To Improve the Efficacy of the UN Convention on the Law of the Sea*

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Abstract: It has been nearly 30 years since the adoption of the UN Convention on the Law of the Sea (UNCLOS) in 1982. This article seeks to examine the status of the Convention as it is currently implemented, identify its deficiencies, and explore the principles to follow and the approaches and institutional mechanisms to adopt to enhance its efficacy. The constitutional status of the Convention in the context of the law of the sea dictates that the Convention is viewed from the vantage point of the seas as a whole and its efficacy enhanced as part of the law of the sea and international law. As the amendment procedure prescribed in the Convention renders it difficult to activate, the most effective way to enhance the efficacy of the Convention is arguably through the standardization of state practices via diplomatic negotiations and legislation at the international and regional levels. Meanwhile, the multi-tiered nature of the rule of the sea also calls for the cooperation among international and regional organizations as well as other related institutions, and the synchronization of their actions, which will have the effect of strengthening the uniform application and effective implementation of the Convention across sovereign states.

Key words: UNCLOS; Improvement; Approach; Mechanism

After nearly 10 years of negotiation and delicately balancing the political interests and legal rights of all nations involved, 117 participating nations

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signed the *United Nations Convention on the Law of the Sea* (UNCLOS) at the Third UN Conference on the Law of the Sea in 1982.[①] At the final session of the Conference, Tommy Koh, president of the Conference, called the Convention of 320 articles with nine annexes "a constitution for the oceans."[②] In his critique of the development of the law of the sea between the late 1960s and 1982, Ma Yingjiu noted, "By revamping the old order of the sea in such magnitude, to such extent, and with such impact, [the UNCLOS] arguably revolutionized the law of the sea."[③] Twenty-eight years have passed since the Convention was adopted. It is high time for us to examine the issues not addressed by the Convention, the issues only partially resolved by the Convention, the problems inherent to the implementation of the Convention, and the new challenges posed by social developments on the law of the sea, and to determine how to enhance the efficacy of the Convention within the framework of the law of the sea as established by the Convention and in the overall international legal regime.

The UNCLOS is undoubtedly the constitution of the law of the sea. We must base our research with regard to the efficacy of the Convention on this underlying premise. The UNCLOS established a system comprising archipelagic states, exclusive economic zones (EEZ's) and deep seabed areas. It created new obligations, such as the protection of the marine environment, gave existing international organizations, such as the Food and Agricultural Organization (FAO) and the International Maritime Organization (IMO), new responsibilities, and founded new institutions, such as the International Seabed Authority (ISA), the Commission on the Limits of Continental Shelf (CLCS) and the International Tribunal for the Law of the Sea (ITLOS). In fact, the constitutional status of UNCLOS dictates that it establish a firm legal framework for the jurisdiction over and the use, rule, and preservation of the seas on the one hand, and that it keep up with political, economic and social developments through in-

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① UN Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea: A Historical Perspective, 1998, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (visited on 6 July 2010).

② Tommy Koh, A Constitution for the Oceans: Remarks by Tommy Koh, final session of the Third UN Conference on the Law of the Sea, Montego Bay, December 1982. Some scholars deem E. M. Borgese the first man that called UNCLOS a "constitution for the Oceans". *See* P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, Hague: Martinus Nijhoff Publishers, 1997, p. 49.

③ Ma Yingjiu, Tiaoyutai Islands and Maritime Delimitation in East China Sea under the New Law of the Sea, Taibei: Taiwan Zhengzhong Press, 1986, p. 157.

ternal and external mechanisms, on the other. [①]

The UNCLOS is not a master key capable of opening the locks to all issues relating to the sea. Since the day of its adoption, it has faced numerous challenges. For example, illegal, unreported, and unregulated (IUU) fishing has dramatically decreased the quantity of fish stocks, drawing people's attention to the regulation of the fishing industry. [②] Human activities causing serious damage to marine ecosystems, in particular to coral reefs, have put marine ecological preservation and establishment of marine ecological protected zones on the UNCLOS agenda. Serious pollution caused by oil leaks from ships in recent years has aroused renewed emphasis on the importance of prevention, control and handling of pollution caused by ships. [③] The recent spill of crude oil from British Petroleum's oil well in the Gulf of Mexico has also pushed us to reevaluate the balance between the exploitation of marine resources and the protection of the marine environment. After 9/11, increased pirate activities in Somalia prompted us to reconsider the scope of the UNCLOS and aggressively look at the prospects of establishing an international and regional legal framework for safeguarding marine security. These are all issues that are not properly addressed by the UNCLOS. [④] Additionally, problems arising from lack of clarity in the provisions of the Convention are becoming increasingly apparent. For example, the ownership of residual rights in the EEZ is not clearly delineated in the UNCLOS. As a result, it is difficult to determine the legitimacy of military and surveillance activities undertaken by a foreign state in the EEZ; provocation by naval forces in the EEZ lends increasing urgency to this issue. Examples of such provocation are found in the China-U. S. aircraft collision in the South China Sea in 2001 and the USNS Impeccable Incident in 2009.

