
ISSUE FOCUS

China Being A Maritime Power under the UNCLOS: Issues and Ways Ahead

Mincai Yu*

China has recently established a strategic goal of building herself into a maritime power. China's pursuit of this goal is interconnected with the UNCLOS. However, China faces increasingly serious challenges resulting from the application of the UNCLOS, especially the provisions in relation to the EEZ and the new continental shelf, which were strongly supported by China herself at the UNCLOS III. Drawing lessons from the participation in the UNCLOS III, this article argues that the only option for China in response to the challenges is to transform her traditional position of a coastal State into that of a maritime power by actively applying and defending the relevant UNCLOS regimes as well as taking future law-making seriously on marine biodiversity, including the marine genetic resources, beyond national jurisdiction. At the same time, China should hold an open attitude in the revision of national laws which are arguably incompatible with the UNCLOS.

Keywords

China, A Maritime Power, UNCLOS, UNCLOS III, South China Sea, Real Challenges, Possible Options, Dotted Line

* Associate Professor of International Law at Renmin University of China Law School & Senior Fellow at Collaborative Innovation Center of South China Sea Studies. LL.B.(CUPL), Ph.D.(Peking). ORCID: <http://orcid.org/0000-0002-6207-1678>. This paper is supported by the Fundamental Research Funds for the Central Universities and the Research Funds of Renmin University of China (No. 14XNK001). The author may be contacted at: ymc685@sina.com /Address: Renmin University of China School of Law, 59 Zhongguancun Street, Haidian District, 100872, Beijing, China.
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I. Introduction

2014 is a very special year for China in respect of her maritime affairs. It is the twentieth anniversary of the entry into force of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) as well as the eighteenth anniversary of China’s ratification of it.¹ Earlier this year China has officially established a national goal of “building China into a maritime power,”² firstly put forward in the Report to the Eighteenth National Congress of the Communist Party of China of 2012.³ China is shifting her national agenda from the traditional land-centered strategy to an ocean-centered one. China’s efforts to develop herself into a maritime power are closely interwoven with the UNCLOS, which has long been regarded as the constitution for the Oceans. However, the task of applying the UNCLOS while implementing her national strategy to become a maritime power at the same time is highly complicated.

In this article, the author seeks to identify these challenges and propose the Chinese ways forward for the becoming of a maritime power from an international legal perspective. This paper is composed of five parts including a short Introduction and Conclusion. Part two will introduce the China’s contributions to the UNCLOS as an analytic background. Part three will analyze the legal challenges that China is facing. Then, Part four will seek to identify China’s possible ways ahead.

II. China’s Contributions to the UNCLOS

The UNCLOS is a product of the Third UN Conference on the Law of the Sea (“UNCLOS III”).⁴ It was a large-scale international law-making process in which

¹ 1833 U.N.T.S. 31363 (The UNCLOS came into force on November 16, 1994; China has ratified it on June 7, 1996).

² Keqiang Li, *Full Text: Report on the Work of the Government*, THE PEOPLE’S DAILY, Mar. 15, 2014, available at <http://english.peopledaily.com.cn/90785/8567219.html> (last visited on Sept. 28, 2014).

³ Hu Jintao, *Firmly March on the Path of Socialism with Chinese Characteristics and Strive to Complete the Building of a Moderately Prosperous Society in All Respects*, Report to the Eighteenth National Congress of the Communist Party of China on November 8, 2012, *re-cited from* Xinhuanet, *Full text of Hu Jintao’s report at 18th Party Congress*, THE PEOPLE’S DAILY, Nov. 19, 2012, available at <http://english.people.com.cn/90785/8024777.html> (last visited on Sept. 28, 2014).

⁴ See UN Codification Division of the Office of Legal Affairs, *Third United Nations Conference on the Law of the Sea, 1973-1982*, available at <http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html> (last visited on Sept. 28, 2014) (UNCLOS III was prepared by the UN Sea-Bed Committee in 1972 and starting in December 1973).

China participated for the first time after the restoration of her legitimate seat at the UN in October 1971. China joined the whole process from the very beginning to the end, making enormous efforts and contributions to the formulation, adoption and universality of the UNCLOS.⁵

First, China advanced legitimate and constructive propositions involving many aspects of the rights and uses of the sea, which had been incorporated into the relevant provisions of the UNCLOS or reflected by them, such as Articles 2-3, 15-16, 19(1), and 21 relating to the territorial sea; Articles 55-58, 62(2), 69-70, 73, 77-79, 74(1 & 3) and 83(1 & 3) with respect to the exclusive economic zone (“EEZ”) and the continental shelf; Articles 87, 92, 116, 118-119 and 125 regarding the high seas; and Articles 136-137, 141-143, 145, 157-160 and 179 pertaining to the international seabed area (hereinafter the Area).⁶

Second, China promoted innovational developments of the traditional law of the sea. The UNCLOS III was held in context of the developing countries being called on to build a new legal order for the sea in lieu of the old one. Then, they suggested such revolutionary concepts as the EEZ and the “common heritage of mankind,” and put forward the proposals on the new law of the sea regimes replacing the conventional maritime order. China ‘consistently’ and “firmly took side with the third world countries,”⁷ not only backing their reasonable propositions on the ocean affairs,⁸ but also opposing the maritime Powers to create barriers for the UNCLOS III.⁹ As a result of the concerted solidarity of both China and other developing

⁵ Cf. International Law Teaching and Researching Division of Law Department of Peking University (ed.), *Material Collections on the Law of the Sea* [北京大学法律系国际法教研室编: 海洋法资料汇编] (1974) <available only in Chinese>; The Document Collections of the Chinese Delegation to attend the United Nations-related Conferences [中国代表团出席联合国有关会议文件集 (1982.1-6)] (1983) <available only in Chinese> [hereinafter Chinese Delegation Document Collections].

⁶ 3 Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction, U.N. GAOR, 28th Sess., at 71-74 & 101, Supp. 21, U.N. Doc. A/9021 (1973) [hereinafter Sea-bed Committee Report]; Third United Nations Conference on the Law of the Sea, 110th plen. mtg. at 7, U.N. Doc. A/CONF.62/SR.100 (Mar. 19, 1978), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XI/a_conf-62_sr-110.pdf; 116th plen. mtg., at 33, U.N. Doc. A/CONF.62/SR.116 (Feb. 27, 1979), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XI/a_conf-62_sr-116.pdf (all last visited on Oct. 6, 2014).

⁷ The Document Collections of the Chinese Delegation to attend the United Nations-related Conferences [中国代表团出席联合国有关会议文件集(1975.1-6)] 42-46 (1976). <available only in Chinese>

⁸ Third United Nations Conference on the Law of the Sea, 191st plen. mtg. at 102, U.N. Doc. A/CONF.62/SR.191 (Dec. 9, 1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-191.pdf (last visited on Oct. 6, 2014).

⁹ Third United Nations Conference on the Law of the Sea, 55th plen. mtg. at 20, U.N. Doc. A/CONF.62/SR.55 (Apr. 18, 1975), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_IV/a_conf-62_sr-55.pdf (last visited on Sept. 28, 2014).

countries at the final session of the UNCLOS III, the new comprehensive treaty on the law of the sea was successfully adopted.

