
Forty Years' Reflection of the Legislative Features of the UNCLOS: A Critical Analysis

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Forty years have passed since the UNCLOS was adopted and it is necessary to reexamine its successes and failures. This article will set out to check the four legislative features of the UNCLOS and then make some suggestions. From the aspect of legislative technique, the UNCLOS is extensive with an ambitious framework but is vague in details. From the aspect of a principled position, meanwhile, its provisions are mainly beneficial to countries with long and unimpeded sea lines but not to landlocked countries, short coastlines, or an impeded outward extension. From the aspect of rights and interest division, the division of maritime rights and interests of countries in the UNCLOS is not operational in practice. From the aspect of dispute resolution, it has constructed an ambitious mechanism accommodating various international judicial institutions, which is, however, too complicated, lacks focus, and has loopholes. The international community should consider revising and improving the Convention in view of certain shortcomings and deficiencies in its legislative features.

Keywords

Legislative Features, UNCLOS, Legislative Technique, Principled Position, Rights and Interest Division, Dispute Resolution

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I. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) is a constitution of the law of the sea. It has been decades since the adoption and entry into force of the UNCLOS. Looking back at the positions and attitudes of different countries or groups of countries during the negotiations, it is easy to ascertain that they actually exerted considerable influence on the legislative techniques, basic orientation, and main contents of the Convention. Therefore, on the occasion of the 40th anniversary of the adoption of the Convention and in the face of new developments in the global maritime situation, the international community must re-examine the legislative features of the Convention considering the advantages and disadvantages of its accession.

The UNCLOS was the outcome of the three United Nations Conferences on the Law of the Sea. At that time, the global struggle for maritime rights and interests was reaching a peak. The maritime superpowers were delineating their spheres of influence in various oceans, while other countries, especially coastal third-world countries, were not willing to sit still but bound to act and make their own claims. To mediate the standoff, two international conferences on the law of the sea were held in 1958 and 1960, but the conventions¹ reached in these conferences were not well-accepted by the developing countries with dissatisfaction. Therefore, the Third International Conference on the Law of the Sea was held from December 1973 with a total of 168 countries or organizations participating. By December 1982, the Third United Nations Conference on the Law of the Sea, which lasted for nine years, finally came to an end and the UNCLOS was adopted with 119 countries or entities.²

During the negotiation, different countries have adopted different positions and strategies in the negotiations. For example, China had always held a clear attitude in the negotiations, which was to stand firmly on the side of the so-called “third-world” developing countries. China’s position was well reflected in the issue of the establishment of the exclusive economic zone (EEZ) system which is not beneficial to all countries. Some negotiating countries have made detailed calculations on the

¹ Namely, the Convention on the Territorial Sea and Contiguous Zone, the Convention on the High Seas, the Convention on the Conservation of High Seas Fisheries and Living Resources, and the Convention on the Continental Shelf.

² As some scholars pointed out, the background of adopting the UNCLOS included the following three aspects: first, the national liberation movement became an irresistible historical trend; second, the anti-hegemony struggle was on the rise; and third, the rapid development of science and technology made the exploitation of seabed resources possible. See ZHOU ZHONGHAI, *INTERNATIONAL LAW OF THE SEA* [国际海洋法] 8 (1987).

distribution of benefits among countries after the establishment of the 200-nautical-mile economic zone. Those who benefit the most are the major maritime powers such as the US, the then Soviet Union, Japan, and the UK, as well as developing countries with long coastlines. China is not among these countries, but in the end, China supported the EEZ system. China's position during the negotiation process had ideological color, i.e., as the leader of the then Third World, it should fully support the majority of developing countries.

Since the majority of the Third World countries were coastal States, China was supporting them who wanted to get a share of future ocean development. In this process, China's national interests did not coincide with those of these countries. Nonetheless, due to the historical consideration and ideological influence, the Chinese government adhered to this position for a long time after the adoption and entry into force of the Convention.

In contrast, the US's position in the negotiation process was more straightforward to maximize their national interests. The prerequisites for the US's support for the Third UN Conference on the Law of the Sea were the following: it should take leadership of the conference and guide its direction; the seabed system should guarantee the freedom of US seabed activities; any resolution involving seabed development should guarantee the US's seabed interests;³ and it should control of seabed development agencies in spite of the large number of developing countries with voting power.⁴

However, the UNCLOS, as the "crystallization of the struggle for unity among the developing countries,"⁵ has been safeguarding the interests of small coastal countries limiting the rights and interests of large maritime powers. Moreover, a significant portion of the ocean, which was originally free to use for benefit, was taken away by coastal third-world countries through the Convention. The US finally refused to sign the UNCLOS because of the severe restrictions to it. Although developing and Western countries signed the Agreement on the Implementation of Part II of the UNCLOS in 1994, which significantly adjusted the content of the international seabed area system; met the requirements of most developed countries; and prompted their accession to the UNCLOS, the US still believes that the Convention cannot guarantee or even infringe upon its national interests. It thus refuses to ratify it to date.

³ Memorandum from the Chairman of the Nat'l Sec. Council under Secretaries Commi. (Rush) to President Nixon (May 14, 1974), NSC-U/DM-109B, E3 Documents on Global Issues, Doc. 12.

⁴ Third United Nations Conference on the Law of the Sea, official records, Vol.2, Second session, Caracas, 20 June-29 August 1974, New York, 1975, at 74.

⁵ Lan Haichang, *An Analysis of the Pros and Cons of China's Ratification of the United Nations Convention on the Law of the Sea* [我国批准〈联合国海洋法公约〉利弊剖析], 6 L. Rev. [法学评论]37 (1988).

The UNCLOS was adopted through a specific international legislative act that emerged under the special background of the time (the intensification of the Cold War and the rise of the Third World), which led to its formulation process being influenced by considerable ideological factors. Thus, the norms formulated in the UNCLOS have been undermined to a large extent and even gone far from the basic position and design of the Convention to unusual features.

