West Atlantic Fisheries Organisation, the North Atlantic Salmon Conservation Organisation, and the Commission on the Conservation of Antarctic Marine Living Resources. It also engages as an observer with several RFMOs on behalf of overseas territories.

12. An ongoing challenge for fisheries management is the impact of warming oceans on marine ecosystems, including distributions of fish stocks. In 2017, the International Council for the Exploration of the Sea reported that 16 species have shown changes in their distribution across the North-East Atlantic, with 8 of these species having shifted their distribution across management boundaries.[8] Such changes put pressure on existing management systems, as states may start to demand changes to management rules to reflect the new status quo, potentially leading to resource conflict. Shifts in stock distribution are particularly likely to impact allocations based upon zonal attachment, which has been promoted by the UK in its recent negotiations. At the same time, the precise extent and permanency of any changes might be disputed by other states who could lose out from an amendment to existing arrangements. Arguably, recent disputes over mackerel and herring in the North-East Atlantic are examples of this phenomenon. Calls from the fishing industry to review the science underpinning advice on cod stocks are also partly based upon arguments that the stocks are shifting northwards and scientific models do not reflect the new reality.[9] Both of these situations underline the need for credible and transparent scientific information to form the basis for decision-making. However, it also calls for more robust decision-making processes and associated accountability mechanisms, in order to ensure that unilateral assertions are subject to scrutiny. The exception to compulsory dispute settlement under UNCLOS for disputes relating to the conservation and management of fisheries within national jurisdiction (Article 297(3)) is a major obstacle in this respect, as it prevents states from having their actions being subjected to objective scrutiny of courts and tribunals. However, as discussed below, other forms of scrutiny and enforcement action can, and should be applied, to further the sustainability of fishing within and beyond national jurisdiction.

Agreements relating to Marine Environmental Protection

13. In the field of marine environmental protection, international treaties have largely been developed on a sectoral basis. Whilst these additional treaties are principally only binding on the parties, they may also be incorporated into the legal framework established by UNCLOS by way of so-called rules of reference.

14. In the case of pollution from land-based sources, which is the most widespread cause of marine pollution, UNCLOS simply requires that states take into account internationally agreed rules, standards and recommended practices and procedures' (UNCLOS, Article 207(1)). This is a weak formulation and it arguably gives states too much discretion to decide how to deal with this significant problem. The main global instruments on this topic are non-binding in character.[10] The variety of sources of pollution from land-based sources does make it challenging to agree on appropriate regulatory measures and it is necessary to take into account local conditions and capacities when designing effective legal regimes, particularly when

[8] https://www.ices.dk/news-and-events/news-archive/news/pages/substantial-changes-in-fish-distribution-identified-by-ices.aspx
[9] See e.g. https://thefishingdaily.com/featured-news/shetland-fishermen-urge-ministers-to-take-a-closer-look-at-cod-quota-advice/
[10] See J Harrison, *Saving our Oceans through Law* (OUP 2017) 68-75.

developing countries may be involved. Nevertheless, the attention given to this form of marine pollution is not proportionate to the threats it poses and it is an issue which requires increased political will and the negotiation of stronger legal obligations at the regional or global level. Indeed, some problems, such as plastic pollution, arguably require a coordinated global response, as no single state or region is able to tackle such threat by themselves.[11]

15. In contrast, in the case of pollution from ships, UNCLOS expressly requires flag states to ensure that their national laws and regulations 'at least have the same effect as that of generally accepted international rules and standards' (Article 211(2)). This is widely agreed to be a reference to relevant rules adopted through the International Maritime Organisation (IMO). As a result, UNCLOS converts relevant international rules into a minimum standard for all states, whether or not they are a party to the IMO instruments containing the rules. The rules of reference in UNCLOS are also dynamic, allowing the legal framework to effectively adapt over time. The IMO has been successful over the years in reducing the incidence of marine pollution from vessels and its standards are regularly amended to address new technologies or new threats. The emphasis on consensus decision-making in the IMO means that opt-out procedures in this context are rarely invoked in practice.[12]

