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China in the UNCLOS and BBNJ negotiations, yesterday once more?

Nengye Liu¹  and Shirley V. Scott^{2*} 

¹Yong Pung How School of Law, Singapore Management University, Singapore and ²School of Humanities and Social Sciences, UNSW Canberra, Canberra, Australia

Corresponding author: Nengye Liu; E-mail: nengyeliu@smu.edu.sg

Abstract

This article compares China's stance during the UNCLOS negotiations – the starting point of contemporary law of the sea, with its engagement in the latest development of negotiations on the United Nations agreement on biodiversity beyond national jurisdiction (BBNJ). It answers the question, how does China participate in these two important rules-making processes of the international law of the sea? By identifying salient positions China took in each set of lengthy negotiations and explaining the reasons behind, the article also aims to reflect what a rising China may bring to the international legal maritime order in the foreseeable future. The first part of this article, on the nature of China's engagement in the UNCLOS negotiations, draws on archival study of official records of the UNCLOS III (1973–1982), as has been digitalized by the UN Office of Legal Affairs. The second part examines the period between the adoption of the UNCLOS (1982) and the start of the BBNJ process (2004), paying attention to China's shifting practice towards the exploration and exploitation of the deep seabed mineral resources, and its concerns over the ratification of the UNCLOS and the 1995 FSA. Then the article focuses on China in the BBNJ negotiations – Working Groups, Preparatory Committee Meetings and Intergovernmental Conferences. Drawing upon the evolution of China's positions over the past five decades, the article concludes with some insights on the likely future directions and implications of China's engagement with the international law of the sea.

Keywords: BBNJ; China; High Seas; The Area; UNCLOS

1. Introduction

It was an afternoon in August 2022, at the United Nations (UN) Headquarters in New York. The international community was negotiating a new legally binding agreement on the high seas. After a lengthy debate as to whether 'common heritage of mankind' is a principle of international law or merely a concept,¹ a Chinese diplomat, echoing a speech just made by the Bangladeshi delegation, spoke emotionally of the West's lack of political will to share the benefits arising from

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¹The resulting agreement refers to 'the principle of the common heritage of humankind', see 2023 Agreement under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement), Art. 7(b).

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exploiting marine genetic resources in the Area – the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.²

This was a unique and *déjà vu* moment, reminiscent of the famous photo of Chinese Minister of Foreign Affairs Qiao Guanhua laughing heartily at the UN General Assembly in 1971.³ That was the year in which the People's Republic of China (PRC) replaced the Republic of China (ROC) as the only legitimate representative of China to the UN.⁴ Every child in mainland China was taught in high school history class that in the 1970s China stood firmly with developing countries against superpowers and hegemonies – the United States and Soviet Union, and aspired to achieve a new international economic order. It was the votes of the developing world that facilitated the PRC finally arriving at the UN.⁵ Therefore, it was hardly surprising that China aligned closely with the Third World during the third United Nations Conference on the Law of the Sea (UNCLOS III, 1973–1982), inclusive of their prioritizing sovereignty and gaining their fair share of the benefits of the exploitation of the natural resources of the oceans.

In 2022, the international community celebrated the fortieth anniversary of the adoption of the United Nations Convention on the Law of the Sea (UNCLOS). Moreover, after decades of Working Group meetings,⁶ Preparatory Committee meetings (PrepCom),⁷ and six rounds of intergovernmental conferences (IGCs) between 2018 and 2023,⁸ the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement),⁹ as the third implementing agreement of the UNCLOS,¹⁰ was adopted on 19 June 2023. The BBNJ Agreement is an important international legal instrument, covering more than 60 per cent of the world's oceans, which are high seas beyond national jurisdiction. It focuses on four major themes: marine genetic resources (MGRs), including benefit-sharing; area-based management tools (ABMTs), such as marine protected areas; environmental impact assessment (EIA); and capacity building and transfer of marine technology (CBTMT). The Chinese delegation engaged extensively with

²1982 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 397, Art. 1(1).

³Qiao's Laugh – China's Return to the United Nations', *Global Times*, 29 June 2021, available at www.globaltimes.cn/page/202106/1227350.shtml.

⁴UNGA, Restoration of the Lawful Rights of the People's Republic of China in the United Nations, UN Doc. A/RES/2758(XXVI) (25 October 1971).

⁵In fact, most European countries voted to support the restoration of PRC's membership of the UN, while some developing countries, e.g., Brazil, Bolivia, Chad, Philippines, Saudi Arabia, and Venezuela, were against A/RES/2758(XXVI). The voting is available at = digitallibrary.un.org/record/654350?ln=en.

⁶Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ Working Group) was established in 2004. See UNGA, Oceans and the Law of the Sea, UN Doc. A/RES/59/24 (17 November 2004), para. 73.

⁷UNGA, Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, UN Doc. A/RES/69/292 (19 June 2015). The PrepCom met four times between 2016 and 2017. For negotiation history of the BBNJ Agreement see E. Papastavridis, 'The Negotiations for a New Implementing Agreement under the UN Convention on the Law of the Sea Concerning Marine Biodiversity', (2020) 69(3) *International and Comparative Law Quarterly* 585; see also D. Freestone, 'Introduction: The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges', in D. Freestone (ed.), *Conserving Biodiversity in Areas beyond National Jurisdiction* (2019), 3.