The primary purpose of this research is to critically reexamine the past forty years' development of the UNCLOS. This article will set out to check the four legislative features of the UNCLOS and then make some suggestions. This paper is composed of four parts including Introduction and Conclusion. Part two will retrospect the legislative features of UNCLOS and Part three will discuss both positive and negative impacts of the UNCLOS on Member States.

II. Legislative Features of the UNCLOS: A Retrospect

The UNCLOS is a constitutional treaty for regulating international maritime relations as a whole. Although the UNCLOS is an important piece of international legislation and its adoption built a new stage in the development of the international law of the sea,⁶ the specific historical background and process of its development necessarily lead to its unusual legislative characteristics.

A. Legislative Technique

The UNCLOS is extensive with an ambitious framework but is vague and ambiguous in its details, thus providing wide room for each party to interpret its rules according to its own interests. As the framers had ambitious goal to make a dominant legal document of the law of the sea today, the final draft has comprehensively regulated the legal relations of the sea on an unprecedented scale and developed the law of the sea under new conditions, thereby creating various new rules and regimes such as the width of the territorial sea, the regime of archipelagic states and archipelagic waters, the 200-nautical-mile EEZ, the principle of the natural extension of the continental shelf, and the international seabed regime. Therefore, the Convention is justly called the Charter of the Sea,⁷ which has a multitude of thematic interfaces with other fields

⁶ LIU NANLAI ET AL., INTERNATIONAL LAW OF THE SEA [国际海洋法] 9 (1985).

⁷ THE LEGAL SYSTEM OF THE SEA [海洋法律制度] 96 (Deer Shouben ed., 1992).

of regulation in international law and policy.⁸

However, since the UNCLOS is the product of compromise between many countries and regional groups with different interest, its overall structure was inevitably built without considering too much on the details. In this way, the specific content of the Convention has some obvious defects and imperfections.

Take Article 121, paragraphs 1-3 as example. These provisions state that an island is a naturally formed area of land surrounded by water and above water at high tide; may have a territorial sea, a contiguous zone, an EEZ, and a continental shelf like any other land territory; and a rocky outcrop that cannot sustain human habitation or its own economic life shall not have an EEZ or continental shelf. Article 121 roughly defines an island under international law, its theoretical legal effects, and on what conditions its legal effects should be derogated. However, Article 121 neither clearly defines “island” and “reef,” nor specifies the criteria for “sustaining human habitation or economic life of its own.”⁹ This has led to a confusing situation in which many countries have seized rocky reefs and forcibly stationed on them, claiming that they are “islands” or can “sustain human habitation or their own economic life” to obtain more maritime rights and interests, thus creating more disputes.¹⁰

Although the UNCLOS has established a framework and taken the first step to build a comprehensive international order for the oceans, its wording is partly cumbersome and vague on various core matters and key issues, which often leads to the inconsistent interpretation favoring both parties simultaneously to the dispute in question. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties provide the principles of interpreting the true intent of international treaty.¹¹ However, these provisions can only be applied to general ambiguities in the text. Moreover, if the text itself is too ambiguous or is not intended to clearly define rights and obligations, the rules of interpretation cannot work actively. The UNCLOS is one of those difficult examples. It has precisely led some countries to disregard the principles and rules of interpretation under the 1969 Vienna Convention on the Law of Treaties and interpret the UNCLOS in their own favor. Judging from these

⁸ NELE MATZ-LÜCK ET AL., *THE LAW OF THE SEA: NORMATIVE CONTEXT AND INTERACTIONS WITH OTHER LEGAL REGIMES* 5 (2023).

⁹ UNCLOS art. 121, ¶3.

¹⁰ Guoqiang Luo, *The Role and Construction of the Multilateral Path in Resolving the South China Sea Dispute* [多边路径在解决南海争端中的作用与构建], 4(4) L. F. [法学论坛] 94 (2010).

¹¹ Article 31 adopts an objective interpretation, i.e., interpretation by convention, while Article 32 is adopted as a means of interpretation only to a limited extent. See HAOPEI LI, *INTRODUCTION TO THE LAW OF TREATIES* [条约法概论] 351-2 (2d ed. 2003); OLIVER DÖRR & KIRSTEN SCHMALENBACH, *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 559-634 (2018); CHANG-FA LO, *TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES* 3-15 (2017).

discouraging facts, the legislative technique of the Convention was not reasonable.

B. Principled Position

The preamble of the UNCLOS states that it “will take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked.” However, its provisions are mainly beneficial to countries with long and unimpeded sea lines but not to landlocked countries, countries with short coastlines, or countries with impeded outward extension.¹²

The principle that “land dominates the sea” implies substantial inequality between states with different geological structures and locations, although this is not in itself a violation of the principle of equality.¹³ Absent a better criteria for allocating maritime rights and interests, there is nothing wrong with the UNCLOS to use of this principle to determine the maritime order, not to mention that the International Court of Justice has repeatedly emphasized the role of this principle in several maritime delimitation cases.¹⁴ As long as the principle of “land dominates the sea” continues, the Convention’s preamble is simply not so much to conceal the natural geological differences between states.

Since the delimitation of the territorial sea, the contiguous zone, the EEZ, and the continental shelf depend on the existence and length of the coastline (baselines), there is no difficulty for the African and American continents and the Pacific islands to acquire and fully enjoy these maritime rights and interests. This is why Chile declared its sovereignty over the sea within 200 nautical miles of its coast as early as 1946.¹⁵ Under the EEZ system, a country is not a small country any more if it is surrounded by sea on all sides. In contrast, Singapore, surrounded by other countries, has a land area of 227 square nautical miles, but its EEZ is only 100 square nautical miles. As for landlocked countries such as Mongolia, they have no coastline, baselines, territorial

¹² SUHAILAH AKBARI, *THE WTO TRANSIT REGIME FOR LANDLOCKED COUNTRIES AND ITS IMPACTS ON MEMBERS’ REGIONAL TRANSIT AGREEMENTS* 20-1 (2021).