16. Greenhouse gas emissions from ships is on the agenda of the IMO, with progress made on setting energy efficiency standards for new ships but significant challenges remain in converting the existing fleet to minimise emissions. This has been one of the most controversial issues faced by the IMO[13] and short-term measures adopted in June 2021[14] clearly do not do enough to reduce the carbon emissions of the international shipping industry. The United Kingdom should be commended for its leadership role in this respect, being one of the first countries to produce a national action plan to address greenhouse gas emissions from ships (the Clean Maritime Plan). The United Kingdom was also one of several states who launched a Declaration on Zero Emission Shipping by 2050 at COP 26, which is a welcome development as it represents a greater level of ambition that seen in the Initial Strategy on Reduction of Greenhouse Gas Emissions adopted by the IMO in 2018. It is vital that the signatories to the declaration work through the IMO to get multilateral agreement on more ambitious measures as a matter of urgency, in particular a more ambitious IMO Strategy when it is reviewed in 2023 and agreement on mid-term measures to reduce maritime emissions, including potential market-based mechanisms.[15] In developing such measures, the impacts on developing countries, particularly mid-ocean territories dependent upon shipping for vital supplies, must be taken into account.

Deep Seabed Mining in Areas beyond National Jurisdiction

[11] Ibid, 90-91.
[12] J Harrison, *Making the Law of the Sea* (CUP 2011) 163-165.
[13] J Harrison, 'Recent Developments and Continuing Challenges in the Regulation of Greenhouse Gas Emissions from International Shipping' (2013) 27 *Ocean Yearbook* 359-384.
[14] https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC76meetingsummary.aspx
[15] See J Harrison, *Saving the Oceans through Law* (OUP 2017) 265-266.

17. The other international organisation that plays a key role in the modern law of the sea is the International Seabed Authority (ISA), which is established under UNCLOS to oversee the deep seabed mining regime under Part XI of the Convention, as amended by the 1994 Implementing Agreement. The UK is an important member of the ISA, not only as an elected member of the Finance Committee and the Council[16], but also as a sponsoring state of two contracts granted by the ISA, both held by UK Seabed Resources Ltd. The ISA is at a critical stage in the development of exploitation regulations, which must be completed by 2023 following a request by Nauru in line with paragraph 15 of section 1 of the 1994 Agreement.[17] Regulations of the ISA will be binding on all operators in areas beyond national jurisdiction, without any option to opt-out, which differentiates the ISA from most other international organisations as it exercises a quasi-legislative competence.[18] Moreover, the ISA is in the enviable position of being able to adopt regulations for an emerging industry, before any significant activity has yet taken place. It will also have its own enforcement powers.[19] Yet, the development of the exploitation regulations raise critical issues about the balance to be achieved between the promotion of deep seabed mining in order to retrieve valuable seabed minerals and the protection of the fragile, and sometimes unique, marine ecosystems. It does not help that scientific understandings of the deep oceans are limited, but this situation necessitates a precautionary approach. Futhermore, a key part of any regime established by the ISA should be a representative system of protected areas, where all mining is prohibited. Some steps have been taken in this direction in the Clarion-Clipperton Zone in the Pacific, but the ISA needs to do more in other regions. It is vital that protected areas are established on the basis of clear scientific criteria and they are not simply designated in areas where there has been no interest in mining. Furthermore, the protection of such sites should be coordinated with other regulatory mechanisms to ensure that other activities do not cause harm to these sites.[20]

18. As a sponsoring state, the UK has certain responsibilities to ensure that the sponsored entity complies with UNCLOS and ISA Regulations, but it may also impose its own (more stringent) regulatory standards through the licensing regime established under the Deep Sea Mining Act 1981.[21] The UK Government has committed 'not to sponsor or support the issuing of any exploitation licences for deep sea mining projects until there is sufficient scientific evidence about the potential impact on deep sea ecosystems and strong and enforceable environmental standards have been developed by the ISA and are in place.'[22] This statement begs the question of what is meant by 'strong' environmental standards and how the UK will judge this criterion.

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[16] The UK was re-elected to the Council in 2021 for a four year term, on the understanding that it would relinquish its seat for the year 2023 to Norway; see https://www.isa.org.jm/authority/council/members

[17] https://www.isa.org.jm/news/nauru-requests-president-isa-council-complete-adoption-rules-regulations-and-procedures

[18] J Harrison, *Making the Law of the Sea* (CUP 2011) 123.

[19] See J Harrison, 'Checks and Balances on the Regulatory Powers of the International Seabed Authority', in A Ascencio-Herrara and M Nordquist (eds), *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority* (Brill forthcoming).