⁸By virtue of UNGA Res. 72/249 (24 December 2017), Intergovernmental Conference on Marine Biodiversity of Areas beyond National Jurisdiction (IGC) was held at the United Nations Headquarters in New York. IGC 1, 4–17 September 2018; IGC 2, 25 March–4 April 2019; IGC3, 19–30 August 2019; IGC4, 7–18 March 2022; IGC5.1, 15–26 August 2022; IGC 5.2, 20 February–3 March 2023.

⁹See BBNJ Agreement, *supra* note 1.

¹⁰The other two implementing agreements are: The Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, entry into force together with the UNCLOS in 1994; The 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 (Fish Stocks Agreement) adopted on 4 August 1995, entry into force 11 December 2001.

both the UNCLOS and BBNJ negotiations. China ratified UNCLOS in 1996; China has signed but not ratified the 1995 Fish Stocks Agreement (1995 FSA). China signed the BBNJ Agreement on 20 September 2023, although at the time of writing is yet to ratify the Agreement.

The world – and China, have, however, changed profoundly over the past four decades. When the UNCLOS was negotiated, China was among the least developed countries in the world.¹¹ In 2022, according to the World Bank, China's Gross Domestic Product (GDP) surpassed the whole 27 member states of the European Union (EU) and is about 70 per cent of the size of the United States.¹² By the time of the BBNJ negotiations, China had itself become a superpower, competing with the United States globally,¹³ and is largely seen by the West as a challenger to the existing 'rules-based order'.¹⁴ Amid geopolitical tensions between the US and China, this article compares China's stance during the UNCLOS negotiations – the starting point of contemporary law of the sea, with its engagement in the latest development of BBNJ negotiations. It answers the question, how does China participate in these two important rules-making processes of the international law of the sea? By identifying salient positions China took in each set of lengthy negotiations and explaining the reasons behind, the article also aims to reflect what a rising China may bring to the international legal maritime order in the foreseeable future.

The first part of this article, on the nature of China's engagement in the UNCLOS negotiations, draws on archival study of official records of the UNCLOS III (1973–1982),¹⁵ as has been digitalized by the UN Office of Legal Affairs. The second part examines the period between the adoption of the UNCLOS (1982) and the start of the BBNJ process (2004), paying attention to China's shifting practice towards the exploration and exploitation of the deep seabed mineral resources, and its concerns over the ratification of the UNCLOS and the 1995 FSA. Then the article focuses on China in the BBNJ negotiations, built upon statements and submissions from the Chinese delegation as well as participation observation by the lead author during the fourth and fifth sessions of the Intergovernmental Conference on Marine Biodiversity in Areas beyond national jurisdiction (BBNJ IGC 4 and 5.1) in 2022. Drawing upon the evolution of China's positions over the past five decades, the article concludes with some insights on the likely future directions and implications of China's engagement with the international law of the sea.

2. China in the UNCLOS III (1973–1982)

The history of the law of the sea, its origin and development until the adoption of the UNCLOS, is largely western centric. Hugo Grotius wrote his famous book *Mare Liberum* (the freedom of the seas) to defend the Dutch East Indian Company's trade interests at sea, especially in Southeast Asia, against the Portuguese exclusive jurisdiction of the oceans. For many countries in Asia and Africa, after the rise of colonial powers, be it Spanish, Portuguese, Dutch, French or the British

¹¹China's Economy 70 Years on: By the Numbers', *Al Jazeera*, 1 October 2019, available at www.aljazeera.com/economy/2019/10/1/chinas-economy-70-years-on-by-the-numbers.

¹²The World Bank, 'GDP (current US\$) – China, United States', available at data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN-RU.

¹³See, for example, according to US Secretary of State Antony Blinken, 'China is the only country with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it.' The Biden Administration's Approach to the People's Republic of China, 26 May 2022, available at www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/.

¹⁴See, for example, I. B. Kardon, *China's Law of the Sea* (2023). Rules-based international order is a term largely created by western think tanks, while being widely mentioned in western (particularly Australia, the United Kingdom, and the United States) defence and foreign policy papers in recent years. According to Chatham House, 'rules-based international order' means 'The framework of liberal political and economic rules, embodied in a network of international organizations and regulations, and shaped and enforced by the most powerful nations'. See Chatham House, *Challenges to the Rules-Based International Order* (2015).

¹⁵Available at legal.un.org/diplomaticconferences/1973_los/.

Empire, the sea became a major source of threat to their sovereignty and national interests.¹⁶ By the end of the Second World War, most third world countries were still European or American colonies, without independent sovereignty to determine their own affairs and future.

Although China has never been fully colonized by any western power, the country also went through 'the century of humiliation' after the first Sino-British/Opium War in 1840. China was forced to cede Hong Kong to the British following the unequal Treaty of Nanking (1842). The country suffered from foreign interference and invasions throughout the first half of the twentieth century.¹⁷ The PRC was established in 1949. However, it was isolated from the US-anchored western world following the Korean War breaking out in 1950. US-China relations were significantly improved after Richard Nixon's visit to China in 1972. UNCLOS negotiations began in 1973. PRC participation in the UNCLOS negotiations therefore signaled its re-emergence into the international arena, together with many developing countries, which also gained independence as a result of an UN-supported decolonization campaign in the 1960s.