¹³ The equality of states in international law refers to formal equality of sovereignty in theory. See GUOQIANG LUO, *ON THE NOUMENA OF INTERNATIONAL LAW* [国际法本体论] 146-8 (2008); 1 OPPENHEIM’S *INTERNATIONAL LAW* 339-40 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

¹⁴ *North Sea Continental Shelf* (Ger. v. Neth.), Judgment, 1969 I.C.J. 51 (Feb. 20); *Aegean Sea Continental Shelf* (Greece v. Turk.), Judgment, 1978 I.C.J. 36 (Dec. 19); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Merits, Judgment, 2001 I.C.J. 97 (Mar. 16); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. 34 (Oct. 8).

¹⁵ Chile is the world’s longest country, it is only 756,625 square kilometers in area but has a total coastline of about 10,000 kilometers, and the baseline extends outward without obstruction so that its EEZ can reach a staggering 3,704,000 square kilometers! See JAN SAMET & ROBERT FUERST, *THE LATIN AMERICAN APPROACH TO THE LAW OF THE SEA* 44-68 (1973).

sea, contiguous zone, EEZ or continental shelf, and their maritime rights and interests have to rely entirely on the “care” of neighboring coastal states.

Nonetheless, the UNCLOS is silent on how the coastal state “takes care of” landlocked states; it depends entirely on the will of the coastal state itself. It would be a fool’s errand for a landlocked state to ask a coastal state to assume any specific obligations on account of the ambiguous word “care” in the preamble.¹⁶

Despite the ideological atmosphere and considerations in the formulation of the UNCLOS, we have realized that the geological structure and location of countries are not ideologically dependent and all the countries having coastlines can benefit from the Convention. In a different word, no country can fully benefit at all. Although we have repeatedly emphasized that the UNCLOS is the product of the successful struggle of third-world countries against the hegemony of the superpowers over the sea, such a “victory for the developing countries” and “Constitution of the Sea”¹⁷ could not prevent maritime powers such as the US, Canada, Australia, and the UK with long and unimpeded maritime boundaries, from maximizing their EEZs and continental shelves based on the rules of the Convention. Therefore, considering the principle of “land dominates the sea,” there is no difference between the principled positions of developed and developing countries, but only between coastal countries and landlocked countries.¹⁸

As scholars have pointed out, the jurisdictional framework established in the UNCLOS is underpinned by both spatial and functional jurisdictions. These two concepts enable a jurisdiction to be defined both geographically and substantively, allowing for a range of jurisdictional rights, duties, and prohibitions to be allocated between coastal, flag, and port states in a highly flexible and selective manner.¹⁹ The maritime order and regime established by the Convention, from its principled position, favors some coastal states with advantageous coastlines. Such irrationality is due to the excessive influence of geographical location, geological structure, and topography on the rights of member states. As a result, some countries got the overnight wealth for their advantageous coastlines, while others with non-advantageous coastlines only got a limited share of maritime rights and interests. Landlocked countries have

¹⁶ Akbari, *supra* note 12, at 155-64.

¹⁷ NANLAI ET AL., *supra* note 6, at 7. See also John Stevenson & Bernard Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88(3) AM. J. INT’L L. 488-99 (1994); TOMMY KOH, A CONSTITUTION FOR THE OCEANS (United Nations ed., 1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf; UNCLOS app. 33.

¹⁸ ROBIN CHURCHILL, VAUGHAN LOWE & AMY SANDER, *THE LAW OF THE SEA* 1006-27 (4th ed. 2022).

¹⁹ CAMILLE GOODMAN, *COASTAL STATE JURISDICTION OVER LIVING RESOURCES IN THE EXCLUSIVE ECONOMIC ZONE* 10-1 (2021).

quite a few limitations but no guarantees to gain.²⁰

C. Division of Maritime Rights and Interests

If granting various maritime rights and interests to coastal states is analogous to making a cake, then dividing these complicated maritime rights and interests is like cutting a cake, both of which are important but the latter is more crucial in practice. However, influenced by the legislative features of the two aforementioned aspects, the division of maritime rights and interests of countries in the UNCLOS, though seemingly fair and standardized in theory, is less so in practice, which not only fails to guarantee the a priori fair division of maritime rights and interests, but also creates many new disputes.²¹

As previously mentioned, although the UNCLOS constructs a whole system of delineating the territorial sea, contiguous zone, EEZ, and continental shelf by baselines, there is no precise formulation on how their specific rights and interests are delineated in other emerging areas, except for the traditional territorial sea, which only occupies a relatively small proportion of the area following the international custom and treaty. In practice, states used to base all their claims on the provisions of the Convention, but make different claims. In other words, the UNCLOS promises many maritime rights and interests but how exactly these rights and interests are to be divided up is an open question.

If the theoretical maritime rights and interests of the 12 nautical-mile's territorial sea,²² the 12 nautical miles contiguous zone,²³ the 200 nautical miles EEZ,²⁴ the 200-350 nautical miles continental shelf²⁵ as stipulated in the UNCLOS can be enjoyed by all countries, then it does not matter. Because of the natural geological structure and geographical differences between countries and the uneven distribution of the earth's oceans, however, some countries have no baselines at all; some countries have baselines but their surrounding maritime areas do not meet the aforementioned theoretical standards; and some countries must share their surrounding waters with other neighboring or adjacent countries. In a word, the UNCLOS only "draws the pie in the sky," which is theoretically a large piece of pie for each country to get the largest possible share, but does not care about "cutting and sharing the pie." In practice,

²⁰ MATZ-LÜCK ET AL., *supra* note 8, at 125; CHURCHILL, *supra* note 18, at 1018-20.

²¹ KRIANGSAK KITTICHAISAREE, *THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTHEAST ASIA* 82 (1987).

²² UNCLOS art. 3.

²³ *Id.* art. 33.

²⁴ *Id.* art. 57.