[20] J Harrison, *Saving the Oceans through Law* (OUP 2017) 238-240.

[21] See J Harrison, 'The United Kingdom', in V Tassin Campanella and R Makgill (eds), *Routledge Handbook on Seabed Mining and the Law of the Sea* (Routledge forthcoming).

[22] https://questions-statements.parliament.uk/written-questions/detail/2020-03-16/29901

Moreover, there is always a risk that a sponsored entity could seek a different sponsoring state should the UK fail to issue an exploitation licence. It is therefore vital that the UK employs its influence within the ISA to ensure that exploitation regulations are fit for purpose.

How is UNCLOS enforced and how successful is its enforcement?

19. Generally speaking, UNCLOS is enforced by states, acting in their capacity as port states, coastal states or flag states. Precise powers of enforcement will depend upon the nature and location of an activity.

20. UNCLOS confers broad jurisdiction on the coastal state to enforce laws and regulations in its territorial sea as well as more specific powers to enforce fisheries, marine scientific research and marine pollution regulations in its Exclusive Economic Zone. The coastal state also has exclusive jurisdiction over activities on its continental shelf, with concomitant enforcement powers both over relevant installations, as well as in safety zones around such installations. Enforcement by coastal states if often subject to safeguards to ensure that they do not abuse their enforcement powers.[23] These safeguards are an important part of the package deal underpinning UNCLOS, but some of the more recent decisions of international courts and tribunals on whether coastal states have breached their obligations when exercising enforcement powers do raise questions about whether sufficient deference is given to coastal states in their enforcement decisions.[24]

21. On the high seas, the principle of exclusive flag state jurisdiction largely prevails, meaning that the flag state plays the principal role in ensuring that international standards are upheld. Where another state has concerns over the condition or conduct of a vessel on the high seas, it is generally restricted to reporting the matter to the flag state who 'shall investigate the matter and, if appropriate, take any action necessary to remedy the situation' (UNCLOS, Article 94(6)). Flag states do not always carry out such investigations diligently, or, if they do, they may not always communicate the results to the reporting state.

22. In some situations, additional enforcement options may be available. Port states are given a power to enforce violations of applicable international rules and standards for the prevention of pollution from ships on the high seas (UNCLOS, Article 218(1)) subject to a right of pre-emption by the flag state. Whilst this innovative provision is to be welcomed as a recognition that it is not appropriate to rely exclusively on flag states to police the high seas, the procedure has been rarely used in practice, in part because of the challenges of a port state obtaining sufficient evidence to bring a prosecution.[25] Modern technology, such as on-board monitoring equipment and satellite imaging, could remedy these challenges to some extent. However, further attention needs to be given to ensuring effective cooperation between states in order to share evidence to facilitate investigation and commencement of

[23] See J Harrison, 'Safeguards against excessive enforcement measures in the Exclusive Economic Zone – law and practice', in H Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 217-248.
[24] See J Harrison, 'Patrolling the boundaries of Coastal State Enforcement Powers: the interpretation and application of UNCLOS safeguards relating to the arrest of foreign-flagged ships' (2018) 42 *Observateur des Nations Unies* 117-143.
[25] J Harrison, *Saving the Oceans through Law* (OUP 2017) 152-154.

proceedings. An example is the North Sea Network of Investigators and Prosecutors, which has been in place since 2002.[26]

23. It is easier for port state to verify compliance by foreign vessels with construction, design and equipment standards, as they can be inspected when a vessel visits port. To this end, a number of port state inspection regimes exist, whereby states seek to coordinate their port state control powers to improve detection of substandard vessels. The Paris Memorandum of Understanding, of which the UK is a member, plays a vital role in this respect.