On 17 December 1970, the General Assembly decided by resolution 2750 C (XXV),¹⁸ to convene a third conference on the law of the sea in 1973. One hundred and sixty states participated the Third United Nations Conference on the Law of the Sea (UNCLOS III) for nine years. Those who gathered for the opening plenary recognized its historical significance for developing countries. According to UN Secretary General Kurt Waldheim:

It was the first Conference on the subject since the accession to independence of a large number of developing countries, a fact which gave it a very particular and historic significance. . . . It knew enough to realize that it had a real and vital opportunity to establish the legal foundations which could reconcile present needs and interests with those of future generations. That opportunity arose at a time when a dominant concern of the United Nations was to close the gap between developing and developed countries, which had rightly been a major theme in the discussions in the preparatory stage and was a major concern of the Conference.¹⁹

Developing countries formed the Group of 77 (G77) in 1964, with the aim of enhancing co-operation and their joint negotiating capacity in the UN and to work towards a new international economic order.²⁰ In 1967, Ambassador Arvid Pardo, then permanent representative of Malta to the UN, delivered his comprehensive speech to the UN General Assembly and urged the UN to consider 'the vital political questions involved and clear legal provision be made for an international regime, administered by an efficient international authority over the sea-bed and the ocean floor beyond a variously defined continental shelf'.²¹ Pardo suggested that in order to avoid advanced states in a race to scramble resources of the deep seabed and ocean floor beyond national jurisdiction, those resources should be the 'common heritage of all mankind'.²²

¹⁶For a comprehensive study of the engagement of the third world with the law of the sea see E. L. Enyew, 'Sailing with TWAIL: A Historical Inquiry into Third World Perspective on the Law of the Sea', (2022) 21(3) *Chinese Journal of International Law* 439.

¹⁷H. Xue, *Chinese Contemporary Perspectives on International Law, History, Culture and International Law* (2012), at 14.

¹⁸Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea, 1933rd Plenary Meeting of UN General Assembly, 17 December 1970.

¹⁹UNCLOS III, First Session, 1st Plenary Meeting, UN Doc. A/CONF.62/SR.1 (3 December 1973),

²⁰Joint Declaration of the Seventy-Seven Developing Countries made at the Conclusion of the United Nations Conference on Trade and Development (15 June 1964).

²¹A. Pardo, UNGA, 22nd Session, First Committee, 1515th Meeting, UN Doc. A/C.1/PV. 1515 (1 November 1967), para. 14.

²²*Ibid.*

The developing countries came to the UNCLOS III with ambitious objectives. They were major forces in driving the inclusion of new concepts in the UNCLOS, such as common heritage of mankind (CHM), archipelagic waters, and exclusive economic zone (EEZ). It was mentioned in the 1st Plenary Meeting of the UNCLOS III that:

It was essential to emphasize that the Conference would proceed on the basis of General Assembly resolution 2749 (XXV),²³ namely, that the sea-bed beyond national jurisdiction was the common heritage of all mankind. That fact in itself made the Conference unique; for the first time in history the representatives of States would be engaged in translating that vital concept into reality.²⁴

It is important to note, however, that the Convention aimed to be ‘comprehensive both in the sense of covering a wide range of issues governing five sevenths of the earth’s surface and to be widely acceptable’.²⁵ The interests of states diverged considerably and alliances tended to vary from issue to issue;²⁶ thus, for example, coastal states may have shared certain interests, but this did not correspond precisely to a North–South division amongst states.

China first made public its position on major issues in two working papers: those on the ‘Sea Area Within National Jurisdiction’ and on ‘Sea Area Beyond National Jurisdiction’ of 1973.²⁷ Based on official records of China’s participation in the UNCLOS III, China primarily aligned itself with the G77 and showed strong support for the developing countries’ struggle for a new international economic order. Nevertheless, throughout the negotiation, China’s leadership had a drastic shift from Mao Zedong to Deng Xiaoping in 1978. Consequently, Chinese diplomacy during the UNCLOS III could also be divided into two stages.

The first stage (1972–1977) largely fell under Mao Zedong (1893–1976)’s final years of leadership, during the cultural revolution. Even though the tension between the US and China was eased following US President Richard Nixon’s historical visit to China in 1972, Chinese diplomacy in those days can be said to have taken a revolutionary approach, meaning to oppose hegemony wherever possible. In Mao’s eyes, the world was divided into three camps, the first world being two superpowers (US and the Soviet Union), the second world being other developed western European countries and Japan, while the rest is the third world, including China. Moreover, bilateral relations between China and the Soviet Union had deteriorated dramatically in the 1960s, and reached their lowest point in 1969 when border conflict broke out in Zhenbao (Damansky) Island.²⁸ Therefore, ever since the first statement made by Chinese delegation,²⁹ the tone was set

²³UNGA Resolution 2749 (XXV) on Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (1970).

²⁴See UNCLOS III, *supra* note 19, para. 4.

²⁵See ‘The Law of the Sea Conference History Structure and Major Issues’, Attachment A to ‘Notes on Cabinet Submission No. 2030. Australian Policy in the Third United Nations Conference on the Law of the Sea’, 29 March 1978, Australian Archives (AA) A.

²⁶*Ibid.*

²⁷Z. Gao, ‘China and the LOS Convention’, (1991) 15 *Marine Policy* 199, at 204. These were submitted to the Seabed Committee. UN Doc. A/AC.138/SC.II/L.34 (1973) and UN Doc. A/AC.138/SC.II/L.45 (1973).

²⁸‘The Island that Changed History’, *New York Times*, 2 March 2019, available at www.nytimes.com/2019/03/02/opinion/soviet-russia-china-war.html.