As Robin Churchill noted, "Laws, whether international or municipal, do not grow up in isolation, but influence and are moulded by the politics, econom-

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① David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, Oxford: Oxford University Press, 2006, p. 1.

② FAO, *State of the World Fisheries and Aquaculture*, Rome, 2004; Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3～19.

③ V. Frank, Consequences of the Prestige Sinking for European and International Law, *IJMCL*, vol. 20, 2005, p. 1.

④ David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 2.

ics and geography of the 'real world' to which they apply."[①] The same is true of the law of the sea, the advancement of which is fueled not only by the seas and the legal framework governing the seas, but also by the international community and international law. Since the adoption of the UNCLOS, the international community has undergone a series of changes, with international law undergoing corresponding developments. For instance, sustainable development has become one of the underlying principles of international environmental law and has been incorporated as an integral part of the law of the sea.[②] In fact, many legal instruments adopted after the 1992 UN Conference on Environment and Development in Rio de Janeiro adhere to the same principles of sustainable use of the resources of the sea and sustainable development of the sea, such as the FAO 1993 *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the FAO 1993 Agreement),[③] the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (the 1994 Implementation Agreement),[④] and the 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (the 1995 Implementation Agreement).[⑤] In addition, in areas that the UNCLOS does not cover, provides insufficient coverage, or provides coverage that is incapable of implementation, the international community has reached agreements to provide for coverage, such as the 2001 UNESCO *Convention on the Protection of the Underwater Culture Heritage*.[⑥]

In short, firmness and flexibility are the two concurrent objectives for both

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

② The principle of sustainable development was expanded to other natural resources, such as non-navigational uses of international watercourses. *See* Stephen C. McCaffrey, *The Law of International Watercourses*, Oxford: Oxford University Press, 2007, pp. 453～461.

③ FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1997.

④ United Nations, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, 28 July 1994.

⑤ United Nations, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995.

⑥ UNESCO, Convention on the Protection of the Underwater Culture Heritage, 2001.

international and domestic law. The law of the sea is no exception. The UNCLOS, on the one hand, established a firm legal framework for the jurisdiction over and the use, rule, and preservation of the seas by balancing the interests of the various countries. On the other hand, as the constitution of the law of the sea with a macro vision, the UNCLOS cannot possibly address every type of issue; rather, developments in technology, economics and international law dictate that it retain a certain degree of flexibility required to meet new challenges and, through the rule of the law of the sea, make sustainable use and development of the sea a reality.

Ⅰ. Constitutional Status of UNCLOS and Enhancement of Its Efficacy

To identify ways in which to enhance the efficacy of the UNCLOS, it is imperative that we stay focused on the fact that the UNCLOS is built on the vision of the seas as an integral whole. This underlying principle determines the nature of the UNCLOS, impacts the relationship between the UNCLOS and international law, including treaties, and dictates whether the UNCLOS will be able to meet challenges and make headway in the new millennium. As Howard S. Schiffman once said, the ocean is an integral ecosystem, and thus the UNCLOS should be considered as a whole. ① The preface of the Convention also states, "The problems of ocean space are closely interrelated and need to be considered as a whole." This is also why sovereign states are compelled to resolve issues of the law of the sea through negotiations and as a package. This way they are able to establish "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." ②

The UNCLOS abolished the laissez-faire regime established by the traditional law of the sea aimed at navigation and fishing, by dividing the seas into jurisdictional areas, i. e., the territorial sea, contiguous zone, archipelago, conti-

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① Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008; Peter Bautista Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, Hague: Kluwer Law International, 1997, p. 3.

② *See* the Preface to UNCLOS.

nental shelf, EEZ, and the high sea. [①] Within the territorial sea of 12 nautical miles, the coastal state enjoys full sovereignty, while foreign states have the privilege of innocent passage. [②] In the contiguous zone of 24 nautical miles, the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and to punish violations of such laws and regulations committed within its territory or territorial sea. [③] Rights of the archipelagic state over its neighboring sea are prescribed in Part IV of the UNCLOS. The EEZ is a legal system newly established under the UNCLOS, which accords sovereign rights to the coastal state for the purposes of exploring and exploiting, conserving and managing the natural resources of the waters subjacent and of the seabed and its subsoil. It also gives the coastal state jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. [④] Part VI of the UNCLOS incorporated and expanded on the legal system of continental shelf as affirmed by the 1958 *Continental Shelf Convention* and international customary law. A large part of the traditionally free high seas was placed under the jurisdiction and control of coastal and archipelagic states. Part VII incorporated the *Convention on the High Seas* and relevant international customary law. Part XI contains provisions relating to international seabed areas and common heritage of mankind, the two most controversial issues under the UNCLOS. Part XV provides for a unique dispute resolution mechanism.