24. Developments in international fisheries law have also seen greater cooperation in enforcement, both through at-sea inspections and port state measures. Under the UNFSA, members of a relevant RFMO are entitled to board and inspect the vessels of any other party to the Agreement, whether or not that party is also a member of the RFMO (Articles 21-22). Officials from the inspecting state may secure evidence of any suspected serious violations of international fisheries regulations, and they may even take the vessel to the nearest appropriate port, but the decision on whether to instigate enforcement proceedings remains with the flag state. In principle, the flag state is under an obligation to refer the case to its authorities with a view to instituting proceedings 'if it is satisfied that sufficient evidence is available', but this obligation still leaves some discretion for the flag state to act (Article 19(1)(d)). There is a need for greater transparency and accountability of flag states when making such decisions.[27] An alternative to prosecution is the denial of landing opportunities for vessels suspected of carrying out illegal, unregulated or unreported (IUU) fishing. The entry into force of the FAO Port State Measures Agreement in June 2016 is particularly significant in this respect as it provides for global approach to ensuring that fishing vessels suspected of carrying out IUU fishing cannot land their catch. The UK became a party to this Agreement on 31 January 2021 and it should play an active and constructive role in its implementation. Trade measures may also sometimes be used against states which are believed to be supporting IUU fishing (e.g. under EU Regulation 1005/2008 and EU Regulation 1026/2012 which still operate in a modified form as retained EU law), provided that the measures are non-discriminatory. There is evidence that EU measures on IUU fishing have had an important influence in persuading some states to strengthen their fisheries law and policy. It remains to be seen how the UK utilises these tools now that it has left the EU.

Does UNCLOS help or hinder maritime security?

25. Maritime security potentially covers a range of issues, including terrorism, drug trafficking and people smuggling. These issues are only tangentially addressed in UNCLOS itself. The concept of the contiguous zone allows a state to take measures to prevent inter alia custom or immigration offences, some of which may relate to maritime security (UNCLOS, Article 33). The United Kingdom currently has no contiguous zone. Whilst it was flagged as an issue for consideration in the 2014 UK National Strategy (p. 40), I am not

[26] https://www.ospar.org/work-areas/cross-cutting-issues/north-sea-network
[27] See J Harrison, 'International Transparency Obligations in Fisheries Conservation and Management: Inter-State and Intra-State Dimensions' (2020) *Marine Policy* 104105.

aware of any further developments on that front. Otherwise, UNCLOS simply calls for international cooperation between relevant states on pertinent matters (e.g. Articles 99, 108). UNCLOS does contain an exception to exclusive flag state jurisdiction for incidents of piracy (Article 105), but the exception has been narrowly interpreted in practice, meaning that activities such as hijacking or actions against offshore installations fall outside of the scope of the exception. Gaps in the law have been plugged through the negotiation of other treaties, particularly the Convention on the Suppression of Unlawful Acts of Navigation (SUA Convention) and its 2005 Protocol. The latter instrument specifically extends the range of offences covered by the original SUA Convention to include the carriage of weapons of mass destruction by sea and the harbouring of terrorists on board a vessel. The Protocol also introduces important reforms in relation to enforcement. The original SUA Convention provided that states must prosecute suspected perpetrators of relevant offences when they were present in their territory or extradite them to other states, but it explicitly went on to say that 'nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag' (Article 9), thereby reinforcing the principle of exclusive flag state jurisdiction on the high seas for terrorist offences. This position is modified by the Protocol, which allows parties to indicate in advance that they will permit other parties to board and search vessels flying their flag in order to determine whether relevant offences have been (or are about to be) committed (Article 8bis). Whilst this treaty has the potential to facilitate the promotion of maritime security, the 2005 Protocol only has 52 parties to date and few states would appear to have given the advance agreement to permit interdiction of their vessels. Indeed, although the United Kingdom signed the Protocol in 2007, it has not yet become a party, a fact that was lamented by the House of Commons Foreign Affairs Committee back in 2009.[28] It is not clear whether the United Kingdom still intends to become a party to this treaty.[29] Indeed, the United Kingdom's participation in maritime security treaties is patchy overall. For example, it is also not yet a party to the 2003 Agreement concerning cooperation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean Area, despite being involved in its negotiation and the existence of a number of Overseas Territories in the region.

How successful is dispute resolution under UNCLOS?

26. UNCLOS is well-known for its compulsory dispute settlement mechanism whereby most disputes can be submitted to arbitration or some other agreed dispute settlement mechanism. Since UNCLOS entered into force in 1994, a relatively small number of disputes have been submitted for settlement, although the UK itself has been directly involved in two UNCLOS disputes[30],

[28] See *Fourth Report from the Foreign Affairs Committee, Global Security Non-Proliferation* (2009) para. 33.

[29] The 2014 UK National Strategy for Maritime Security noted that the UK was a 'signatory to several multinational treaties and agreement which promote cooperation to interdict vessels on the high seas', but it faisl to note the vital distinction between a signatory and a party to an international treaty.