²⁹Mr Ling Ching (China) formally proposed that before the Conference proceeded to elect the remaining officers it should take a decision on the principle of one State, one seat (concerning the number and distribution of seats in the General Committee, the three Main Committees and the Drafting Committee), concerning which divergent views had been expressed . . . It should be noted that only the two super-Powers were asking for more than one seat. That was an unfair and unreasonable manifestation of super-Power hegemony, which his delegation firmly opposed.’ UNCLOS III, First Session, 4th Plenary Meeting, UN Doc. A/CONF.62/SR.4 (11 December 1973), para. 2.

as ‘allying with developing countries,³⁰ fighting against hegemonies.³¹ China openly attacked two super powers, expressing opposition to their ‘maritime hegemony’. Chinese diplomats singled out the Soviet Union several times, calling them for example, ‘the super-power that flaunted the banner of socialism’;³² the ‘super-Power which claimed to be the natural ally of the developing countries’;³³ and ‘Ambitious Soviet social-imperialism’.³⁴

During this period, Chinese diplomats repeatedly raised concerns about fair and equitable participation in the negotiation process;³⁵ this is an issue for developing countries on many occasions of international negotiations due to the lack of capacity and resources. Moreover, China actively advocated for those newly independent countries to continue their negotiations in between the formal sessions of the UNCLOS III.³⁶

China was also supportive of establishing the new regime of 200 nautical miles EEZs, as suggested by Latin American countries.³⁷ The UN General Assembly recognized the right to permanent sovereignty over natural resources in 1972 and 1973,³⁸ which provided a legal basis for newly independent developing countries to expand their jurisdiction at sea up to 200 nautical miles to protect their fisheries and other marine resources.³⁹ China regarded the EEZ regime as the third world countries’ struggle against ‘super-Power maritime hegemony’.⁴⁰ Further, this was an issue for PRC to develop diplomatic relations with several Latin American countries.⁴¹ China

³⁰E.g., UNCLOS III, Second Session, 28th Plenary Meeting, UN Doc. A/CONF.62/SR.28 (3 July 1974), para. 77: ‘China, which was one of the countries of the third world and would support their just demands, had never lorded it over others. His country had never been a super-Power and never would be one.’

³¹E.g., UNCLOS III, Second Session, 25th Plenary Meeting, UN Doc. A/CONF.62/SR.25 (2 July 1974), para. 11: ‘Mr. CHAI Shu-fan (China) said that the international situation had changed considerably since the two previous Conferences on the Law of the Sea had been held, and the third world countries had now become the main force combating colonialism, imperialism, and hegemony, as had been demonstrated at the recent sixth special session of the General Assembly. The expansionist policies of the two super-Powers were being firmly resisted by third world countries and were also arousing opposition among many “second world” countries. The historical trend was irresistible - countries wanted independence, nations wanted liberation and the people wanted revolution.’

³²*Ibid.*, para. 12.

³³*Ibid.*, para. 18.

³⁴UNCLOS III, Fourth Session, 67th Plenary Meeting, UN Doc. A/CONF.62/SR.67 (23 April 1976), para. 47.

³⁵See for example, UNCLOS III, Second Session, 13th Plenary Meeting, UN Doc. A/CONF.62/SR.13 (15 December 1973), para. 25, by Ambassador Ling Ching (China). This point was reaffirmed in future sessions, such as in 11th Meeting of General Committee, UN Doc. A/CONF.62/BUR/SR.11 (15 April 1975), paras. 26–27, by Mr. PI Chi-lung (China).

³⁶The Chinese delegate gave a speech to the 20th Plenary Meeting of the Second Session, arguing that ‘Political developments could occur between sessions of the Conference, and the Conference and its Credentials Committee should be able to discuss problems arising from any such political developments.’ See UNCLOS III, Second Session, 20th Plenary Meeting, UN Doc. A/CONF.62/SR.20 (27 June 1974), para. 44.

³⁷The Latin American States had been precursors in the development of international legal thinking on the regime of the seas: as early as 1956, the Mexico resolution, adopted by the Inter-American Council of Jurists, had established that the breadth of three miles for the delimitation of the territorial sea was insufficient and did not constitute a general rule of international law. In 1970, a large group of Latin American countries had adopted the Montevideo and Lima Declarations which stressed the economic interest of the coastal States in disposing of the natural resources of the sea and noted the geographical, economic and social link between the sea, the land and man, which gave the coastal States legitimate priority in the utilization of the natural resources of the marine environment. In 1972, the Declaration of Santo Domingo had been signed, which had made clear the need to establish two zones in ocean space; one under the jurisdiction of coastal States, extending not more than 200 miles, and another subject to the authority of the international community.’ See UNCLOS III, Second Session, 21st Plenary Meeting, UN Doc. A/CONF.62/SR.21 (28 June 1974), para. 3.

³⁸UNGA, Permanent Sovereignty over Natural Resources of Developing Countries, UN Doc. A/RES/3016(XXVII) (1972); UNGA, Permanent Sovereignty over Natural Resources, UN Doc. A/RES/3171(XXVIII) (1973).

³⁹See Enyew, *supra* note 16, at 468–73.

⁴⁰See UNCLOS III, *supra* note 31, para. 12.