²⁵ *Id.* art. 76.

therefore, some countries do not share it at all because most of the sea areas in the world seas are not enough for neighboring countries to share.

In terms of delimitation rules, the UNCLOS has the ambition to unify the views of all parties and regulate the issue comprehensively, but did not implement it successfully. Article 12(1) of the Convention on the Territorial Sea and Contiguous Zone is copied by Article 15 of the UNCLOS, but the latter does not make any new development. Meanwhile, Articles 74 and 83 of the UNCLOS provide that the boundaries of the EEZ/continental shelf between states with opposite or adjacent coasts shall be determined by agreement based on international law to secure an equitable solution. However, as Yoshifumi Tanaka has criticized, as these two provisions do not mention any specific method of delimitation and have the extremely vague meaning of “equitable settlement,” they are useless for addressing specific problems.²⁶ This seemingly very flexible provision not only fails to help achieve the delimitation of state boundaries but may also lead to disputes between states.²⁷

Clearly, the UNCLOS promises to give member states many maritime rights and interests without a practical scheme or basis to divide these maritime rights and interests in concrete terms. Such an institutional design can only smoothly operate if the geological structure of the country concerned is advantageous and the surrounding sea is in good condition. In a considerable number of maritime delimitation practices, however, it has not been operable. Many countries may find that the theoretical maritime rights and interests under the UNCLOS are unavailable or only partially available to them in practice. As a consequence, the maritime rights and interests of landlocked countries become relatively diminished or even denied because the maritime areas are now more often divided by the coastal state. Furthermore, once the relevant maritime areas are not enough coast-to-coast or divided by neighboring countries, it will inevitably lead to protracted and intense disputes, as the current tense situation in the Asia-Pacific waters has demonstrated.²⁸

D. Dispute Resolution

The UNCLOS has constructed an ambitious dispute settlement mechanism covering various methods and international judicial institutions in an attempt to provide a set of universal solutions for maritime dispute settlement. However, the mechanism

²⁶ YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 47 (2006).

²⁷ DORINDA DALLMEYER & LOUIS DeVORSEY JR. (EDS.), RIGHTS TO OCEANIC RESOURCES: DECIDING AND DRAWING MARITIME BOUNDARIES 42 (1989).

²⁸ Han Aiyong, *The Changing Regional Maritime Order and Asia-Pacific Security* [地区海洋秩序变迁与亚太安全], 6(6) J. PARTY SCH. CENT. COMM. COMMUNIST PARTY CHINA [中共中央党校学报] 67 (2017).

is too complicated, not focused, has loopholes, and lacks the support of a blanket agreement. Therefore, it has not been fully recognized by member states in practice.

The UNCLOS requires the states parties to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means.²⁹ Any dispute concerning the interpretation or application of the Convention which has been submitted to conciliation and remains unsettled, shall, at the request of any party to the dispute, be submitted to a court or tribunal of competent jurisdiction.³⁰ A state party may, by a written declaration, choose the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, an arbitral tribunal, or a special arbitral tribunal for the settlement of disputes.³¹ A State Party may also decline, by a written declaration, to accept the jurisdiction of any of these courts or tribunals, except for international seabed disputes.³² The ITLOS has jurisdiction over three types of disputes: first, any dispute concerning the interpretation or application of the UNCLOS; second, any dispute concerning the interpretation or application of other international agreements relating to the purposes of the UNCLOS; and third, disputes concerning the interpretation or application of treaties or conventions in force relating to the subject matter of the UNCLOS may also be submitted to the tribunal if all States Parties to such treaties or conventions agree to do so.³³

The above provisions reflect the intention that all disputes involving maritime rights and interests can be submitted to this dispute settlement mechanism, which is rather like a unified maritime dispute settlement mechanism. Due to the disagreement on the dispute settlement during the negotiation process, however, the UNCLOS did not adopt a package of dispute settlement agreement similar to the WTO but let the member states voluntarily choose to apply it. Finally, on major issues involving national sovereignty and maritime rights, almost no country wants to bind itself voluntarily to some kind of compulsory dispute settlement procedure unless everyone else does.

A point at issue is whether the large number of dispute settlement bodies available under the UNCLOS is conducive to dispute resolution. What is the impact on the authority of dispute settlement bodies? In international disputes especially relating to state sovereignty, the dispute settlement body must have sufficient authority and enforcement power. To promote the use of its dispute settlement mechanism by states,

²⁹ UNCLOS art. 279.

³⁰ *Id.* art. 286.

³¹ *Id.* art. 287(1).

³² *Id.* art. 287(2).

³³ *Id.* art. 287(4).

the Convention has been expanding its scope to cover almost all possible dispute settlement methods and institutions, which has diluted the authority of its dispute settlement institutions, thus making it difficult to fully guarantee the enforcement of dispute settlement results. In order to build a sufficiently attractive international maritime dispute settlement mechanism, the focus should be on the implementation of the ruling. Without implementation measure and compliance power, effective dispute settlement mechanism is simply unrealistic.

The biggest controversy in recent years has come from the loopholes in Annex VII of the UNCLOS. As a part of the dispute settlement mechanism of the Convention with only 13 articles, Annex VII is intended to supplement the ITLOS. When the relevant system was initially designed, Annex VII was not a priority option. Clearly, Annex VII is not comparable to Annex VI, which provides for 41 articles in detail. Consequently, if Annex VII is intentionally applied, it will leave more room for the legal operation of certain countries. In this way, Article 287 of the UNCLOS is an arbitration clause with compulsion that procedurally prohibits States Parties from making reservations.³⁴ In this context, States Parties, regardless of their attitude toward the dispute settlement mechanism of the Convention, cannot avoid Annex VII arbitration as the “only remaining method.”