Third, China took an active part in the deliberations of the negotiating groups so as to smoothly progress the UNCLOS III and ultimately achieve its objective. From the beginning of the UNCLOS III, China was very enthusiastic toward a new convention on the law of the sea. As early as attending the sessions held by the UN Sea-Bed Committee, China submitted three Working Papers on Sea Area within the Limits of National Jurisdiction, Marine Scientific Research, and the International Sea Area, respectively, elaborating her principled standpoints on relevant topics of the law of the sea.¹⁰ During the UNCLOS III, China individually or collectively with other developing countries, continued to propose new drafts for amending the conventional legal regimes of the sea.¹¹ In the negotiations, China maintained the firm position against the monopolization of the ocean by a few maritime Powers.¹² On the other hand, China was flexible to endorse relevant provisions in the Negotiating Text or even to accept some provisions in conflict with her position.¹³ Following the spirit of the new convention as a package deal, China had voted in favor of it on April 30, 1982.

Finally, China participated in the informal consultations, convened by the then UN Secretary-General from 1990 to 1994, on Part XI of the UNCLOS, and voted for, signed, and ratified the Agreement relating to the implementation of Part XI of the UNCLOS. This Agreement, substantially modifying provisions relating to the exploration and exploitation of the resources in the Area, had paved the way for the major industrialized countries to widely ratify the UNCLOS and to universalize it.

¹⁰ *Supra* note 5, at 73-74, 78-79 & 81-82. *See also* Sea-bed Committee Report, *supra* note 6.

¹¹ *Supra* note 8, at 102.

¹² Third United Nations Conference on the Law of the Sea, 156th plen. mtg. at 23, U.N. Doc. A/CONF.62/SR.156 (Mar. 8, 1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_sr-156.pdf (last visited on Oct. 6, 2014).

¹³ *See, e.g.*, Third United Nations Conference on the Law of the Sea, 8th Meeting, at 37, U.N. Doc. A/CONF.62/C.1/SR.8 (July 17, 1974), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_II/a_conf-62_c-1_sr-8.pdf (last visited on Sept. 28, 2014). With regard to the voting procedures in the Council of the International Seabed Authority, China originally proposed that decisions on questions of substance be taken by a two-thirds majority, opposed to introduce a disguised veto system on the pretext of consensus. After the coordinators of the working group of 21 proposed a new version of Article 161, paragraph 7, in which questions of substance were divided into three categories, with different voting procedures for each, China was not satisfied with that formula, but "it would not object if the formula was acceptable to most countries."

III. China's Benefits and Challenges under the UNCLOS

It is undoubted that China has benefitted from her signature and ratification of the UNCLOS. Chinese delegation said:

The new Convention has laid down a number of important legal principles and regimes for safeguarding the common heritage of mankind and the legitimate maritime rights and interests of all States and brought about a change in the former situation, in which the old law of the sea served only the interests of a few big Powers.¹⁴

As for China, the entry into force of the UNCLOS “would be conducive to safeguard her maritime rights and interests; expand maritime jurisdiction; ... protect actual status and the long-term interests as a pioneer investor; ... play her active role in the ocean affairs; and... to maintain the national image.”¹⁵

At the same time, however, China has clearly recognized the potential challenges posted by the UNCLOS. The Chinese delegation said: “There are still shortcomings and even serious defects in the provisions of quite a few articles in the Convention.”¹⁶ China further explained the challenges as follows. First, “in the articles of the Convention relating to innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea.”¹⁷ Second, Article 76 of the UNCLOS as regards the definition of the continental shelf lacked some degree of flexibility to adapt to the geographical and geological features of the continental margin, and the common paragraphs 1 of Articles 74 and 83 as regards the delimitation of the EEZ or the continental shelf between opposite and adjacent States did not expressly mention “the principle of equity generally recognized in international law and confirmed in many international documents and in international jurisprudence.”¹⁸ Last, “Resolution II of the Conference, governing preparatory investment in pioneer activities relating

¹⁴ *Supra* note 8, at 102.

¹⁵ Vice Foreign Minister Zhaoxing Li, Explanation on the proposal for the consideration of ratifying the United Nations Convention on the Law of the Sea, May 11, 1996, *re-cited from* Yaping Mu & Yan Zheng, *New situation and China facing the issues and challenges after the entry into force of the Convention on the Law of the Sea* [慕亚平, 郑艳: 《海洋法公约》生效后的新形势和我国面临的问题与挑战] <available only in Chinese>, 3 L. REV. [法学评论] 52 (1999).

¹⁶ *Supra* note 8, at 102.

¹⁷ *Id.*

¹⁸ *Id.*

to polymetallic nodules, has done too much in the way of meeting the demands of a few industrialized nations and given them and their companies some privileges and priorities. This was inappropriate.”¹⁹

China’s overall assessment of the UNCLOS at that time is still questionable. As a matter of fact those regarded as defects do not constitute the real challenges. Throughout the UNCLOS III China basically maintained that the innocent passage of foreign warship in the territorial water should not affect the security of the coastal State demanding, in accordance with its laws and regulations, prior authorization or notification of such passage, so that “the sovereignty and security of the coastal State” could be ensured.²⁰ Ironically, such a position does not sit comfortably with Chinese current needs to be a maritime power. China is dissatisfied with the formation rather than substance in respect of the definition of continental shelf and delimitation of the EEZ or the continental shelf, because China merely proposed to insert a phrase “no excess of” following the diction ‘extend beyond’ in paragraph 1 of Article 76 and a word, ‘generally’ before ‘consists of’ in paragraph 3 of the same article.²¹ Actually, Articles 74 and 83 have no adverse effects at all on China given that they emphasize on the delimitation of maritime boundary by agreement and the achievement of an equitable solution, no matter what principles would be applied. As far as Resolution II is concerned, only a few industrialized nations and their companies are listed as pioneer investor. China was not included, even though she had been surveying the Pacific Ocean so as to allegedly have met the conditions laid down by Resolution II for pioneer investor.²² Any other States signing the UNCLOS, however, could get such status of pioneer investors if only they satisfy those requirements. China was finally registered as a pioneer investor in the Area in 1991 under Resolution II.

In the meantime, China attempted to expand her jurisdictional sea areas of “nearly three million square kilometers” establishing the EEZ and the new continental shelf regime.²³ It was a real challenge. First, China can hardly enjoy, under Articles 57

¹⁹ *Id.*

²⁰ Third United Nations Conference on the Law of the Sea, 135th plen. mtg. at 23, U.N. Doc. A/CONF.62/SR.135 (Aug. 25, 1980), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XIV/a_conf-62_sr-135.pdf (last visited on Oct. 25, 2014).

²¹ Statement by deputy head of Chinese delegation SHEN Weiliang at the informal meeting of the Second Committee, Mar. 19, 1982 [沈伟良副团长在二委非正式会议上的发言] (1982年 3月 19日). See Document Collection of Chinese Delegation, *supra* note 5, at 85.

²² Third United Nations Conference on the Law of the Sea, 178th plen. mtg., at 142, U.N. Doc. A/CONF.62/SR.178 (Apr. 28, 1982), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_sr-178.pdf (last visited on Oct. 6, 2014).