According to Myron H. Nordquist, the key to the success of The Third UN Convention on the Law of the Sea, notwithstanding the extreme complexity of the issues on the agenda, rested in the fact that that Convention was mindful of the political and legal nature of those issues and was able to strike a balance among the political interests and legal rights of the various nations. Many pro-

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① R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 2.

② Part II of UNCLOS.

③ Article 33 of UNCLOS.

④ Part V of UNCLOS. *See* Symaa. Ebbin, Alf Hankon Hoel, and Arek. Sydnes ed., *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, Springer, 2005; Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature Under International Law*, Cambridge: Cambridge University Press, 1989; David Joseph Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987.

visions of the Convention were the result of bargaining among different states and groups of states. This way of making law through building consensus and finding packaged solutions is what makes the UNCLOS unique. ① By the same token, it also means that the UNCLOS, which took nearly 10 years of deliberation to become a reality, is virtually impossible to amend. In addition, the various discreet systems under the law of the sea are not allowed to chart their own course in contradiction with the UNCLOS. ②

The constitutional status of the UNCLOS dictates that it is systematic and comprehensive. As Philip Allot noted, the UNCLOS provides for every issue; not only does it provide for rights and obligations, it also entitles the states explicit freedom or leaves them certain discretion through ambiguous definition of relevant rights and obligations. ③ However, it is not possible for the UNCLOS to be 100% comprehensive because it is not intended to resolve all problems but rather to provide a legal framework and mechanism for problem-solving. This is why the UNCLOS addresses certain controversial issues with ambiguous or arbitrary language or stays silent on them altogether. Moreover, about 70 sections in the UNCLOS are expressly subject to the application of bilateral or multilateral international agreements. ④ Further, multiple provisions are dedicated exclusively to the amendment procedure of the Convention. ⑤

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① M. H. Nordquist ed., *United Nations Convention on the Law of the Sea* 1982: *A Commentary*, Dordrecht: Martinus Nijhoff Publishers, 1985-2003, vol. 5, p. 260.

② David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 169～221.

③ P. Allot, Power Sharing in the Law of the Sea, *AJIL*, vol. 77, 1983, p. 8.

④ R. Wolfrum, The Legal Order for the Seas and Oceans, in M. H. Nordquist and J. Norton ed., *Entry into Force of the Law of the Sea Convention*, Hague: Martinus Nijhoff Publishers, 1995, p. 190.

⑤ UNCLOS can be improved through amendment, reference to other rules and adoption of regional and international agreements. Articles 311～316 are on amendment of UNCLOS. Provisions that could be improved by reference to other rules include Article 22(3)(a), Article 39(2), Article 41(3), Article 53(8), Article 60(3), (5)&(6), Article 61(3), Article 94(5), Article 119(1)(a), Article 201, Article 211(2), (5)&(6), Article 226, Article 262 and Article 271. Provisions to be improved through other regional and international agreements include Article 69(2)&(3), Article 98(2), Article 125(2), Article 197, Article 207(4), Article 208(5), Article 210(4), Article 211(3) and Article 243.

Ⅱ. Ways to Enhance the Efficacy of the UNCLOS

The constitutional status of the UNCLOS dictates that we do not reinvent the wheel and try to resolve issues of the law of the sea through brand new approaches. ① On the contrary, we should work within the existing rules and through existing mechanisms to amend the UNCLOS where necessary and enforce the UNCLOS where appropriate. In fact, as a treaty, the efficacy of the UNCLOS can be enhanced through multiple means, by amendment, by being adopted into commonly accepted international standards, and by reference to relevant international and regional agreements. ② As the amendment procedure of the UNCLOS has built into it insurmountable obstacles such as the voting procedure, ③ the efficacy of the UNCLOS is better enhanced mainly through diplomatic negotiations and new agreements being reached by international organizations, both in the immediate term and longer term.

Of course, certain approaches may be more suitable than others in addressing certain issues in respect to the UNCLOS. Based on that premise, David Freestone categorized UNCLOS provisions which are in need of further actions into five groups: (a) abstract provisions, the implementation of which are explicitly required to be effected through the establishment of concrete standards; (b) provisions which are expected to lead to foreseeable conflict that they have built-in rules of conflict resolution. For example, Article 59 of the UNCLOS states, "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective

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① David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 204.

② B. Oxman, Tools for Change: the Amendment Procedure in Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea, New York: United Nations, 2003, p. 195.