⁴¹For example, see Joint Communiqué on the Establishment of Diplomatic Relations Between the People’s Republic of China and Argentina, 19 February 1972, available at www.fmprc.gov.cn/web/gjhdq_676201/gj_676203/nmz_680924/1206_680926/1207_680938/200011/t20001107_9367071.shtml (in Chinese); Joint Communiqué on the Establishment of Diplomatic Relations Between the People’s Republic of China and Peru, 2 November 1971, available at www.fmprc.gov.

rejected the notion that the economic zone should be considered part of the high seas.⁴² It was China's view that the coastal state should have the:

right to protect, use, explore and exploit all the natural resources in the zone, to adopt necessary measures and regulations to prevent the resources from being plundered, encroached on, damaged or polluted, and to exercise overall control and regulation of the marine environment and scientific research within the zone.⁴³

Nevertheless, it is important to note that, although the EEZ was a major innovation and tool that might help redistribute more evenly the benefits of ocean resource use, it was not that the US opposed it. Although the United States had initially been reluctant to support the extensive offshore jurisdictional claims it became apparent that the EEZ concept was not necessarily contrary to US interests and US policy changed. By August 1974 the United States had proposed a maximum limit of 200 nautical miles for the economic zone, within which the coastal state would have the jurisdiction and sovereign and exclusive rights for the purposes of exploiting the living and non-living resources.⁴⁴ Indeed, it was already clear by the time that the Convention was concluded that some developed states were likely to benefit more from the concept than developing countries.⁴⁵

Chinese diplomats had some doubts about the EEZ regime during the UNCLOS III as well. Ambassador Ling Ching (Deputy Head of Chinese Delegation in the Second Session and Head of Chinese Delegation in the Fourth Session) explained in his Memoir 'From Yan'an to the United Nations' that it was wrong for China to see the EEZ as a regime serving the whole developing world's interests.⁴⁶ In fact, geographically disadvantaged developing countries, such as Venezuela and Algeria, were against the idea of EEZs.⁴⁷ Moreover, Ling believed that China, as a country bordering semi-closed seas (East China Sea, Yellow Sea, and South China Sea), would be in an awkward situation in relation to the establishment of 200 nautical miles EEZs. Given that the distance between baselines of China and neighbouring countries, such as Japan, is less than 400 nautical miles, it will be difficult for China to rely on the natural prolongation principle for maritime delimitation.⁴⁸ Furthermore, China may have not anticipated that it would one day become the world's largest distant water fishing country⁴⁹ and its distant water fishing fleet could cause diplomatic issues due to fishing activities in or near other countries' EEZs.⁵⁰

cn/web/gjhdq_676201/gj_676203/nmz_680924/1206_680998/1207_681010/200011/t20001107_9369010.shtml (in Chinese). It is noted that both Communiqués mentioned Taiwan and EEZs. Argentina and Peru recognize PRC as the only legitimate government representing China and acknowledge China's position that Taiwan is an inseparable part of PRC territory. In return, China recognizes Argentina's jurisdiction and Peru's sovereignty in sea areas within 200 nautical miles adjacent to their coastline.

⁴²See UNCLOS III, *supra* note 31, para. 16.

⁴³See Gao, *supra* note 27, at 204–5 citing UN Official Records of the Third United Nations Conference on the Law of the Sea Vol. II, 1974, at 187 and also referencing UN Doc. A/AC.138/SC.II/L334 (1973).

⁴⁴S. V. Scott, 'The LOS Convention as a Constitutional Regime for the Oceans', in A. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (2005), 9, at 27.

⁴⁵R. G. Darman 'The Law of the Sea: Rethinking U.S. Interests', (1978) 56 *Foreign Affairs* 373, at 383.

⁴⁶C. Ling, *From Yan'an to the United Nations, Ling Ching's Career as a Diplomat* (2008), at 165–70 (in Chinese).

⁴⁷*Ibid.*, at 166.

⁴⁸*Ibid.*, at 169–70.

⁴⁹China's official document provides that in 2022, there are 177 approved distant water fisheries (DWF) enterprises and 2551 DWF vessels, including 1498 high seas fishing vessels, operating in the high seas of the Pacific, Indian Ocean, the Atlantic and Antarctica. See The State Council Information Office of the People's Republic of China, White Paper 'Development of China's Distant-Water Fisheries', October 2023, available at www.scio.gov.cn/zfbps/zfbps_2279/202310/t20231024_775875.html.

⁵⁰N. Liu, 'China's Regulation of its Distant Water Fishing Fleets', (2021) 36 *International Journal of Marine and Coastal Law* 165, at 166.

China was enthusiastically and wholeheartedly in favour of the principle of common heritage of mankind (CHM) as applied to the deep seabed. On numerous occasions, the Chinese delegation made comments to the effect that the international sea-bed 'should be used for peaceful purposes. Its resources were owned jointly by the peoples of all countries'.⁵¹ It was also clear from the Chinese delegation that the International Seabed Authority (ISA) should be established with a Council, General Assembly, and an Enterprise to manage deep seabed mining on behalf of all countries.⁵² The Chinese delegation upheld the CHM principle throughout UNCLOS III. Mr. Liang Yufan from the Chinese delegation made a strong statement in the eleventh session of UNCLOS III:

His delegation stressed that the articles in Part XI were a package which reflected a great deal of compromise, particularly on the part of the developing countries. The principle of the common heritage of mankind and the need for provisions which would benefit everyone could not be changed without undermining the principles and purposes of the convention, thereby destroying the package. His delegation strongly endorsed the position of the Group of 77 and hoped that the United States would adopt a realistic position and co-operate with a view to enabling the Conference to fulfil its task and complete its programme of work.⁵³