²³ The Environmental and Resources Protection Committee of the National People’s Congress, The report on the results of the consideration for the proposals presented by the representatives and delivered to deliberate by the chairman group

and 76 of the UNCLOS or China's 1998 Law on the EEZ and Continental Shelf, the 200 nautical mile EEZ or the continental shelf beyond 200 nautical miles extending at maximum to 350 nautical miles measured from the baselines or 100 nautical miles from the 2,500 metre isobath (hereinafter the outer continental shelf).²⁴ Due to the geographical features and the competing claims of the maximal maritime areas, the overlapping EEZ or continental shelf areas exist between China and its marine neighbors in the Yellow Sea, East China Sea and South China Sea, thus producing the tricky issues of maritime boundary delimitation. Even if China had submitted, pursuant to Article 76, paragraph 8 of the UNCLOS, the limits of the outer continental shelf in part of the East China Sea to the Commission on the Limits of the Continental Shelf ("CLCS") in 2012,²⁵ it seems that CLCS would not possibly consider China's submission, let alone making its recommendations. It might be due to Japan's objections²⁶ and the inner practice of CLCS.²⁷ Consequently, China's extensive jurisdictional marine zones are purely illusory. In fact, China has never published the geographical coordinates of points of the 200 nautical mile limits defining her EEZ, while some other States, such as France, the Netherlands, and Liberia, have done so.²⁸

Second, Chinese fishermen have been forced to change their traditional lifestyle, or sometimes fallen into confrontations or even violent conflicts with marine forces of neighbor States.²⁹ Owing to coastal States' declaration, one after another, of the 200

of the fifth meeting of the Eighth National People's Congress. For details, see The official website of NPC (Aug. 29, 1997), available at http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content_5003804.htm (last visited on Sept. 28, 2014).

²⁴ LIHAI ZHAO, STUDIES ON THE ISSUES OF THE LAW OF THE SEA [赵理海: 海洋法问题研究] 21-98 (1996). <available only in Chinese>.

²⁵ U.N. Oceans & Law of the Sea (Division for Ocean Affairs and the Law of the Sea), Commission on the Limits of the Continental Shelf ("CLCS") Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submission to the Commission: Submission by the People's Republic of China, (Dec. 14, 2012), available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_chn_63_2012.htm (last visited on Sept. 28, 2014).

²⁶ Communication of Japan dated 28 December 2012, SC/12/372, available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_chn_63_2012.htm (last visited on Sept. 28, 2014).

²⁷ Commission on the Limits of the Continental Shelf, July 15 – Aug. 30, 2013, *Progress of work in the Commission on the Limits of the continental Shelf - Statement by the Chairperson*, ¶ 61, CLCS/80 (Sept. 24, 2013), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/485/26/PDF/N1348526.pdf?OpenElement> (last visited on Aug. 6, 2014). CLCS concluded at the thirty-second session in 2013 that: "Taking into account the *notes verbales* and the presentation made by the delegation, the Commission decided to defer further consideration of the submission and the *notes verbales* until such time as the submission was next in line for consideration, as queued in the order in which it was received."

²⁸ See Oceans and the Law of the Sea: Report of the Secretary-General Addendum, U.N. Doc. A/66/70/Add.2 (Aug. 29, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/482/99/PDF/N1148299.pdf?OpenElement> (last visited on Oct. 6, 2014).

²⁹ Zewei Yang, *The Present and Future of the Sino-South Korean Fisheries Dispute: A Chinese Lawyer's Perspective*, 5

nautical mile EEZs, Chinese fishermen's fishing areas have been rapidly decreased so that their fishing activities would be in a more uncertain risk. Following the Fishery Agreements reached by China and Japan in 1997, and South Korea in 2000 as well as the Agreement on the delimitation of the territorial seas, the EEZs and continental shelves in Beibu Bay in 2000 signed by China and Vietnam, Chinese fishermen should be expelled from their traditional fishery grounds; a great deal of them had to change their jobs. Take the Sino-Vietnam Agreement for example. As the Guangdong province "has reduced 32,000 square kilometers of the traditional high yield fishery grounds, more than 6,600 fishing vessels have been obliged to withdraw from Beibu Bay fishery grounds, and over 100,000 fishermen need to re-employ."³⁰ It is also not unusual for Chinese fishermen to be pursued in the EEZs of other countries, or detained, fined and sentenced, or even lost their lives. *E.g.*, a South Korean Coast Guard officer was stabbed to death by a Chinese fisherman in the Yellow Sea in December 2011,³¹ while a Chinese fisherman was shot dead with a rubber bullet by a South Korean Coast Guard officer who was trying to arrest him during the law enforcement in October 2012.³²

Third, the EEZ and the new continental shelf have been invoked as both "the legal bases" for the South China Sea countries to assert sovereignty over the Nansha Islands, and "the legal sources" for them to challenge China's dotted line in the South China Sea.³³ The EEZ or the continental shelf regime under the UNCLOS is only related to explore, exploit, conserve and manage the marine resources. However, it is unfortunately misinterpreted by the South China Sea neighbors as a legal basis for occupying the Nansha Islands and reefs. Those countries, such as Vietnam, the Philippines and Malaysia, claim that the Nansha islands and reefs are located in their EEZs or on their continental shelves, thus entitling them to claim sovereignty over relevant islands and reefs.³⁴ They also question the legal status of

J. EAST ASIA & INT'L L. 481-487 (2012).

³⁰ Resolution on continuing to support the coastal fishermen for industrial transformation and keeping the fishing areas stable, passed by the Sixteenth Meeting of the Standing Committee of the Eleventh People's Congress of Guangdong Province, (Jan. 22, 2010) <available only in Chinese>, available at http://zwgk.gd.gov.cn/006939748/201003/t20100316_11775.html (last visited on Sept. 28, 2014).

³¹ Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference (Dec. 13, 2011) <available only in Chinese>, available at http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/jzhsl_602247/t886766.shtml (last visited on Sept. 28, 2014).

³² Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference, (Oct. 17, 2012) <available only in Chinese>, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t980695.shtml (last visited on Sept. 28, 2014).

³³ Hong Thao Nguyen, *Vietnamese Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims*, 5 J. EAST ASIA & INT'L L. 195-207 (2012).

³⁴ Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Remarks on the title

China's dotted line in the South China Sea, declaring that it is inconsistent with the UNCLOS. In response to China's Communication regarding the joint submission by Malaysia and Vietnam of the limits of the outer continental shelf in the southern part of the South China Sea,³⁵ in May 2009, Vietnam said that: "China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes *Verbale* CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void."³⁶ Indonesia answered that: "The so called 'nine-dotted lines map' as contained in the above circular note ... clearly lacks international legal basis and is tantamount to upset UNCLOS 1982."³⁷ The Philippines also argued that: "The claim ... by the People's Republic of China on the 'relevant waters as well as the seabed and subsoil thereof' (as reflected in the so-called nine-dash line map attached to Notes *Verbale*)...would have no basis under international law, specifically UNCLOS."³⁸ Vietnam and the Philippines expressed the same points on China's Note with respect to the 2009 Vietnamese submission of the limits of the outer continental shelf in the North Area (VNM-N) of the South China Sea.³⁹ More decisively, on January 22, 2013, the Philippines had taken the legal step of initiating the compulsory arbitral proceedings under Article 287 and Annex VII of the UNCLOS against China in respect of their dispute over the South China Sea.⁴⁰ The Philippines requested the Arbitral Tribunal which was constituted under

of sovereignty over the Huangyan Island, (Nov. 7, 2000) <available only in Chinese>, available at http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t5600.shtml. See also *Jurisprudential Evidence to Support China's Sovereignty over the Nansha Islands* (Nov. 11, 2000) <available only in Chinese>, available at http://www.fmprc.gov.cn/mfa_eng/topics_665678/3754_666060/t19234.shtml (all last visited on Sept. 28, 2014).