③ David Freestone and Alex G. Oude Elferink, Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 173～183.

importance of the interests involved to the parties as well as to the international community as a whole."Whether or not marine states have the right to engage in military or quasi-military activities in the EEZ of coastal states is an example of the kind of issues that should be resolved in accordance with this Article;[①](c) provisions that were agreed upon as a result of balancing the interests of different nations and thus purposely vague. For example, under Article 17 of the UNCLOS, the right of innocent passage of warships in the territorial sea of the coastal state is unclearly defined;(d) provisions which became outdated due to developments in international law or innovations in technology; and (e) provisions that are inherently deficient, such those in respect of the protection of highly migratory species. [②]

We can demonstrate how the efficacy of the UNCLOS can be enhanced through internal and external channels by examining the principle of sustainable development, the protection of underwater cultural heritage and the management of fisheries. As a newly established principle of international law, the principle of sustainable development has been widely observed in various aspects of the human exploration and exploitation of natural resources, including those of the sea. For example, Article 56 of the UNCLOS provides for the sovereign right of the coastal state in the EEZ, for the purpose of exploring and exploiting, conserving and managing the natural resources (whether living or non-living) of the waters superjacent to the seabed and of the seabed and its subsoil, as well as the jurisdiction in regards to marine environmental protection and preservation. However, according to Part VI and Part VII of the UNCLOS, preservation and sustainable use of resources in the continental shelf and the high seas apply only to living resources. Consequently, David Ong raised the question whether the principle of sustainable development applies to the exploration and exploitation of non-living resources in the continental

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① Kaiyan Homi Kaikobad, Non Consensual Military Surveillance in the Exclusive Economic Zone, 2009; George V. Galdorisi and Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, *Cal. W. Int'l L. J.*, vol. 32, 2002; John C. Meyer, The Impact of the Exclusive Economic Zone on Naval Operations, *Naval L. Rev.*, vol. 40, 1992; Stephen Rose, Naval Activity in the EEZ—Troubled Waters Ahead?, *Naval L. Rev.*, vol. 39, 1990; Boleslaw A. Boczek, Peacetime Military Activities in the Exclusive Economic Zone of Third Countries, *Ocean Dev. & Int'l. L.*, vol. 9, 1988; Alan V. Lowe, Some Legal Problems Arising from the Use of the Seas for Military Purposes, *Marine Policy*, vol. 10, 1986.

② David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 15～16.

shelf. In fact, Part VI of the UNCLOS highlights the exclusive sovereign rights of the coastal state over the living resources in the continental shelf. It is also difficult for us to argue that the coastal state also has an obligation to preserve non-living resources. Nevertheless, pursuing the trends of international law, the preservation and exploitation of non-living resources will probably follow the principle of sustainable development in the future. For example, exploitation of undersea oil and gases should follow the principle of the protection of the marine environment and be subject to environmental impact assessment. In regards to the non-living resources in the continental shelf, we may be able to argue that their exploration and exploitation should take place in a reasonable and highly efficient manner; after all, these resources are not re-generable. The principle of sustainable development also plays a role in the preservation of the marine ecosystem, which coexists and interacts with the terrestrial ecosystem in which mankind lives. The destruction of the marine ecosystem will not only compromise the biodiversity of the living organisms in the ocean, but also impact the terrestrial and atmospheric ecosystems, thus threatening the sustainable development of mankind. ①

Protection of underwater cultural heritage is an important issue that has not been properly addressed by the UNCLOS. ② In fact, it was not even a main topic on the agenda of the UNCLOS. During the discussions of the legal systems of the various sea territories, attention was given mainly to historical relics discovered in the various sea territories, in particular international seabed areas and the high seas. Articles 149 and 303 of the UNCLOS merely provide general principles on the protection of historical relics discovered in international seabed areas and the high seas. Tullio Scovazzi is of the view that the UNCLOS is seriously deficient in its establishment of a protection system for underwater cultural heritage because it failed to give the coastal state jurisdiction over cultural heritage in areas of the sea beyond their control. The protection given to underwater cultural heritage by the international community is not limited to the law of the sea. Rather, comprehensive protection is accorded

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① Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservation and Vetoes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 2.

② Sarah Dromgoole ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention* 2001, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Roberta Garabello and Tullio Scovazzi ed., *The Protection of the Underwater Cultural Heritage: Before and After the* 2001 *UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2004.

to underwater cultural heritage through the adoption of a series of legal instruments aimed specifically at it, general agreements on cultural heritage protection, as well as environmental protection and maritime treaties. ① To date, the most important of such agreements is the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, which supplements the UNCLOS and makes it more complete. ②

With regard to fishing and the preservation of fish stocks, the UNCLOS also contains serious deficiencies. For instance, Part V is obviously lacking in its attempt to regulate domestic fishing industries. While the quantity and quality of allowable catch within the jurisdiction of many coastal states has decreased sharply and over-fishing is rampant, these coastal states nevertheless turn a blind eye to IUU fishing. Under the UNCLOS, it is not mandatory that coastal states preserve fish stocks; neither does the UNCLOS have an effective enforcement mechanism through which to ensure that coastal states reasonably and effectively regulate their domestic fishing activities. The FAO *Code of Conduct for Responsible Fisheries* adopted in 2008 (the FAO Code of Conduct) and the 1995 *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (the UN Fish Conference) elaborated on and gave detail to the UNCLOS as it relates to the general protection of fish stocks. While the FAO Code of Conduct is not legally binding and the UN Fish Con-