Even in the UNCLOS III, there is one issue in respect of which China distanced itself from most developing countries: dispute settlement. Although certain developing countries, including Bangladesh,⁵⁴ for example, placed great importance on setting up a compulsory dispute settlement regime under the UNCLOS, China held a different view. As early as the 60th Plenary Meeting in 1976, the Chinese delegation stated that:

The Chinese Government had consistently held that States should settle their disputes through negotiation and consultation on an equal footing and on the basis of mutual respect for sovereignty and territorial integrity. Of course, States were free to choose other peaceful means to settle their disputes. However, if a sovereign State were asked to accept unconditionally the compulsory jurisdiction of an international judicial organ, that would amount to placing that organ above the sovereign State, which was contrary to the principle of State sovereignty. Moreover, problems within the scope of the State sovereignty and exclusive jurisdiction of a sovereign State should be handled in accordance with its laws and regulations. That was why his delegation considered that the provisions in document A/CONF.62/WP.9 concerning the compulsory jurisdiction of the law of the sea tribunal were inappropriate.⁵⁵

⁵¹See UNCLOS III, *supra* note 31, para. 18.

⁵²For example, UNCLOS III, 22nd Meeting of the First Committee, Third Session, UN. Doc. A/CONF.62/C.1/SR.22: 'Mr. TIEN Chin (China) said that he agreed with representatives of developing countries that the international sea-bed machinery should be an organization jointly administered by all sovereign States, big and small, on a basis of equality. It should not fall under the control of and be monopolized by the super-Powers or be used by them to plunder the common heritage of mankind, but should work for the benefit of all peoples. The organization should have broad powers, including the right to direct exploration and exploitation of sea-bed resources, and should regulate all activities in the international area, such as scientific research, production, processing and marketing. The super-Powers must not be allowed to reduce the machinery to a hollow administrative framework devoid of real power.'

⁵³UNCLOS III, Eleventh Session, 156th Plenary Meeting, UN Doc. A/CONF.62/SR.156 (8 March 1982), para. 40.

⁵⁴UNCLOS III, Fourth Session, 62nd Plenary Meeting, UN Doc. A/CONF.62/SR.62 (7 April 1976), para. 63: 'Mr. RASH ID (Bangladesh) said that Bangladesh attached great importance to the procedure of dispute settlement, since, as a developing country, it would be depending more and more on the extensive exploitation and exploration of sea resources, which could be carried out only when the interests of countries like Bangladesh were secure and an atmosphere of peace reigned over the ocean.'

⁵⁵UNCLOS III, Fourth Session, 60th Plenary Meeting, UN Doc. A/CONF.62/SR.60 (6 April 1976), para. 27.

This same position was to underpin China's attitude towards the 2016 *The Philippines v. China South China Sea Arbitration*; China boycotted it from the very beginning based on the understanding that arbitration cannot be initiated unilaterally without consent of the parties.⁵⁶

In 1978, Deng Xiaoping took power from Mao's designated successor Hua Guofeng and decided to implement the reform and open-door policy. China turned to embrace the western world, opened its market to foreign corporations and sought to establish a market economy. This domestic power shift was also reflected in the UNCLOS III negotiations. Leading academics of international law, those who used to be marginalized during the Cultural Revolution, such as Wang Tieya,⁵⁷ were invited to join the Chinese delegation. Although China's position in the negotiations was not fundamentally changed, its tone was softened, and its involvement became more technical as distinct from ideological. For example, in the Eighth Session (1979), the Chinese delegation pointed out that in their view the delimitation of the continental shelf should be based on natural prolongation.⁵⁸ Prior to 1978, China's position during UNCLOS III generally consisted of 'broad policy outlines or general principles' more so than 'specific regulations'.⁵⁹ This was perhaps the first time that the Chinese delegation sought to express a specific position so as to safeguard China's own national interest at sea. Accordingly, China became more active in committee meetings⁶⁰ rather than merely using politicized language in the plenary.

The UNCLOS III (1973–1982) can be seen as the PRC's debut in a multilateral negotiation at the United Nations. It was a remarkable period of geopolitical shift, when the US and PRC were normalizing their diplomatic relationship to deal with the threat of the Soviet Union. Meanwhile, largely guided by Mao Zedong's ideology about China as part of the third world, the Chinese delegation firmly aligned itself with the G77 and supported developing countries on most occasions, especially when it came to the establishment of the EEZ and the incorporation of the CHM principle. The UNCLOS III laid solid foundation for China's engagement with international law of the sea. As discussed in Sections 3 and 4, though China's national interests at sea changed significantly over the following decades, China mostly chose to work around, rather than openly abandon regimes and principles they had defended and advocated during the UNCLOS III.

3. From the UNCLOS III to the BBNJ

China signed the UNCLOS on the day it was opened for signature on 10 December 1982, and during the 1980s, China Ministry of Foreign Affairs was quite favourably disposed towards the

⁵⁶China Ministry of Foreign Affairs, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, available at www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201412/t20141207_679387.html.

⁵⁷UNCLOS III, Eighth Session, 112th Plenary Meeting, UN Doc. A/CONF.62/SR.112 (25 April 1979), para. 49: 'Mr. WANG Tieya (China) said that in his delegation's view, any compulsory and binding third-party settlement of a dispute concerning sea boundary delimitations must have the consent of all parties to the dispute. Otherwise such a form of settlement would not be acceptable to the Chinese delegation.'