- ³⁵ Communication of the Permanent Mission of the People's Republic of China to the United Nations dated 7 May 2009, No. CML/17/2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf (last visited on Sept. 28, 2014).
- ³⁶ Communication of the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations dated 8 May 2009, No. 86/HC-2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vnm_e.pdf (last visited on Sept. 28, 2014).
- ³⁷ Communication of the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations dated 8 July 2010, No. 480/POL-703/VII/10, available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf (last visited on Sept. 28, 2014).
- ³⁸ Communication of the Permanent Mission of the Republic of Philippines to the United Nations dated 5 April 2011, No. 000228, available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf (last visited on Sept. 28, 2014).
- ³⁹ Communication of the Vietnamese Permanent Mission to the United Nations dated 18 August 2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_phl_2009re_vnm.pdf (last visited Sept. 28, 2014). See also Communication of the Philippine Permanent Mission to the United Nations dated 5 April 2011, available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf (last visited on Sept. 28, 2014).
- ⁴⁰ L. Bautista, *The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute*, 6 J. EAST ASIA & INT'L L. 520-524 (2013).

Annex VII to declare that: “China’s maritime claims in the South China Sea based on its so-called ‘nine dash line’ are contrary to UNCLOS and invalid.”⁴¹

The abovementioned challenges, to a significant extent, might result from China’s adoption of a political approach in the UNCLOS III.⁴² Since the very beginning of joining the Sea-Bed Committee, China has been regarding this new conference on the law of the sea as the forum for opposing the maritime hegemony of the super-Powers,⁴³ rather than that for maximizing legal rights and interests as possibly in the sea. China identified herself as a supporter of the third world cause;⁴⁴ she was unconditionally supporting claims from developing countries with extensive maritime zones.⁴⁵ Nevertheless, China ultimately falls into a passive dilemma under those new regimes established by the UNCLOS. Although China objected to the maritime Powers’ claims of relevant issues of the law of the sea, such as the freedom of navigation and overflight through straits used for international navigation,⁴⁶ she eventually benefits from those new systems. China also reproached the 1958 Geneva Conventions on the Law of the Sea with serving for the superpowers to push the maritime hegemony, so as to totally deny their value.⁴⁷ Had the 1958 Geneva Conventions been globally adopted as the basis for entitlements to ocean spaces, however, China could have avoided the above-stated challenges because, under the 1958 Geneva Conventions, there exists no EEZ. Then, the continental shelf is only with a depth of 200 metres, or beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources.

China’s politically motivated approach is more evident when comparing with the United States. Although the US strongly opposed the establishment of the EEZ during the UNCLOS III, she eventually becomes the greatest beneficiary of

⁴¹ Republic of the Philippines, Department of Foreign Affairs, The Philippines’ Notification and Statement of Claim on West Philippines Sea (Jan. 22, 2013), available at <http://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>. See also Statement of Secretary Albert F. del Rosario on the Submission of the Philippines’ Memorial to The Arbitral Tribunal (Mar. 30, 2014), available at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/2460-statement-of-secretary-albert-f-del-rosario-on-the-submission-of-the-philippines-memorial-to-the-arbitral-tribunal> (all last visited on Oct. 24, 2014). (On March 30, 2014, the Philippines submitted its Memorial to the Arbitral Tribunal of nearly 4,000 pages).

⁴² M. Carr, *China and the Law of the Sea Convention*, 9 AUSTL. J. CHINESE AFF. 39 (1983).

⁴³ 1972 U.N. Y.B. 32-33 & 35, U.N. Sales No. E.74.I.1.

⁴⁴ *Supra* note 9, at 20.

⁴⁵ 1975 U.N.Y.B. 124, U.N. Sales No. E.77.I.1.

⁴⁶ *Id.* at 127.

⁴⁷ Third United Nations Conference on the Law of the Sea, 98th plen. mtg., at 42, U.N. Doc. A/CONF.62/SR.98 (May 15, 1978), available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_IX/a_conf-62_sr-98.pdf (last visited on Oct. 6, 2014).

such a regime.⁴⁸ The American benefit under the UNCLOS is well shown at the US geographical coordinates of points marking the outer limits of the 200 nautical mile EEZ of its all mainland and islands.⁴⁹ The US is also the greatest beneficiary of the outer continental shelf regime.⁵⁰ Similarly, the US expression of the serious reservations about the deep seabed mining regime to be established pressed the UNCLOS III to revise it so as to take care of the US concern, and to guarantee a seat for the US on the Council of the International Seabed Authority (hereinafter the Authority).⁵¹ In order to further attract the US participation in the UNCLOS, the 1994 Agreement had significantly modified the regime of the Area once again. In addition, the US demands of the freedom of navigation and overflight in international straits and the EEZ, the freedom of scientific research and the non-compulsory transfer of technology had all been satisfied. One could go so far to say that the UNCLOS is purely an international treaty reflecting the American interests and requirements, even though the US voted against the UNCLOS, nor signed, let alone ratifying it.

In contrast, there are no special advantages to China under the UNCLOS. China's so-called maritime rights and interests are the same ones that every coastal State including even non-members can assert and exercise. This is because the UNCLOS "has codified all the available customary international law in respect of the law of the sea."⁵² Take the US once again for example. It extended, respectively, its territorial sea to 12 nautical miles in 1988, its contiguous zone to 24 nautical miles in 1999, and its EEZ to 200 nautical miles in 1983, from the baselines, and asserts sovereignty, jurisdiction or sovereign rights over those areas.⁵³ It had also issued four licenses

⁴⁸ The United Nations Oceans & Law of the Sea (Division for Ocean Affairs and the Law of the Sea), The United Nations Convention on the Law of the Sea: A historical perspective, available at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited on Sept. 28, 2014). (The document writes that among the major beneficiaries of the EEZ regime are the United States, France, Indonesia, New Zealand, Australia and the Russian Federation).

⁴⁹ Federal Register Department of State, Public Notice 2237: Exclusive Economic Zone and Maritime Boundaries; Notice of Limits (1995), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1995_eez_public_notice.pdf (last visited on Sept. 28, 2014).

⁵⁰ W. Verwey, *The New Law of the Sea and the Establishment of a New International Economic Order: The Role of the Exclusive Economic Zone*, 21 *IND. J. INT'L L.* 412 (1981). He said: "The United States, Canada and Australia alone will claim nearly one-third of all available continental shelf."