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① Council of Europe, Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Final Activity Report, Doc. CAHAQ (85) 5, 1985; Council of Europe, Recommendation 1846 on Maritime and Fluvial Cultural Heritage, 2000. Many bilateral agreements on underwater cultural heritage have been signed: Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks, 1972; the Exchange of Note between South Africa and the United Kingdom Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic concerning the Wreck of CSS Alabama, 1989; the Agreement between the Government of the United States of America and the Government of the French Republic regarding the Wreck of La Belle, 2003. Environmental protection agreements that touch upon underwater cultural heritage protection include: 1982 Protocol concerning Mediterranean Specially Protected Areas; 1995 Protocol concerning Specially Protected Areas and Biological Diversity in Mediterranean; the 1990 Protocol Concerning Specially Protected Areas and Wildlife; 2001 IMO Guidelines for the Identification and Designation of Particularly Sensitive Sea Area; 1989 International Convention on Salvage.

② Tullio Scovazzi, The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 120～136.

ference is only applicable to certain types of highly migratory fish stocks, they nevertheless further fleshed out the UNCLOS in terms of a nation's obligation to preserve fish stocks.

The preservation of "shared transboundary fish stocks" is another issue inadequately addressed by the UNCLOS. Compared to highly migratory fish stocks, shared fish stocks have not received the same kind of attention from the international community. Robin Churchill categorized shared fish stocks, examined key issues concerning the management of shared fish stocks, identified shortcomings of Article 63(1) of the UNCLOS, and proposed suggestions for more effective management and preservation of shared fish stocks. ① "Shared" suggests the fish stocks appear and move between the EEZ's of two states. The management and preservation of such fish stocks involve at least two states and entail a series of complex issues such the confirmation of the presence of such fish stocks, scientific research, managerial cooperation, the classification of such fish stocks, implementation measures and the interests of third party states. According to Article 63(1), which states, "where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks", costal states are not obligated to reach agreements. It is also important to note that in managing shared stocks, concerned states must still observe the obligations prescribed in Articles 61 and 62 of stock preservation. These obligations include optimal utilization of the stocks, prevention of overfishing, maintaining or restoring the level of the stocks so as to prevent serious threats to reproduction, and quota fishing. However, without full cooperation among concerned states, it is virtually impossible for coastal states to comply with these obligations on the management of shared stocks. ② At the moment, unlike highly migratory stocks, management of shared stocks must rely more on non-binding legal instruments such as the FAO Code of Conduct and the cooperation between international organizations and states, than on international treaties.

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① Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 3～21.

② M. Hayashi, The Management of Transboundary Fish Stocks under the LOS Convention, *TIJMCL*, vol. 8, 1993, p. 250.

Ⅲ. Mechanisms Supplementing the UNCLOS

To address new challenges, the UNCLOS requires the contracting states to timely and appropriately develop the law of the sea through international and regional organizations and specialized institutions. ① Many provisions in the UNCLOS allow and encourage the contracting states to take such an approach to resolve problems without designating any such organization or institutions. As technologies advance and people's concerns for environmental protection, resources and energy intensify, the General Assembly of the UN (the GA) is increasingly assuming a leading role in coordinating various organizations and institutions dedicated to the development of the law of the sea. Louise de la Fayette believes this is largely attributable to the GA's wide-reaching constituency and regularly scheduled discussions on hot topics related to the law of the sea. In addition, the GA is visionary, consistently placing highlights in the development of the law of the sea on its agenda, thus providing the stability desperately needed for the maintenance of the order sought by the law of the sea. ②

The fact that the UNCLOS does not require contracting parties to form an association but leaves the assessment of its implementation to the GA is highly controversial. Although not all members of the UN are contracting parties to the UNCLOS, the GA adopts resolutions in respect to important law of the sea issues annually. ③ On the other hand, the UNCLOS requires the Secretary General of the UN to hold Meetings of the State Parties where necessary but such Meetings are only given limited, specified administrative responsibilities, such as the nomination and appointment of judges to the ITLOS. ④ The excessively

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① P. Allot, Power Sharing in the Law of the Sea, *AJIL*, vol. 77, 1983, pp. 1～30.

② Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 63～74.

③ Tullio Treves, The General Assembly and the Meeting of State Parties in the Implementation of the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 55.

④ A. G. Oude Elferink, Reviewing the Implementation of the LOS Convention: the Role of the United Nations General Assembly and the Meeting of State Parties, in A. G. Oude Elferink ed., Stability and Change in the Law of the Sea: The Role of the LOS Convention, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 75.

limited scope of responsibility for the Meeting of the State Parties is subject to widespread criticism, leaving the GA as the key institution in charge of the evaluation and development of the UNCLOS. Such a function of the GA will be further strengthened with the initiation by the UN of informal negotiations with respect to ocean policy and the law of the sea.