⁵⁸UNCLOS III, Eighth Session, 116th Plenary Meeting, UN Doc. A/CONF.62/SR.116 (27 April 1979), para. 81: 'His own delegation had consistently taken the view that the delimitation of the continental shelf of a coastal State should be based on the principle of the natural prolongation of its land territory rather than mechanically on certain distance criteria.'

⁵⁹J. Greenfield, *China and the Law of the Sea, Air and Environment* (1979), at 3.

⁶⁰At the first session, the UNCLOS III set up a General Committee, three Main Committees, a Drafting Committee, and a Credentials Committee. The Conference allocated to the First Committee the topic of the international regime of the sea-bed and ocean floor beyond national jurisdiction, and to the Second Committee the topics of the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, land-locked countries, shelf-locked states and states with narrow shelves or short coastlines and the transmission from the high seas, while the topic of the preservation of the marine environment was allocated to the Third Committee. All the main Committees, as far as the topics were relevant to their mandates, were to deal with regional arrangements, responsibility and liability for damage resulting from the use of the marine environment, settlement of disputes, and the peaceful uses of the ocean space, zones of peace and security.

Convention in its finalized form,⁶¹ although at this time it approached ratification with some caution, seemingly keen to take account of what other countries were doing in this regard.⁶² In the 1980s, most developed countries – the US, the UK, Italy, Japan, West Germany, France, and the Soviet Union, refused to ratify the UNCLOS, due to their dissatisfaction with Part XI. The CHM principle was offered by developing countries as an alternative worldview,⁶³ which was at the centre of their quest for a new international economic order. The landlocked and geographically disadvantaged states, which included fifty developing and developed states, were a sufficiently strong group at UNCLOS to ‘prevent rejection’ of the common heritage principle.⁶⁴ However,

[w]hile the developing states could by themselves bring the Convention into force and, indeed, did so by providing the needed number of ratifications, they also understood that, to make the convention’s provisions fully operative, the participation of developed states was needed.⁶⁵

A series of informal consultations, in total 15, took place under the auspices of the UN Secretary-General between 1990 and 1994, which resulted in the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1994 Agreement).⁶⁶ The 1994 Agreement modified provisions of the Part XI, ‘with no thought of this being an undermining’,⁶⁷ on Enterprise, Transfer of Technology, Economic Assistance, Institutional Decision Making, Production Policy, Financial Terms of Contracts, and Contract Review.⁶⁸ It resulted in ‘none’ of the common heritage elements remaining in the Convention.⁶⁹ According to Anand, the CHM ‘has lost its original meaning and substance when it symbolized the interests, needs, hopes, and aspirations of a large number of developing States and non-self-governing peoples’.⁷⁰

Although China was critical about developed countries’ opposition to the principle of common heritage of mankind, this was not the major concern behind China’s hesitation to ratify the UNCLOS. China had participated actively in informal consultations on the deep seabed regime. ‘While [China] still supported what it regarded as the reasonable demands of developing countries, China was in favor of adjusting out-of-date provisions in Part XI of the LOSC’.⁷¹ The Chinese Government took the view that the 1994 Agreement settles some difficult issues of the UNCLOS Part XI and strikes a good balance to accommodate national interests among

⁶¹See ‘Law of the Sea Prepcom: Pre-Sessional Consultations’, cablegram dated 21 February 1985, Australian Archives (AA) 3107/36/14. See also Gao, *supra* note 27, at 208.

⁶²‘Law of the Sea: Ratification of Convention’, 11 August 1983, AA A3107/36/14.

⁶³S. Ranganathan, ‘Decolonization and International Law: Putting the Ocean on the Map’, (2021) 23 *Journal of the History of International Law* 161, at 179.

⁶⁴A. B. M. Vadrot, A. Langlet and I. Tessnow-von Wysocki, ‘Who Owns Marine Biodiversity? Contesting the World Order Through the “Common Heritage of Humankind” Principle’, (2022) 31 *Environmental Politics* 226, at 230.

⁶⁵L. Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance* (1996), at 257.

⁶⁶UNGA, UN Doc. A/48/950 (9 June 1994).

⁶⁷See Ranganathan, *supra* note 63, at 180.

⁶⁸E. Egede and E. Charles, ‘Common Heritage of Mankind and the Deep Seabed Area beyond National Jurisdiction: Past, Current, and Future Prospects’, (2021) *Marine Technology Society Journal* 6, at 42. See also C. Oliveira, H. M. Bombaka and A. Barros-Platiau, ‘Deep Seabed Exploitation, Biodiversity Conservation and Sustainable Development: Does the Principle of the Common Heritage of Mankind Still Have Legal Significant’, in N. Liu and S. V. Scott (eds.), *The Law of the Sea and the Planetary Crisis* (forthcoming).

⁶⁹A. Carlsson ‘The US and UNCLOS III – The Death of the Common Heritage of Humankind Concept?’, (1997) 95 *Maritime Studies* 27, at 28.

⁷⁰R. P. Anand, *Studies in International Law and History: An Asian Perspective* (2004), at 186.