⁵¹ S. NANDAN, M. LODGE & S. ROSENNE EDs., *THE DEVELOPMENT OF THE REGIME FOR DEEP SEABED MINING* 49-53 (2002).

⁵² Permanent Mission of the People's Republic of China to the U.N., Statement by H.E. Ambassador Zhang Yishan, Deputy Permanent Representative of China to the United Nations, at the Plenary of the 59th Session of the UN General Assembly, on Item 49: Oceans and the Law of the Sea, (Nov. 16, 2004), available at <http://www.china-un.org/eng/chinaandun/legalaffairs/hyft560783.htm> (last visited on Sept. 28, 2014).

⁵³ See *Territorial Sea of the United States of America by the President of the United States of America: A Proclamation of 27 December 1988* (Dec. 27, 1988); *Contiguous Zone of the United States - Proclamation by the President of the*

authorizing deep seabed hard mineral resource exploration in specified areas of the east-central Pacific Ocean as early as 1984.⁵⁴ China cannot, however, exercise even the traditional freedom of fishing in the high seas, because this freedom is subject to the relevant treaty obligations.⁵⁵ The UNCLOS also permits States to establish sub-regional or regional fishery organizations for the conservation and management of living resources in the areas of the high seas.⁵⁶ There currently exist a number of global and regional fishery bodies with a management mandate, such as the Commission on the Conservation of Antarctic Marine Living Resources, and the Western and Central Pacific Fisheries Commission, some of which are responsible for setting a total allowable catch and its allocation among the members in the specified areas of the high seas.⁵⁷ As China is not a member of those commissions, Chinese fishermen have been virtually excluded from fishing in the specified areas. It should be noticed that China was one of the few States to advocate the establishment of fishery organizations in the high seas in the Sea-Bed Committee,⁵⁸ which is not laid down in the 1958 Convention on the High Seas. In light of the above, it is apparent that China gains no special rights from the new law of the sea regimes. This is further exemplified by the fact that China can neither have the right to claim the archipelagic waters, nor effectively control, according to Articles 238-265 of the UNCLOS relating to the scientific research, the complaining surveying activities conducted by the US warships in its EEZ or on its continental shelf.⁵⁹

United States of America (Sept. 2, 1999); Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America (Mar. 10, 1983), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm> (last visited on Sept. 28, 2014).

⁵⁴ See Note dated 13 January 1986 from the United States Mission to the United Nations addressed to the Secretary-General of the United Nations, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm> (last visited on Sept. 28, 2014).

⁵⁵ UNCLOS art. 116.

⁵⁶ *Id.* art. 118.

⁵⁷ See Regional Fishery Bodies (RFB)-CCSBT, available at <http://www.fao.org/fishery/rfb/ccsbt/en> (last visited on Sept. 28, 2014). *E.g.*, the Commission for the Conservation of Southern Bluefin Tuna, whose area of competence extends over all national waters and the high seas where southern bluefin tuna are found, functions to set a total allowable catch and its allocation among the members.

⁵⁸ Sea-Bed Committee Report, *supra* note 6, at 104.

⁵⁹ Foreign Ministry Spokesperson Zhang Qiyue's Regular Press Conference, XINHUA NEWS (Sept. 27, 2002), available at http://news.xinhuanet.com/newscenter/2002-09/27/content_577089.htm (last visited on Sept. 28, 2014).

IV. China's Ways Ahead towards a Maritime Power

How does China handle the UNCLOS system on the way to be a maritime power? A possible option is the denunciation of the UNCLOS, although only a few Chinese commentators take that view.⁶⁰ Pursuant to Article 317 of the UNCLOS, States parties are permitted to withdraw from the UNCLOS, which has once been supported by China.⁶¹ However, China would not take such an action. An obvious reason is that China always attaches great importance to the indispensable role of the UNCLOS in regulating the contemporary marine order.⁶² So, China's inevitable choice is to pursue her goals within the framework of the UNCLOS.

As a State party, China could amend the articles of the UNCLOS to cope with the challenges. Regrettably, China could not initiate the amendment procedure for the EEZ or the continental shelf. Under the UNCLOS, the request by a State party to convene a conference to consider its proposed specific amendments to the Convention must be favored by no less than one half of the State parties.⁶³ Article 313 also requires that a proposed amendment by a State party or the proposal for its adoption by the simplified procedure without convening a conference meet no objections from one of other State parties. Since the entry into force of the UNCLOS in 1994, the amendment procedures have never been proposed.⁶⁴

An alternative option available to China is the implementing agreement model developed in the UNCLOS. This is a *de facto* amendment in effect, although not in form, of the UNCLOS. Practice thereof is the 1994 Agreement relating to

⁶⁰ See *The experts say: Nansha was invaded, China could withdraw from the United Nations Convention on the Law of the Sea* [专家称: 南沙遭侵中国可退出联合国海洋法公约], GLOBAL TIMES [环球时报] <available only in Chinese>, July 19, 2012; Peijuan Ji, *Three scholars: China should speed up the development of the South China Sea* [暨佩娟: 三位学者: 中国须加速开发南海], GLOBAL TIMES [环球时报], June 23, 2012; Yeqing Zheng, *Care should be taken to handle the Philippines' request for arbitration* [郑叶青: 应谨慎应对菲律宾的仲裁请求], LEGAL DAILY [法制日报] <available only in Chinese>, Jan. 29, 2013, at 10.

⁶¹ Statement by Deputy Representative Liu du at the meeting of the legal experts group on final clauses, Mar. 10, 1980 [刘度副代表在“最后条款”法律专家小组会议上的发言] (1980年 3月 10日), in *The Document Collections of the Chinese Delegation to attend the United Nations-related Conferences* (1980.1-6) 86-87 (1981).

⁶² See Statement by H.E. Ambassador Wang Min at the 22nd Meeting of States Parties to the United Nations Convention on the Law of the Sea On the Commemoration of the 30th Anniversary of the Opening for Signature of the United Nations Convention on the Law of the Sea (June 8, 2012), available at <http://www.china-un.org/eng/hyyfy/t939872.htm>; Remarks by Head of the Chinese Delegation Ambassador Wang Min at the Meeting in Commemoration of the 20th Anniversary of the Entry into Force of the United Nations Convention (June 9, 2014), available at <http://www.china-un.org/eng/hyyfy/t1163776.htm> (all last visited on Sept. 28, 2014).

⁶³ UNCLOS art. 312.

⁶⁴ A. Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT'L & COMP. L. Q. 564 (2005).

the implementation of Part XI of the UNCLOS and the 1995 Agreement for the implementation of the provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. Unfortunately, it is unlikely that this model is feasible, because it is difficult for a proposal relating to the implementation of the provisions of the UNCLOS regarding the EEZ or the continental shelf to arouse worldwide echoes.