According to Articles 1, 3, and 9 of Annex VII, any party to the dispute may unilaterally initiate arbitration, which means the lack of consent and participation of the respondent party does not affect the initiation and advancement of the arbitration proceedings. Therefore, the unilateral will of the prosecuting party may dictate the initiation of the proceedings, selection of arbitrators, formulation of procedural rules and submission of evidentiary materials and make an award binding on the parties to the dispute on that basis. Such a unilateral arrangement is contrary to the fundamental nature of arbitration and does not meet the basic requirements of procedural justice.³⁵

Since its inception in 1996, ITLOS has heard 30 cases and rendered one advisory opinion (Seabed Disputes Chamber).³⁶ In other words, the dispute settlement mechanism has a take-up rate of only 1.12 cases a year. Moreover, 80% of the cases heard by ITLOS are procedural mainly focusing on prompt release and interim measures.³⁷ In recent, the majority of Annex VII arbitration cases have been unilaterally

³⁴ IGOR KARAMAN, *DISPUTE RESOLUTION IN THE LAW OF THE SEA* 7 (2012).

³⁵ Steel Rometius, *Crime of Law-Bending Arbitration in Chinese Criminal Law and Its Effect on International Commercial Arbitration*, 11 Y.B. PRIV. INT'L L. 283-96 (2009).

³⁶ International Tribunal for the Law of the Sea, List of Cases, <http://www.itlos.org/index.php?id=35>.

³⁷ Guoqiang Luo & Wenxin, *A Comparative Study on the Implementation of Legal Settlement Mechanisms for Maritime Disputes* [海洋争端法律解决机制执行比较研究], 4 J OCEAN U. CHINA (SOC. SCI. ED.) [中国海洋大学学报] 47 (2019); Rosemary Rayfuse, *The Future of Compulsory Dispute Settlement under the Law of the Sea Convention*, 36 VICTORIA U.

and compulsorily initiated, resulting in low participation and enforcement rates and an increasing trend of non-recognition and non-enforcement of arbitral awards by the relevant major countries (such as the UK, China, Russia, and Australia).³⁸ Such a painstaking construction has resulted in low acceptance and enforcement rates which only show that member states do not recognize this dispute settlement mechanism in their practice of maritime dispute settlement.

III. Impact of the UNCLOS on Member States

A. Positive Impacts

First, the coastal developing countries' rights and benefits have been largely met. The Third United Nations Conference on the Law of the Sea was held against a backdrop of demands from numerous developing countries for changing the traditional law of the sea rules and establishing a new maritime order. These developing countries put forward several revolutionary new concepts and related institutional proposals (such as the common heritage of mankind, EEZs, and archipelagic states) and proposals for reforming of the traditional law of the sea regime (e.g., the definition of the continental shelf).³⁹ Since 80% of the world's countries are coastal states and the vast majority of these are developing countries, the claims of coastal developing countries can be said to dominate the interests and demands of developing countries.

Second, although the UNCLOS regime is generally designed to be relatively favorable to the countries with long coastlines and unimpeded outward expansion, some countries with short coastlines can still get a certain share of the maritime area under the Convention. Although China with 32,000 kilometers' coastline has not very good geographical location, for example, it can still enjoy the corresponding territorial sea, the contiguous zone, an EEZ, and the continental shelf. In addition, as China has the ability and advantage of seabed development, it is in the forefront of international seabed area development. In this regard, China can be said to be "worse off than some, better off than many" in the Convention's division of maritime rights and interests. The available share of the cake is limited, but there are some gains in absolute terms. This is the situation for many states, except that a few landlocked ones

WELLINGTON L. REV. 683 (2005).

³⁸ Luo & Wenxin, *id.* at 50.

³⁹ MALCOLM SHAW, INTERNATIONAL LAW 475 (9th ed. 2021).

will be limited and disappointed.⁴⁰

B. Negative Impacts

First, the UNCLOS' principle that "land dominates the sea" is not entirely convincing. Also, providing a basis for coastal developing countries to "run around" the sea restricts the freedom of navigation and development on the high seas. This practice has been implemented for many years and may not be beneficial to the international community as a whole.

In terms of the natural condition of the whole earth, the concept of "land ruling the sea" is only the subjective wish of human society. Therefore, it is not always possible to claim the rights and interests of the sea by the outward extension of the coastline, and this argument was only valid for a certain period of human society at most. Even if this logic is valid, it does not extend indefinitely and needs to be subject to certain restrictions. However, under the current UNCLOS system, there is a tendency to push this logic to the limit and to claim maritime rights and interests by the maximum extension of the coastline, which is unfair to the countries that do not have an advantageous coastline. Furthermore, such a theoretical over-expansion of rights will easily conflict with the complicated reality. The appetite of all member states is greatly mobilized by the logic and tendency, but, in most places, there is not enough sea to share, which leads to the conflict between theory and practice, triggering long and continuous disputes between countries and causing instability in the international situation.⁴¹

In the history of the international law of the sea, the "freedom of the seas" theory has been practiced for centuries.⁴² Nowadays, the originally free ocean is not only circled by the 12 nautical miles' territorial sea system but also by the EEZ and a continental shelf system of 200–350 nautical miles, the beneficiaries of which can only be the coastal states themselves. For example, the US has benefited greatly from the EEZ and the continental shelf regime based on its geographical advantages. As the supreme maritime power, the US has always insisted on the freedom of navigation and overflight in international straits and the EEZ, scientific research, and exploitation of the international seabed area in the negotiations, but even refused to join the

⁴⁰ MATZ-LÜCK ET AL., *supra* note 8, at 125-6; GOODMAN, *supra* note 19, at 471.

⁴¹ Such as the Mediterranean Sea, the South China Sea, the North Sea, and the Caribbean Sea. See THE OXFORD HANDBOOK OF THE LAW OF THE SEA 604-7 (Donald Rothwell et al. eds., 2017).

⁴² Hugo Grotius proposed the "freedom of the seas" doctrine that the high seas cannot be appropriated by any state and both navigation and use of the high seas should be free. See HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHTS WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 7-10 (Ralph Van Deman Magoffin trans., 1916).