[30] The *MOX Plant Case* between the UK and Ireland and the *Chagos MPA Arbitration* between the UK and Mauritius. UK interests were also indirectly implicated in another set of proceedings,

as well as participating in two sets of advisory proceedings under the Convention.

27. In practice, there are many disagreements over which states have chosen not to resort to dispute settlement for broader political or strategic reasons. Moreover, there are critical aspects of the Convention for which there is no provision for dispute settlement. A key example is disputes over whether a coastal state has complied with its obligations to conserve and manage marine living resources within national jurisdiction (Article 297(3)). Whilst this exception was included because of the sensitivity of coastal states to having the exercise of their sovereign rights reviewed, shielding such matters from compulsory dispute settlement is problematic given the poor status of many fish stocks in the world and the need to ensure that states are taking appropriate action to address this problem, as discussed above. At the same time, other alternative procedures could be used to ensure some scrutiny in this respect. It is notable, for example, that the compulsory conciliation procedures in relation to fisheries, provided for in Article 297(3) of UNCLOS, have never been utilised, even though they may offer a basis to bring disputing parties together to agree on an acceptable solution, with the assistance of independent experts.

28. A particular trend in dispute settlement is the invocation by courts and tribunals of rules beyond the Convention as a relevant consideration in settling UNCLOS disputes. Sometimes such rules are used as a means of interpretation of UNCLOS, whereas sometimes they are directly incorporated into the Convention through rules of reference, as discussed above. A clear example is provided by the *Chagos MPA Arbitration (2015)*, whereby the United Kingdom was found to have failed to comply its UNCLOS obligations by not consulting Mauritius before its declaration of a marine protected area around the Chagos archipelago. This finding was based upon a broad reading of Article 2(3) of the Convention[31], which potentially allows disputes under other international rules applicable to maritime zones to be determined through UNCLOS dispute settlement procedures, even if states have not otherwise agreed to the settlement of disputes concerning those rules. There are also other examples where courts and tribunals could be accused of exceeding the defined jurisdictional limits by determining disputes about broader rules of international law that are only tangential to UNCLOS itself. One recent example is the *Enrica Lexie Arbitration (2020)*, where the Tribunal determined the case on the basis of the law of state immunity as applicable to the vessel whilst it was in port, which is a topic that is not addressed by UNCLOS. The Award was adopted by a majority of three votes to two, with the two dissenting arbitrators highlighting their concerns about whether the Tribunal had jurisdiction. These cases raise serious questions about the scope of jurisdiction under the compulsory system of dispute settlement established by UNCLOS. It has been suggested elsewhere that 'the more serious drawback of this expansive view of applicable law is that states will

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namely the *Dispute concerning delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean*, ITLOS Case No. 28. The Special Chamber constituted to decide the dispute held that the UK was not an indispensable third party, as the effect of the ICJ Advisory Opinion on the Chagos Archipelago meant that the UK could no longer claim an interest in the delimitation of the maritime boundary around the territory.

[31] UNCLOS, Article 2(3): 'the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

simply become even more cautious about accepting compulsory jurisdiction clauses in treaties, and may start to repudiate those they had previously been willing to accept.'[32]

29. Another disappointing trend in recent law of the sea dispute settlement practice is the failure of some states, notably the Russian Federation in the *Arctic Sunrise Arbitration* and the People's Republic of China *in the South China Sea Arbitration*, to engage in arbitral proceedings brought against them under the Convention. Of course, these are not the first occasions on which states have refused to participate in international judicial proceedings and their absence does not necessarily prevent a case being heard. However, refusal to engage does undermine the dispute settlement process which was deemed by the drafters as vital to ensuring the integrity of the Convention. Nor is this a phenomenon limited to powerful states. For example, Kenya recently announced that it would not comply with the October 2021 judgment of the International Court of Justice delimiting Kenya's maritime boundary with Somalia, raising the prospect of aggravating tensions in the region. Such developments directly threaten the ability of UNCLOS to provide a stable legal framework for the oceans. It is vital that other states do all they can to encourage full compliance with the law in order to protect the broader interests of the international community. The UK should play a leading role in this regard, although to do so effectively, it must maintain its broader reputation for respecting the international rule of law. Certain recent pronouncements by the UK government are worrying in this respect, particularly statements that it was willing to breach agreements entered into as part of the Brexit process.

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[32] AE Boyle and J Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 *Journal of International Dispute Settlement* 245, 255.