Consequently, the only possible option for China is to apply the relevant UNCLOS regimes to strive for the maritime rights and interests as far as possible. To this end, first, China could engage in negotiation of fishery agreements with relevant countries and join the fishery organizations to which she is not yet a party, with a view to creating stable and safe environment of fishing access for Chinese fishermen. The EEZ regime confers on a coastal State sovereign rights to the fishery resources in its jurisdictional area. However, the coastal State is also obliged to allow other States to utilize the resources. Article 62 of the UNCLOS provides as follows:

1. The coastal State shall promote the optimum utilization of the living resources in the EEZ,⁶⁵
2. ...Where the coastal state does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch;⁶⁶ and
3. In giving access to other States to its EEZ, the coastal State shall take into account the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.⁶⁷

Further, geographically disadvantaged nations shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of coastal States of the same sub-region or region.⁶⁸ Those provisions would afford China the legal basis to obtain fishing rights in other States' EEZs. Article 51 offers the same potential, if China could prove that she has the traditional fishing rights in the archipelagic waters of the Philippines or Indonesia.

At the same time, China could participate, step by step, in fishery organizations such as the Commission for the Conservation of Southern Bluefin Tuna ("CCSBT"),

⁶⁵ UNCLOS art. 62(1).

⁶⁶ *Id.* art. 62(2).

⁶⁷ *Id.* art. 62(3).

⁶⁸ *Id.* art. 70.

North East Atlantic Fisheries Commission, and the Southeast Atlantic Fisheries Organization, as well as turn the status of cooperating non-party in the Inter-American Tropical Tuna Commission into a member, so as to strive for quotas of access to fishing in the areas of the relevant organization's competence.⁶⁹

Second, China could make use of the Rules of Procedure of CLCS to prevent relevant countries from unreasonably expanding the outer continental shelf and take an active part in the formulation of the benefit-sharing arrangements for the exploitation of the resources of the outer continental shelf. Under Article 76, paragraph 8 of the UNCLOS, a coastal State's delimitation of the limits of its outer continental shelf shall be subject to CLCS, i.e., the coastal State shall submit information on the limits of its outer continental shelf to CLCS for consideration. Only on the basis of the recommendations made by CLCS, shall the limits of the shelf established by the coastal State be final and binding. Thus, a coastal State cannot by itself fix the outer limits of the outer continental shelf without the CLCS' recommendations. Annex I to the Rules of Procedure of CLCS provides one procedure to bar the Commission from making such recommendations. It states that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States, that in cases of unresolved land or maritime disputes, related to the submission, CLCS shall not consider and qualify a submission made by any of the States concerned in the dispute, except prior consent given by all of these States.⁷⁰ In the case of the Japan's Submission to CLCS concerning the limits of the outer continental shelf in 2008, China and South Korea made, under the Rules of Procedure, their complaints against the submission of the outer continental shelf measured from the basepoints of Oki-no-Tori Shima; they announced that the so-called Oki-no-Tori Shima Island is in fact not an island, but a rock under Article 121, paragraph 3 of the UNCLOS, and hence is not entitled to any outer continental shelf.⁷¹ CLCS decided at the twenty-ninth session in 2012 that it would not be in a position to take action on the parts of the recommendations relating to the Southern

⁶⁹ Shuolin Huang, *Fishery Rights Are Maritime Rights* [黄硕琳: 渔权即是海权] 6 CHIN. L. SCI. [中国法学] 76-77 (2012). <available only in Chinese>

⁷⁰ See Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40, arts. 1 & 5, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement> (last visited on Oct. 11, 2012).

⁷¹ See Note of the Permanent Mission of the PRC to the UN dated 6 February 2009, CML/2/2009 (Feb. 6, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf; Note of the Permanent Mission of Republic of Korea to the UN dated 27 February 2009, MUN/046/09 (Feb. 27, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf (all last visited on Sept. 28, 2014).

Kyushu-Palau Ridge Region prepared by the sub-commission until such time as the matters referred to in the communications received from China, South Korea, Palau and the US had been resolved.⁷²

China could not only act as a defender of the Area, but also become a beneficiary of the benefit-sharing system for the exploitation of the outer continental shelf resources. Article 82 of the UNCLOS provides that: “The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources beyond 200 nautical miles;⁷³ they shall be made “annually and at certain rate, after the first five years of production at a site,⁷⁴ “through the Authority, which shall distribute them to State parties to the UNCLOS, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States...”⁷⁵ It is estimated that oil exploration on the outer continental shelf could start as early as 2015; attention has been drawn to the benefit-sharing regime in Article 82 and its implementation in due course.⁷⁶ The Secretary-General of the Authority responded that exploitation or mining of the resources of the Area had not commenced so that the sharing of benefits could not as yet take place.⁷⁷ However, China should seriously study the rules, regulations and procedures on equitable sharing of Article 82 benefits, so as to create an equitable benefit-sharing scheme in the process of doing such future work by the Authority.

Third, China should try to clarify the essence of the UNCLOS and differentiate the laws applicable to the sovereignty issues over islands and reefs, and to the maritime rights and interests. The UNCLOS makes clear at the outset that its purpose is to establish, with due regard for the sovereignty of all States, 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

⁷² See Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chairperson, CLCS/74 (Apr. 30, 2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/326/32/PDF/N1232632.pdf?OpenElement> (last visited on Oct. 16, 2014).

⁷³ UNCLOS art. 82, ¶ 1.

⁷⁴ *Id.* art. 82, ¶ 2.

⁷⁵ *Id.* art. 82, ¶ 4.

⁷⁶ U.N. Convention on the Law of the Sea, Meeting of State Parties, June 4-11, 2012, Report of the Twenty-second Meeting of States Parties, SPLOS/251 (July 11, 2012), available at <http://daccess-ods.un.org/TMP/2004252.07614899.html>, (last visited on Oct. 6, 2014).

⁷⁷ U.N. Convention on the Law of the Sea, Meeting of State Parties, June 13-17, 2012, Report of the twenty-first Meeting of States Parties, SPLOS/231 (June 29, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/393/68/PDF/N1139368.pdf?OpenElement> (last visited on Oct. 6, 2014).

study, protection and preservation of the marine environment.⁷⁸ The Convention is basically a group of international laws regulating uses of resources of the sea; it does not provide the ground for claiming sovereignty over the land domain. Considering the customary principle that “the land dominates the sea,”⁷⁹ a coastal State has entitlements to the EEZ or the continental shelf, while the EEZ or the continental shelf can never reversely become the base for control of the land. Thus, it is not valid at all for China’s South China Sea neighbors to claim the sovereignty over the Nansha islands and reefs located in their EEZs or the continental shelves, together with denying the China’s dotted line. Taking advantage of the forums discussing the affairs of the oceans and the law of the sea such as the General Assembly or the Meeting of States parties, China should unambiguously express her opinion that the UNCLOS is entirely unrelated to the territorial claims, and refute her neighbors for their misinterpretation and misapplication of the UNCLOS.⁸⁰

Meanwhile, the Chinese Embassy to the Philippines released the following statement in 2004:⁸¹

China is committed to working with the countries concerned for proper settlement of the disputes related to the South China Sea through peaceful negotiations in accordance with the universally-recognized international law and the contemporary law of the sea, including the fundamental principles and legal regimes set forth in the 1982 UN Convention on the Law of the Sea.

China should make more efforts in dealing with the Nansha questions convincingly in order not to declare such a statement again.

As for China, the essence of the South China Sea issues is the territorial sovereignty disputes caused by the occupation of some islands of Nansha Islands under the Chinese sovereignty by other States.⁸² The overlapping claims to maritime rights

⁷⁸ UNCLOS pmbi.