The UNCLOS also mandated the establishment of special institutions to address specific territorial issues. Such special institutions are primarily the ISA, the CLCS and the ITLOS. By now, the history, function and operation of these three institutions are well researched. ① It is probably fair to say that the principle of common heritage of mankind is the legal foundation of the ISA. It is for the implementation of this principle in the international seabed areas that the UNCLOS established ISA, to take charge of the exploitation of resources in international seabed areas and the environmental protection issues arising from such exploitation, and balancing the interests of the exploiters and the international community. ② As states with dominant marine resource exploitation capabilities were reluctant to join the UNCLOS, the 1994 Implementation Agreement was adopted. ③ As an amendment to Part XI of the UNCLOS, the 1994 Implementation Agreement has been accepted by a majority of the countries around the globe. The ISA also has to respond to continually emerging issues. For example, with the importance of environmental protection gaining momentum, the 1994 Implementation Agreement also requires the ISA to carry out impact assessments in respect to exploitation of resources in international seabed areas.

According to Article 57 of the Charter of the UN, the GA may make recommendations to its specialized agencies, which shall in turn relay the recommendations to the relevant institutions. Among such institutions, the FAO and the IMO are the two key players in the development of the law of the sea. The IMO has undoubtedly been playing a critical role in the development of the law

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① P. B. Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity*, The Hague: Martinus Nijhoff Publishers, 1997; Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Heidelberg: Springer, 2008; Chandrasekhara Rao and P., K. Rahmatullah ed., *The International Tribunal for the Law of the Sea: Law and Practice*, Hague: Kluwer Law International, 2001.

② It was established in 1994 in accordance with Part XI of UNCLOS.

③ Satya Nandan, Administering the Mineral Resources of the Deep Seabed, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*. New York: Oxford University Press, 2006, p. 77.

of the sea before as well as after the adoption of the UNCLOS. Without the series of agreements passed by the IMO, the provisions of the UNCLOS on navigation, pollution, maritime safety, preservation of ecosystems and many other issues would only be as good as a piece of paper. [①] Nevertheless, such quasi-legislative powers of the IMO are subject to limitations imposed by the UNCLOS. For instance, Articles 311(2) and 237(2) of the UNCLOS explicitly require that measures adopted by the IMO comply with relevant provisions of the UNCLOS. Certain legal instruments go as far as explicitly stating that they are in compliance with the UNCLOS. An example is found in Article 5 of *International Convention for the Prevention of Pollution from Ships* adopted in 1973 by the IMO.

As mentioned above, the FAO passed a series of code of conducts in respect of the preservation and management of fish stocks, which help to supplement the relevant provisions of the UNCLOS. [②] In fact, the UNCLOS does not authorize the FAO to design rules or standards regarding the preservation of living resources; it is through codes of conduct, which are non-binding, that the FAO assumes an active role in the preservation of living resources. The UNCLOS takes a sovereign state-dominated approach in the preservation of marine living resources; that is, except highly migratory fish stocks, coastal states have sovereign rights and jurisdiction over the living resources in their respective EEZ's. [③] It is therefore not hard to understand why the FAO seeks to control

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① Key agreements adopted by IMO include: International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, 1975 UKTS 77; Convention on the International Regulations for Preventing Collisions at Sea 1972, 1977 UKTS 77; International Convention for he Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), 1340 UNTS 61; International Convention for Safety of Life at Sea 1974, 1184 UNTS 2; International Convention on Maritime Search and Rescue 1979, 1986 UNTS 59; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, 1678 UNTS 221; International Convention on Salvage 1989, 1996 UKTS 93。

② The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (1994) 33 ILM 968; FAO Code of Conduct for Responsible Fisheries; International Plan of Action for the Conservation and Management of Sharks; International Plan of Action for the Management of Fishing Capability 1999; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2001.

③ Robin R. Churchill, The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea, in Anastasia Strati, Marla Gavouneli, and Nikolaos Skourtos ed., *Unresolved Issues and New Challenges to the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 3.

IUU *fishing activities through non-binding legal instruments.* ①

Finally, judicial bodies, in particular the International Court of Justice (ICJ) and ITLOS, also supplement the UNCLOS through their interpretation and application thereof. The significance of their role in developing the law of the sea can best be seen in the formulation of principles, rules and standards regarding maritime delimitation. Articles 74 and 83 of the UNCLOS require that the delimitation of the EEZ and continental shelf between states with opposite or adjacent coasts is effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution. However, even the equidistance and special circumstances rule on delimitation of territorial sea under Article 15 of the UNCLOS are subject to the principle of equitability. Without generally applicable and acceptable rules, standards and approaches, development of the law on maritime delimitation is effectively left in the hands of judicial authorities. To date, cases concerning maritime delimitation account for a majority of the cases handled by the ICJ. As Yoshifumi Tanaka noted, in the foreseeable future, we will probably not see a breakthrough in the current, general principle-based law on maritime delimitation. Meanwhile, international courts and countries have been striving to achieve a balance between predictability and flexibility, resolving each delimitation dispute equitably by applying general principles to individual cases. ②

Ⅳ. Strengthening the Implementation of the UNCLOS

As David Anderson observed, development of the law of the sea has shifted from the formulation of rules to the strengthening of the enforcement of existing rules by contracting states. ③ The focal point of the development of the law

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① Kristina M. Gjerde, High Sea Fisheries Management under the Convention on the Law of the Sea, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, pp. 280～307.