Convention to which the overwhelming majority of countries have agreed, when the above requirements were not fully met.⁴³

Obviously, the international seabed area regime is rather a constraint for the countries capable of developing the seabed area. Traditionally, international law considers the international seabed area as something that does not belong to any country and can be “preempted.” Due to their varying levels of economic and scientific power, however, countries were bound to be polarized on the issue of developing the international seabed area. In the end, most developing countries were not willing to accept such a result.

In this course, the UNCLOS has created a new concept of an international seabed area. According to Part XI of the Convention, the international seabed area and its resources are regarded as the “common heritage of mankind.”⁴⁴ Therefore, no state may claim or exercise sovereignty or sovereign rights over the international seabed area and its resources. Furthermore, since no state or natural or juridical person may appropriate any part of the international seabed area and its resources, all rights to the exploitation of the resources belong to mankind as a whole and are administered by the International Seabed Authority (ISA) on behalf of all mankind.⁴⁵ Again, Part II of the UNCLOS aims to prohibit national exploitation and to give the right of exploitation to the ISA, which will entrust the exploitation to the states concerned and distribute the proceeds of exploitation to them equitably. This “potluck” utopian idea is difficult to achieve as no country is willing to consume its own resources to explore and develop the seabed under the ISA and “dedicate” the developed seabed resources to “all mankind” and get some burden.⁴⁶

In this context, the US, the UK, France, Germany who could independently develop the sea bed refused to sign or ratify the UNCLOS. Rather, they signed a small-scale Agreement on Interim Arrangements for Deep-sea Polymetallic Nodules, commonly known as the “small treaty.”⁴⁷ Faced with such pressure, developing countries had to make concessions and reached an agreement on the Implementation of Part II of the UNCLOS with the aforementioned countries in 1994, which transformed the single exploitation system to a parallel exploitation system. This Agreement finally changed

⁴³ TED McDORMAN, *SALT WATER NEIGHBOURS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA* 85-114 (2009).

⁴⁴ UNCLOS art. 136.

⁴⁵ SHAW, *supra* note 39, at 540-3.

⁴⁶ MARKUS SCHMIDT, *COMMON HERITAGE OR COMMON BURDEN?: THE UNITED STATES POSITION ON THE DEVELOPMENT OF A REGIME FOR DEEP SEA-BED MINING IN THE LAW OF THE SEA CONVENTION I* (1989).

⁴⁷ Weiliang Shen & Guangjian Xu, *The Third United Nations Conference on the Law of the Sea and UNCLOS* [第三次联合国海洋法会议和海洋法公约], *CHINESE Y.B. INT'L L.* [中国国际法年刊] 433 (1983).

the basic mode of operation of the enterprise, reducing or lifting the restrictions imposed on parallel developers. Such a new operational system effectively allowed those countries with conditions to develop seabed resources on their own (provided that developing countries also explore and submit another mining area for direct exploitation by the enterprise or joint exploitation with developing countries), which eventually led to the entry into force of the UNCLOS with the ratification of most countries.

Even though the seabed is now subject to the supervision of the Authority, when it could be developed independently still implies a lack of reciprocity and a constraint for countries that can develop independently. That is the reason why the US, which is much more geographically privileged than China and not worried about the expansion of its EEZ and continental shelf, has not ratified the Convention.

Second, the UNCLOS does not take into account the characteristics of the Asia-Pacific maritime area, and the theoretical width of the EEZ and the continental shelf it provides is not smoothly extended by any country in the area, which caused many disputes. The East Asia-Pacific sea area is a long and narrow sea surrounded by many countries in this region.⁴⁸ The East China Sea is only 150–360 nautical miles wide but surrounded by 4 coastal countries; the South China Sea is 900 nautical miles wide but surrounded by 11 countries (including 7 coastal countries and regions), with 230 islands, reefs, sands, and beaches in the South China Sea, all of which may be used to expand the maritime rights and interests based on the principle of the land ruling the sea.⁴⁹

Most of the countries in Southeast Asia are coastal states clustered in shallow waters. Therefore, the 200-nautical-mile EEZs claimed by these countries will necessarily overlap. When Indonesia extends its claimed EEZ from the straight baseline of its archipelago, it will overlap the claimed EEZs of Malaysia, Singapore, the Philippines, Vietnam, Papua New Guinea, and Australia. Meanwhile, Singapore's declared EEZ will partially overlap the claimed EEZs of Malaysia and Indonesia, while Malaysia's extension of its jurisdiction will include those areas claimed by Thailand, Singapore, Indonesia, Brunei, the Philippines, Vietnam, and China. In addition to demarcation issues and jurisdictional overlap, the EEZ extension would also change the legal status of many traditional pelagic fisheries from being high seas areas to being under the jurisdiction of a particular country. It would make Malaysia, Singapore, and Thailand closed sea zones, and these countries would not be able to access the high seas unless

⁴⁸ Eric Grove, *Sea Power in the Asia-Pacific at the Turn of the Millennium*, in *SEA POWER IN THE ASIA-PACIFIC AT THE TURN OF THE MILLENNIUM 95-96* (Christopher Dent ed., 2003).

⁴⁹ THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 41, at 626-46.

they passed through the EEZ of one or both of their neighbors.⁵⁰

Unfortunately, the UNCLOS has failed to fully consider the special circumstances of especially Southeast Asian seas, thus giving rise to marked and frequent conflicts of interest. Some scholars at the beginning of China's ratification of the UNCLOS estimated that China's jurisdictional maritime area could reach 3 million square kilometers under the newly established EEZ and continental shelf regime of the Convention.⁵¹ However, such a statement is an overly optimistic and purely theoretical interpretation that is detached from the geographical reality of the East Asia-Pacific sea areas. Indeed, according to the UNCLOS, these small islands in the East China Sea and South China Sea, despite their limited value, could have their own territorial sea, contiguous zone, EEZ, and continental shelf, as long as they prove to be capable of sustaining human habitation or their own economic life.⁵² It can not only expand the scope of national jurisdiction, but also secure the right to exploit the corresponding water resources. This system aims to allow each country's maritime rights and interests to be guaranteed and extended as much as possible. Although its starting point is undoubtedly good, the Convention does not take into account the special geographical environment of Southeast Asian waters.