⁷⁹ North Sea Continental Shelf (Germ./Den. and Neth.), Judgment, 1969 I.C.J. 51 (Feb. 20), available at <http://www.icj-cij.org/docket/files/51/5537.pdf> (last visited on Oct. 6, 2014).

⁸⁰ U.N. GAOR, 68th Sess., 63^d plen. mtg. at 7-9, U.N. Doc. A/68/PV.63 (Dec. 9, 2013); *Report of the twenty-third Meeting of States Parties to the United Nations Convention on the Law of the Sea*, June 11–14, 2013, at 14-15, SPLOS/263 (July 8, 2013), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/386/14/PDF/N1338614.pdf?OpenElement> (last visited on Oct. 6, 2014).

⁸¹ Embassy of the People’s Republic of China in the Republic of the Philippines, Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue (Apr. 8, 2004), available at <http://www.fmprc.gov.cn/ce/ceph/eng/z/nhwt/183765.htm> (last visited on Sept. 28, 2014).

⁸² Ministry of Foreign Affairs of the People’s Republic of China, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on January 23, 2013, (Jan. 23, 2013), available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1007746.shtml (last visited on Sept. 24, 2014).

in relevant waters are secondary. The former is governed by general international law concerning national territory, while the latter is governed by the UNCLOS. The dotted line in the South China Sea is a matter of territorial sovereignty and has nothing to do with the UNCLOS.⁸³ Furthermore, the dotted line has been objectively existing before the UNCLOS comes into being. China should make efforts to differentiate the legal status of the dotted line from the UNCLOS and, to this end, actively forge an international consensus.

Fourth, bearing in mind lessons from participating in the UNCLOS III, China should handle, from a maritime power's perspective, the issues regarding the legal status of marine genetic resources beyond national jurisdiction and the rights of maritime navigation. Marine genetic resources such as hydrothermal vent and cold seep in areas beyond national jurisdiction have been recently found and known; they are highly relevant to food security, agriculture, health, industrial applications, environmental remediation and biofuel production. As the resources in the Area are limited to all solid, liquid or gaseous mineral resources in situ in the Area or beneath the seabed, all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.⁸⁴ So marine genetic resources fall within neither the definition of the resources in the Area, nor the Authority's competence. Some developing countries, however, expressed the contrary opinion at the General Assembly to set up the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea or the Meeting of States Parties.⁸⁵ In their view, the role of the Authority is not restricted to the mineral resources, but should cover all resources, including marine genetic resources of the Area.⁸⁶ Such new resources are a part of the "common heritage of mankind," and the benefits arising therefrom should accrue to the entirety of humankind as a whole, and not on a first-come-first-served basis.⁸⁷ Therefore, a legal regime for marine genetic resources in areas beyond national jurisdiction should be rapidly developed, and it must draw on the UNCLOS.⁸⁸ In response, the Ad Hoc Open-ended Informal Working Group made a recommendation in 2011 that the General Assembly should initiate a process,

⁸³ Ran Guo, *Legal Basis of China's Claim over the Huangyan Island*, 6 J. EAST ASIA & INT'L L. 534 (2013).

⁸⁴ UNCLOS arts. 133 & 137(2).

⁸⁵ U.N. GAOR 67th Sess., ¶ 15, U.N. Doc. A/67/95 (June 13, 2012), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F67%2F95&Submit=Search&Lang=E (last visited on Oct. 11, 2012).

⁸⁶ *Id.*

⁸⁷ U.N. GAOR, 64th Sess., 58th plen. mtg., at 20, U.N. Doc. A/64/PV.58 (Dec. 4, 2009); U.N. GAOR, 66th Sess., 76th plen. mtg., at 9, U.N. Doc. A/66/PV.76 (Dec. 6, 2011), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F66%2FPV.76&Submit=Search&Lang=E (last visited on Oct. 11, 2014).

⁸⁸ *Id.* U.N. Doc. A/66/PV.76, at 2, 4 & 25.

with a view to addressing the possible development of a multilateral agreement, under the UNCLOS, relating to conserve and sustainably use marine biodiversity in areas beyond national jurisdiction, in particular, marine genetic resources.⁸⁹ At the meetings in April 2014, the UN Member States agreed to develop an international instrument regulating the conservation and sustainable use of marine biodiversity within the UNCLOS.⁹⁰

China is yet to show her clear position on the legal status of marine genetic resources in areas beyond national jurisdiction, although it was proposed that, in the Working Paper of General Principles for the International Sea Area submitted to the Sea-Bed Committee, resources of the international sea area shall in principle be jointly owned by the people of all countries.⁹¹ In recent years, China maintained at the UN forums that currently relevant research should be stepped up, in light of complex legal and political issues relating to utilize marine genetic resources and the limited knowledge available to mankind.⁹² Simultaneously, China is of view that steps and measures for the conservation of the resources should be agreed to within the framework of the UNCLOS and other relevant international conventions taking into full account the existing regimes governing the use of high seas and international seabed.⁹³ Furthermore, the Authority and other relevant international organizations should be encouraged to play an active role in this regard.⁹⁴ China supports the above-mentioned process, emphasizing that the relevant work should proceed gradually and fully consider the legitimate needs of States, especially developing countries, to use marine biological resources.⁹⁵

It seems that China should stand with the developing countries, on the one hand, considering that just ten highly developed States are dominating some 90 per

⁸⁹ U.N. GAOR 66th Sess., ¶ 40, U.N. Doc. A/RES/66/231 (Apr. 5, 2012), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/66/231 (last visited on Oct. 11, 2014).

⁹⁰ UN News Centre, *At UN, countries to consider need for global instrument to protect marine biodiversity*, (Apr. 2, 2014), available at <http://www.un.org/apps/news/story.asp?NewsID=47492&Cr=ocean&Cr1=#.VDP3ZmeSxxw> (last visited on Sept. 28, 2014).

⁹¹ *Supra* note 6, at 101.

⁹² Permanent Mission of the People's Republic of China to the UN, Statement by H.E. Ambassador LIU Zhenmin, Deputy Permanent Representative of China to the United Nations, at the Plenary Meeting of the 62nd Session of the UN General Assembly, on Item 77 "Oceans and the Law of the Sea," Dec. 10, 2007, available at <http://www.china-un.org/eng/chinaandun/legalaffairs/hyf/t388772.htm> (last visited on Sept. 28, 2014).

⁹³ Permanent Mission of the People's Republic of China to the UN, Statement by Ambassador LIU Zhenmin at the Plenary Meeting, (Dec. 7, 2006), available at <http://www.china-un.org/eng/chinaandun/legalaffairs/hyf/t349646.htm> (last visited on Sept. 28, 2014).

⁹⁴ *Supra* note 53.