② Rainer Lagoni and Daniel Vignes ed., *Maritime Delimitation*, Leiden/Boston: Martinus Nijhoff Publishers, 2006; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford: Hart Publishing, 2006; Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Hague: Kluwer Law International, 1998—2004; Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries*, Denver/Boston: Kluwer Law and Taxation Publishers, 1990; Prosper Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications Limited, 1989.

③ David Anderson, Freedom of the High Seas in the Modern Law of the Sea, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 345.

of the sea is likewise shifting from the creation of rights and obligations to integral and effective governance of the seas. The governance of the seas involves the uniform application of numerous international legal instruments in sovereign states, and the coordination of international and regional organizations and other competent institutions. ① While new rules are still needed with respect to emerging issues such as marine environmental protection, preservation of marine ecosystems and marine safety, there is a more pressing need to strengthen the enforcement of the law of the sea through a three-tiered, international, regional and national approach. ②

How to ensure effective enforcement of international law by sovereign states is a long-standing topic for the international law community. For the law of the sea, how to ensure uniform application and implementation in the various states is an extremely complex question. In an effort to define state practices and determine the mutual impact between state practices and the UNCLOS, Robin Churchill conducted a survey of contracting and non-contracting states in their domestic implementation of the UNCLOS. He concluded that, although the states might have had varying interpretations and implementation of the UNCLOS, their practices did not amount to re-interpretation of the UNCLOS and did not give rise to international customary rules of law that are inconsistent with UNCLOS. ③

As of 1 June 2010, 160 parties have rectified or acceded to the UNCLOS, 138 have rectified or acceded to the 1994 Implementation Agreement, and 77 have rectified or acceded to the 1995 Implementation Agreement. ④ Although a majority of the countries in the world have rectified or acceded to the UNCLOS, we still need the UNCLOS to apply to all countries in order for it to be an explicit and stable legal framework for the peaceful development and governance of the seas. ⑤ As Robin Churchill has pointed out, the implementation

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① Louis de la Fayette, The Role of the United Nations in International Ocean Governance, in David Freestone, Richard Barnes and David M. Ong ed., *The Law of the Sea: Progress and Prospect*, New York: Oxford University Press, 2006, p. 63.

② Yoshifumi Tanaka, *A Dual Approach to Ocean Governance*, Ashgate, 2008, pp. 1～27.

③ Robin R. Churchill, The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, in Alex G. Oude Elferink ed., *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 91～145.

④ http://www.un.org/Depts/los/reference_files/status2010.pdf (visited on 6 July 2010).

⑤ Bernard H. Oxman, The Rule of Law and the United Nations Convention on the Law of the Sea, *EJIL*, vol. 6, 1996, p. 353.

of the UNCLOS in the various states is not uniform, making the encouragement of more countries to join the UNCLOS yet another objective for the UN. The same is true of the 1994 Implementation Agreement and the 1995 Implementation Agreement.

To push for the global enforcement of the UNCLOS, we should coordinate the global enforcement mechanism of the UNCLOS with other multilateral and unilateral means based on the concrete needs of each territory, and through legislative, administrative and judicial channels, expand the scope of enforcement. For instance, the IMO followed the example of the WTO and created the "green" list of countries that fully and strictly comply with the *International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel*.[①] David Anderson advocates this approach to promoting compliance of the UNCLOS by contracting states. The *Voluntary IMO Member State Audit Scheme* also employs a similar approach.[②] As its name suggests, this method is not a compulsory measure of supervision; rather, it is based on the willingness of each member state to have its compliance and implementation assessed.

The GA is also an important platform for discussions of the implementation of the UNCLOS among the member states, because it can ensure that the UNCLOS is not controlled by a minority of states, thus preserving the general acceptance and wide application of the law of the sea. Since the UNCLOS taking effect on 16 November 1994, the GA has been publishing resolutions with regard to the UNCLOS every year, identifying core issues to be urgently addressed. For example, in its resolutions of 2009, the GA called upon competent international organizations to assist in the development of national capabilities in oceanic science and sustainable management of the seas and marine resources, through the cooperation with the governments of various states and at the global, regional, sub-regional and bilateral levels. It also expressed a concern for human activities that were causing harm to the marine environment, biodiversity and ecosystems, and for maritime organized transboundary crimes that were threatening the marine safety and security, including piracy, armed

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① International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995.