For the East Asia-Pacific region, where the sea is narrow and the extension of the coastline faces various obstacles, the aforementioned provisions⁵³ are just like drawing a pie to feed the hunger but laid a hidden danger for the huge and frequent conflicts of interest between neighboring countries. When the UNCLOS was first drafted, some scholars argued that the provisions themselves would give rise to new disputes in Asia and there was no Asian country who claimed continental shelf limits or 200-nautical-mile EEZ.⁵⁴ Moreover, some conflicts which were not seen in the 1950s occurred after the 1990s only because the provisions of the UNCLOS began to be put into effect.⁵⁵ For more than two decades, however, all East Asian coastal states have claimed 200-nautical-mile EEZs and continental shelves, thereby turning the sea into

⁵⁰ PHIPHAT TANGSUBKUL, *ASEAN AND THE LAW OF THE SEA* 111 (1982).

⁵¹ Wenzong Liu, *The Ratification and Entry into Force of the United Nations Convention on the Law of the Sea is of Great Significance to China* [*联合国海洋法公约*的批准和生效对中国具有重大意义], 14(4) *J. FOREIGN AFF. INST.* [外交学院学报] 50 (1997).

⁵² From the legislative vision of the UNCLOS, islands, regardless of their size, can have a territorial sea of about 452 square nautical miles (a circle with a radius of 12 nautical miles) and an EEZ and a continental shelf of about 125,664 square nautical miles (a circle with a radius of 200 nautical miles). See UNCLOS arts. 3, 57 & 76.

⁵³ UNCLOS arts. 3, 33, 57 & 76.

⁵⁴ George Lauriat, *Chaos or Cooperation?*, 199 *FAR-EASTERN ECON. REV.* 16 (1983).

⁵⁵ For example, Indonesia and Vietnam, separated by hundreds of nautical miles of water, now have an overlapping continental shelf north of the Natuna Islands, and territorial disputes over numerous islands in the South China Sea have been exacerbated by the application of the UNCLOS because they can all be used to claim EEZ.

a gladiatorial arena where disputes between rival states have severely affected their relations with each other.⁵⁶

Third, the UNCLOS has provided room for member States to interpret its provision arbitrarily, which leads to the disputes in such areas as the East Asia-Pacific waters. Even though the Convention does not take into account the actual situation of the waters in this region and the provisions on the EEZ and continental shelf may lead to fierce competition between countries, the disputes can be resolved in a peaceful manner if the UNCLOS provides member states with a clear, fair and precise maritime delimitation regulation. Regretfully, however, a realistic and feasible solution for the relative disputes cannot be found in the Convention.

The UNCLOS does not provide a highly advanced legal ground for the resolution of delimitation disputes. Articles 74 and 83 of the Convention appear to be the rules of delimitation, but they are only useful in practice if the parties can reach a political compromise and are not operational for disputes requiring judicial settlement. The UNCLOS neither clearly defines “islands” and “reefs,” nor spells out specific criteria for “sustaining human habitation or economic life of their own”; if the maritime areas in question are not enough for the coastal states facing with each other or the neighboring countries to divide, it will inevitably lead to protracted and intense disputes.

Therefore, Catley and Keliat have commented that the provisions of the UNCLOS are only partially judicial, emphasizing flexibility rather than legal certainty. Also, the UNCLOS only recognizes the rights of the EEZ but does not state how to resolve disputes over the EEZs, which will undoubtedly aggravate the dispute over the islands.⁵⁷ Today, the extent to which the islands and reefs in question may have jurisdictional maritime zones can only be drawn up by each claimant state. Around the South China Sea, all the countries claimed their jurisdiction of islands and reefs to have EEZs after the UNCLOS entered into force in the 1990s. If their claimants are allowed, no high seas will be left in the South China Sea, and the EEZs of these islands and reefs will overlap the EEZs of the coastal states such as China, Vietnam, etc. around the South China Sea.⁵⁸

⁵⁶ Mark Valencia, *Regime-Building in East Asia: Recent Progress and Problems*, in *THE FUTURE OF OCEAN REGIME-BUILDING* 671 (Aldo Chircop eds., 2016).

⁵⁷ BOB CATLEY & MAKMUR KELIAT, *SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA* 68 (1999).

⁵⁸ For example, the EEZ of the Pratas Reel will overlap with that of the Philippines; the EEZ of the Paracel Islands will overlap with the EEZ of China's Hainan Island and the mainland coast of Vietnam; Huangyan Island is located exactly within the EEZ of the Philippines; and the EEZ of the entire Spratly Islands will overlap with the maritime boundaries of the countries surrounding the South China Sea, thereby complicating the sovereignty and maritime disputes in the South China Sea. See PHIPHAT TANGSUBKUL, *ASEAN AND THE LAW OF THE SEA* 111 (1982).

Even if some islands are not covered by Article 121(3) of the UNCLOS and are thus entitled to an EEZ and continental shelf, the actual width of these zones can only be determined by the delimitation of the EEZs and continental shelves of the surrounding coastal states. In this regard, the disputed islands will have limited legal impact in such delimitation.⁵⁹ In addition, some countries such as Vietnam and the Philippines are deliberately migrating to the Spratlys islands they occupy to create conditions to “sustain human habitation.” Their attempts to enhance the status of the “reefs” referred to in Article 121(3) in this way are clearly an abuse of the UNCLOS.⁶⁰ In a sense, however, this misuse is caused by the Convention itself.

Yu Mincai has commented that the EEZ and the new continental shelf, which are touted to expand China’s jurisdiction, have become China’s real “soft underbelly” or “troublemaker”; they have become the “legal basis” for neighboring countries in the South China Sea to claim sovereignty over China’s Spratly Islands and to challenge China’s “nine dotted-line.”⁶¹ These comments are indeed appropriate.