⁹⁵ U.N. GAOR, 66th Sess., 75th plen. mtg., at 18, U.N. Doc. A /66/PV.75 (Dec. 6, 2011), available at http://www.un.org/ga/search/view_doc.asp?symbol=A+%2F66%2FPV.75&Lang=E (last visited on Aug. 11, 2012).

cent of the patents related to marine genetic resources.⁹⁶ On the other hand, it seems most favorable for China to invoke the freedom of the high seas in relation to marine genetic resources, because China has made significant progress in the discovery and survey of them. She has so far discovered 17 hydrothermal active zones in three oceans such as the Pacific Ocean, the India Ocean, and the Atlantic Ocean, approximately accounting for one tenth of hydrothermal zones found in the world.⁹⁷ In any event, China should ensure its vested interests to be guaranteed or seek the maximal benefits as a basic starting point to deal with the issues of the legal status of the marine genetic resources and their law-making process.

As far as the rights of maritime navigation are concerned, including the innocent passage, the right of transit passage, archipelagic sea lanes passage, or the high sea freedom of navigation, Chinese merchant ships and warships would be provided with legal guarantee for convenient or free access to and from the oceans, in particular through international straits such as the Strait of Malacca and Japanese Osumi Strait. This is particularly true when China's first aircraft carrier 'Liaoning' was formally delivered to the Chinese Navy in September 2012.⁹⁸

However, China may be subject to certain restrictions or interference in exercising the rights of maritime navigation. Some countries, including China herself, made laws or declarations under the UNCLOS regime requiring foreign warships to obtain advance approval or prior notification for the passage through the territorial sea. Article 11 of the 1983 Maritime Traffic Safety Law of China states that foreign military ships may not enter the Chinese territorial sea without authorization; it is reaffirmed by Article 6 of the 1992 China's Law on the Territorial Sea and the Contiguous Zone.⁹⁹ China also made a similar declaration upon the ratification of the UNCLOS.¹⁰⁰ Moreover, some other States neither include the right of transit passage from some international straits (e.g. Denmark and Finland),¹⁰¹ nor

⁹⁶ *Supra* note 28, at 43.

⁹⁷ Jiancai Jin, *The economic strategy for the oceans to expand the activity space of our country in the international sea area* [金建才: 经略大洋 拓展我国在国际海域的活动空间], 4 OCEAN DEV. & MGMT. [海洋开发与管理] 36 (2011) <available only in Chinese>.

⁹⁸ See *Q&A about aircraft carrier "Liaoning ship,"* THE PEOPLE'S DAILY (Sept. 27, 2012), available at <http://english.peopledaily.com.cn/90786/7962070.html> (last visited on Sept. 28, 2014).

⁹⁹ OFFICE OF POLICY, LAW AND REGULATION OF STATE OCEANIC ADMINISTRATION (ed.), COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 202 & 253 (3d ed. 2001).

¹⁰⁰ United Nations Oceans & Law of the Sea (Division for Ocean Affairs and the Law of the Sea) Declarations and Statements, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm# (last visited on Sept. 28, 2014).

¹⁰¹ *Id.*

recognize the right of archipelagic sea lanes passage (*e.g.*, The Philippines).¹⁰² In the past, China has experienced some inconvenience in navigation. In November 2012, *e.g.*, Japanese surveillance aircraft or warships followed the Chinese naval fleet sailing through the Miyako Strait.¹⁰³

The abovementioned laws or declarations are arguably in conflict with the UNCLOS. The 1999 General Assembly Resolution stated that declarations and statements on the UNCLOS, which have been generally considered not to be in conformity with Articles 309 and 310, include those purporting to require notification or permission before warships exercise the right of innocent passage or relating to the rights of transit passage and archipelagic sea-lane passage.¹⁰⁴ The General Assembly on many occasions calls upon Member States to harmonize, as a matter of priority, their national legislation with the provisions of the UNCLOS, not only to ensure the consistent application of those provisions but also to confirm any declarations or statements with the UNCLOS are in conformity therewith and, otherwise, to withdraw any of them that are not in conformity.¹⁰⁵ The General Assembly also required States to guarantee freedom of navigation, the rights of transit passage, archipelagic sea lanes passage and innocent passage in accordance with the UNCLOS.¹⁰⁶

China similarly holds the view that the regimes of the transit passage through international straits and of the passage through archipelagic sea lanes should be complied with and preserved by all States.¹⁰⁷ She also stressed that laws and regulations legislated by any coastal States should not undermine the principle of the freedom of navigation, but be in line with the UNCLOS and the relevant international law.¹⁰⁸ Accordingly, China should modify the 1983 Law and 1992 Law to abolish the distinction between foreign military ships and non-military ships

¹⁰² *Id.*

¹⁰³ See *A Chinese naval fleet passed through the Miyako Strait, Japan dispatched its warships and aircraft to follow up* [中国海军编队通过宫古海峡 日本出动舰机跟踪] <available only in Chinese>, CHINA NEWS, Nov. 28, 2012, available at <http://www.chinanews.com/gj/2012/11-28/4366564.shtml> (last visited on Oct. 28, 2014).

¹⁰⁴ U.N. Doc. A/57/57 (Mar. 7, 2002), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F57%2F57&Lang=E (last visited on Oct. 20, 2014).

¹⁰⁵ G.A. Res.56/12, ¶ 4, U.N. Doc. A/RES/56/12 (Dec. 13, 2001), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F56%2F12&Lang=E; G.A. Res. 68/70, ¶ 7, U.N. Doc. A/RES/68/70 (Feb. 27, 2014), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F68%2F70&Lang=E (all last visited on Oct. 20, 2014).

¹⁰⁶ *Id.* G.A./Res. 68/70, U.N. Doc. A/RES/68/70 (Feb. 27, 2014), ¶ 23, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/70 (last visited on Oct. 20, 2014).

¹⁰⁷ *Supra* note 90.

¹⁰⁸ *Id.*

in the regard of innocent passage through the territorial sea, in order to recognize all ships having such right.¹⁰⁹ Meanwhile, China should take the lead to withdraw her declaration regarding the passage of foreign warships through the territorial sea, and explicitly declare that she would not accept or acquiesce in any of laws or declarations incompatible with the provisions of the UNCLOS. Furthermore, China should actively assert and exercise the rights and freedom of maritime navigation, and ensure the freedom of navigation in the South China Sea.

V. Conclusion

China's efforts to build herself into a maritime power are closely connected with the UNCLOS in the sense that the Convention is the international rule of law guarantee for China. On the journey of marching towards a maritime power, however, China faces more and more complex challenges in the course of applying the UNCLOS. The only feasible option open to China is to apply current regimes of the UNCLOS to solve the relevant issues and to strive for the maritime rights and interests as possible. Keeping in mind lessons from the participation in the UNCLOS III, China should not maintain her politically centered approach and traditional stance of a coastal State. Instead, China should maintain an open attitude with a maritime power's eyes in dealing with the UNCLOS and the future new law-making process relating to it. To this aim, China should act as an active player with firm responsibility in applying and defending the UNCLOS; amend her domestic law which is arguably incompatible with the UNCLOS in order to recognize the right of innocent passage by foreign warships through the territorial sea; and take the lead to withdraw her declaration on the UNCLOS in this regard, as well as push forward and safeguard the rights or freedom of maritime navigation.

¹⁰⁹ Hyun-Soo Kim, *The 1992 Chinese Territorial Sea Law in the Light of the UN Convention*, 43 INT'L & COMP. L. Q. 903 (1994).