② Voluntary IMO Member State Audit Scheme, adopted in November 1993, IMO Doc A 946 (23); Framework and Procedures for the Voluntary IMO Member State Audit Scheme, IMO Doc A 974(24); Code for the Implementation of Mandatory IMO Instrument, IMO Doc A 973(24).

robbery, smuggling and other acts of terrorism targeting navigation and marine facilities and other maritime interests. It further pointed out the critical importance of the outer limit of the continental shelf beyond 200 nautical miles and that it served the interests of the international community for the coastal states owning the continental shelf beyond 200 nautical miles to submit their delimitation claims to the CLCS.

While global and multilateral enforcement mechanisms are more effective in facilitating the common interests of mankind, they are challenged by the interests of sovereign states, because the implementation of the law of the sea depends on the cooperation of sovereign states. This challenge also reflects a present day international community in which sovereign states take center stage juxtaposed against a horizontal system of enforcement of international law in the context of the law of the sea. For example, in terms of the management of ships, the UNCLOS established a system led by flag states and coastal states. Although such a system has long been criticized because flag states lack the incentive or capability to effectively manage ships, abandoning the system is not realistic as it will leave the management of ships in a legal vacuum. To strengthen the flag state's regulation of ships, the FAO adopted the FAO 1993 Agreement, which requires the flag state to enact domestic laws consistent with international law in critical areas. ① Another way to strengthen the management of ships is through the supervisory authority of relevant countries, in particular the port states. Following an increasing number of fishing conventions and the expansion of counter-marine terrorist activities, memorandums on port state's supervision of ships have been concluded for a good number of areas, such as the Paris, Tokyo, the Caribbean Sea, Latin American, the Indian Ocean, the Mediterranean Sea and the Black Sea Memorandums.

As mentioned above, in its 2009 resolutions, the UN expressed its concern for piracy, marine armed robbery, smuggling and other organized crimes against marine navigation, marine facilities and other marine interests as they have threatened marine safety and security, caused lamentable deaths, and adversely affected international trade, energy safety and the global economy. Recently, egregious piracy activities in Somalia, and the international community's concerted effort in combating such activities, once again brought marine safety to

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① Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993.

the forefront of international attention. ① In fact, the UNCLOS does not address marine safety directly. To preserve marine safety not only requires the reinforcement of a multilateral cooperation system, but also the strengthening of the rights of supervision and enforcement of the coastal states, flag states and port states. ②

The dispute resolution mechanism of the UNCLOS is another means to facilitate the effective implementation of the Convention. According to Section 1 of Part XV of the UNCLOS, disputes between contracting parties shall be resolved in a peaceful manner through consultation, mediation and other approaches. Where the parties cannot reach an agreement, the compulsory procedures laid out in Section 2 will kick in. Since the UNCLOS went into effect, the compulsory procedures have rarely been used. Only a few cases have been submitted to the ITLOS. However, such procedures have been effective in clarifying and resolving certain issues of the Convention. Moreover, the compulsory procedures have been adopted by and incorporated into many other agreements concerning the law of the sea, such as the FAO 1993 Agreement, the 1995 Implementation Agreement, the *Convention on the Conservation and Management of Fishery Resources in the South－East Atlantic Ocean*, ③ the *Convention on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, ④ the *Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South－Eastern Pacific*, ⑤ and the UNESCO *Convention on the Protection of the Underwater Culture Heritage*. In addition, as mentioned above, the ICJ has been playing an important role in developing rules with respect to the law of the sea, such as on maritime delimitation and titles to islands. ⑥

In conclusion, the problems not addressed by the UNCLOS, the issues in-

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① Myron H. Norduist, Rudiger Wolfrum, John Norton Moore and Rona Long ed., *Legal Challenges in Maritime Security*, Leiden/Boston: Martinus Nijhoff Publishers, 2008.

② Henrik Ringbom, *The EU Maritime Safety Policy and International Law*, Leiden/Boston: Martinus Nijhoff Publishers, 2008; Natalino Ronzith ed., *Maritime Terrorism and International Law*, Dordrecht: Martinus Nijhoff Publishers, 1990.

③ The Convention on the Conservation and Management of Fishery Resources in the South－East Atlantic Ocean, done at Windhoeck on 20 April 2001.

④ The Convention on the Conservation and management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu on 5 September 2000.

⑤ The Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South－Eastern Pacific, signed at Santiago de Chile on 14 August 2000.

⑥ Barbara Kwiatkowska, *The Contribution of the World Court to the Development of the Law of the Sea*, Den Bosch: Book World Publications, 2002.

adequately resolved by it, the difficulties in its implementation and the new challenges to it brought on by social development, all push us to reflect on its shortcomings, and to pursue proper and feasible approaches and adopt appropriate mechanisms to improve on it and further develop the law of the sea. Because of the constitutional nature of the UNCLOS and its unique role of balancing the political interests and legal rights of different parties, to amend it is presents an obstacle insurmountable at the moment. Consequently, diplomatic negotiation and reference to new rules and standards formulated by international organizations and institutions aimed at facilitating uniform state practices, are currently the key and possibly the most effective approaches for the improvement on the UNCLOS.

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