Fourth, the ineffective dispute settlement mechanism of the UNCLOS makes it not only difficult to give the parties full confidence in the fair settlement of maritime disputes, but also easy to be abused. In terms of the dispute settlement mechanism, the UNCLOS has built a basic framework without specific maritime delimitation rules and a set of advanced dispute settlement mechanisms like the WTO Agreement. Some scholars point out that the dispute settlement mechanism of the UNCLOS is unsatisfactory. Fundamentally tilted toward the Group of 77, it does not reflect meaningful progress in current dispute settlement practice.⁶²

Indeed, the current practice of adjudicating specific cases relies more on the principles of international law and influential international precedents, while the provisions of the Convention only have a preliminary reference value. Furthermore, the influence of the ITLOS is limited and the acceptance rate is low not because there are no more maritime disputes among the States Parties, but because this dispute settlement mechanism established by the UNCLOS with the ITLOS as the center and the arbitral tribunal as the auxiliary is not welcomed by the States Parties. Some

⁵⁹ The partial effect and zero effects are more common in relevant international practice. See Guoqiang Luo & Quan Ye, *The Legal Effect of Disputed Islands in Maritime Delimitation* [争议岛屿在海洋划界中的法律效力], 1(1) CONTEMP. L. REV. [当代法学] 116 (2011).

⁶⁰ Jiming Li, *UNCLOS and the Territorial Dispute in the South China Sea* [海洋法公约与南海领土争议], 2 STUD. S. CHINA SEA [南洋问题研究] 87 (2005).

⁶¹ Mincai Yu, *China and the UN Convention on the Law of the Sea* [中国与〈联合国海洋法公约〉], 10 MOD INT’L REL. [现代国际关系] 57-8 (2012). See also Valencia, *supra* note 56, at 671.

⁶² Marianne Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternative to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 585 (1982).

scholars have pointed out in comparison that, looking at the handling of law of the sea disputes by the ITLOS, PCA and ICJ, it can be seen that in all cases involving maritime delimitation or territorial disputes, states are mostly willing to submit to the ICJ or PCA; only cases concerning the prompt release of vessels and crews and the prescription of provisional measures are referred to the ITLOS.⁶³

The tendency of expanding the jurisdictional power of Annex VII arbitration can, to a certain extent, urge the State parties to actively seek other peaceful methods of dispute settlement lest the cases would fall into the compulsory procedures of the Annex VII Arbitral Tribunal. Also, the increase in arbitration practice is significant in constructing and improving the international maritime legal order. Recently, however, certain Annex VII Arbitral Tribunals have been pursuing jurisdiction expansion in the wrong way, causing certain negative effects.

Over the past ten years, the Annex VII Arbitral Tribunal has interpreted the provisions of the UNCLOS evolutionarily to expand jurisdiction. As it is contrary to the original intent of the contracting parties, the jurisdictional disputes have been escalating, making it difficult for the validity of the award to be recognized by the respondent parties. Such awards are not enough to convince other international judicial and arbitral bodies. Accordingly the International Court of Justice has never invoked them in the course of its deliberations.⁶⁴

Although the Annex VII Arbitral Tribunal is able to exercise jurisdiction to make rulings on individual cases in a judicial manner and has catered to the needs of some developing countries, the authority of the Tribunals' rulings is difficult to recognize and convince other international judicial and arbitral institutions to voluntarily invoke, elaborate, and follow them.⁶⁵ What if the Annex VII Arbitral Tribunal expands its jurisdiction but is not recognized; the practice of arbitration increases, but the credibility of the award decreases? It is conducive neither to the overall operation of the maritime dispute settlement mechanism, fragmenting the interpretation of the provisions of the UNCLOS, nor to developing and improving the international maritime legal system.

⁶³ HUI WU, STUDIES ON THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA [国际海洋法法庭研究] 282 (2002).

⁶⁴ Mario Gervasi, *The Interpretation of the United Nations Convention on the Law of the Sea in the Chagos Marine Protected Area Arbitration: The Influence of the Land Sovereignty Dispute*, in INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 198 (Angela Del Vecchio & Roberto Virzo eds., 2019).

⁶⁵ Bingbing Jia, STUDY ON THE DISPUTE SETTLEMENT MECHANISM OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: ANNEX VII ARBITRATION PRACTICE [《联合国海洋法公约》争端解决机制研究：附件七仲裁实践] 159-60 (2018).

IV. Conclusion

Forty years have passed since the adoption of the UNCLOS. It is necessary to review why the most influential maritime power, namely, the US, has not joined and why more countries has shifted from optimistic support to negative maintenance. After listing the legislative features of the Convention and its positive and negative impacts on member States, it is easy to find that the implementation of the UNCLOS has both advantages and disadvantages for most member countries, especially for strong maritime powers, landlocked countries, and countries with short coastlines, or geographically inaccessible countries, where the disadvantages outweigh the advantages.

Faced with this harsh reality, maritime lawyers have increasingly abandoned the mainstream attitude of blind optimism and unconditional support for the UNCLOS; they have instead adopted a critical attitude and even considered withdrawing from the Convention as a possible option in the future.⁶⁶ The international community should thus discuss revising the Convention to complement some shortcomings and deficiencies in its legislative features. This will finally bring more member States to return to the Convention. In this process, its dispute settlement mechanism should be fully recognized and implemented following its legislative purposes.

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⁶⁶ In the reality of China's island disputes, the UNCLOS is rarely effective in dispute settlement, and China's maritime rights and interests have been repeatedly appropriated by claimant countries maliciously using the name of the Convention. If the conflict between China and its neighboring countries is further accentuated, withdrawing from the Convention can be expected to secure a wider space for dealing with it. See Yingjie Ma et al., *The Withdrawal Mechanism of the United Nations Convention on the Law of the Sea and China's Considerations* [〈联合国海洋法公约〉退出机制及我国的考量], 5 PAC. J. [太平洋学报] 24 (2013).