⁷¹S. Lee and J. Kim, ‘Applying the Principle of the Common Heritage of Mankind, An East Asian Perspective’, in K. Zou (ed.), *Global Commons and the Law of the Sea* (2018), 15, at 40.

developed and developing countries.⁷² In fact, in 1990, China was one of first countries to submit its application for registration as pioneer investor for deep seabed mining to the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea,⁷³ only after France, Japan, India, and the USSR.⁷⁴ The aim of the pioneer investor registration is to ensure China could use new sources of mineral resources for its social and economic development.⁷⁵ As of 2024, China, through the China Ocean Mineral Resources Research and Development Association (COMRA) and Beijing Pioneer Hi-Tech Development Corporation, is one of very few countries currently sponsoring exploration contracts with the ISA of all three types of deep seabed mineral deposits in the Area (polymetallic nodules in the Clarion-Clipperton Fracture Zone, polymetallic sulphides in the Southwest Indian Ridge, the Central Indian Ridge, and the Mid-Atlantic Ridge, and cobalt-rich ferromanganese crusts in the Western Pacific Ocean).⁷⁶

In 1994, Zhao Lihai – the first Chinese Judge of the International Tribunal for the Law of the Sea (ITLOS) elaborated the Chinese Government’s concerns over the ratification of the UNCLOS.⁷⁷ These were notably closely aligned with concerns that the Chinese delegation had pointed out during the final session of the UNCLOS III, and pertained to the provisions on innocent passage, definition of the continental shelf, boundary delimitation of the EEZ and continental shelf, and the international seabed regime.⁷⁸ Judge Zhao enumerated five issues. First, Article 17 of the UNCLOS provides a legal basis for innocent passage of foreign war ships through other countries’ territorial sea. This is in contradiction with Article 6 of the 1992 Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone, which requires foreign war ships to seek approval before entering China’s territorial sea. Zhao suggested that the Chinese Government could make a statement upon ratification of the UNCLOS, based on Article 310, to ensure innocent passage of foreign military vessels must come with prior notification or approval.⁷⁹

Second, China had been insisting on applying the principle of natural prolongation to determine the limit of its continental shelf in the East China Sea, which extends to Okinawa Trough – China-Ryukyu (Liuqiu) Border Trough. Given that the distance between the coastlines of China and Japan is less than 400 nautical miles, it was anticipated that both countries’ claims on the establishment of EEZs would overlap. Furthermore, China and Japan could potentially have two maritime boundaries (EEZ and continental shelf) in the East China Sea, which might cause inconvenience for exerting jurisdiction at sea. According to Zhao, China could take the position that the Okinawa Trough is the single maritime boundary for both continental shelf and EEZ between two countries.⁸⁰

The third concern articulated by Judge Zhao pertained to Article 76 (1) of the UNCLOS, which defines the continental shelf as ‘the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin . . .’. China is suspicious of the definition of the continental margin in

⁷²L. Zhao, *Research on the Law of the Sea* (1996), at 186–7 (in Chinese), where Zhao quotes the speech of Mr Li Zhaoxing, the Head of Chinese Delegation to the 48th Session of the UN General Assembly.

⁷³The Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea was established in December 1982. UNGA, Res. 37/66 (3 December 1982).

⁷⁴Z. Wang, ‘China and the Exploitation of Deep Seabed Polymetallic Nodules’, (1991) 15(2) *Marine Policy* 132, at 132.

⁷⁵*Ibid.*

⁷⁶Exploration Contracts, International Seabed Authority, available at www.isa.org/jm/exploration-contracts/.

⁷⁷See Zhao, *Issues on China’s Ratification of the UNCLOS*, *supra* note 72, at 150–6 (in Chinese).

⁷⁸W. Shen and G. Shu, ‘The Third UN Conference on the Law of the Sea and the Convention on the Law of the Sea’, (1983) *Chinese Journal of International Law*, 434 (in Chinese) cited in Gao, *supra* note 27, at 206. See UNCLOS III, Eleventh Session, 182nd Plenary Meeting, A/CONF.62/SR.182 (30 April 1982), paraz. 121–122.

⁷⁹See Zhao, *supra* note 77, at 153.

⁸⁰*Ibid.*

Article 76 (3), which ‘comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise’. This concern is also regarding the Okinawa Trough. China believed that the west side of Okinawa Trough is a natural prolongation of the mainland of China, which does not have the shelf, the slope, and the rise. In any case, Zhao quotes Article 76(10) to reassure the Chinese Government that Article 76 does not apply to the ‘question of delimitation of the continental shelf between States with opposite or adjacent coasts’.

Fourth, China was not comfortable with Section 2, Part XV of the UNCLOS regarding compulsory dispute settlement in relation to issues regarding the interpretation and/or application of the Convention.⁸¹ Zhao believed that the compulsory dispute settlement system of the UNCLOS would not be of great concern to China, since it is a ‘very detailed regime with many limitations and exceptions’⁸² and China would be able to ‘exclude sovereignty disputes, such as maritime delimitation from the compulsory dispute settlement’.⁸³ China did make a specific declaration on 25 August 2006 to reaffirm that ‘PRC does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention’.⁸⁴ Needless to say, the South China Sea Arbitration initiated by the Philippines (2013–2016) was a stress test to China’s position and practice towards compulsory dispute settlement of the UNCLOS.

Last but not the least, although the UNCLOS quickly gathered 159 signatures in the first two years after the adoption,⁸⁵ by 1993, among 60 countries that ratified the UNCLOS, most of those were developing countries⁸⁶ with limited financial capacity to support the establishment and administration of the ISA, ITLOS, and the Commission on the Limits of the Continental Shelf.⁸⁷ Therefore, China was waiting for developed countries to ratify the Convention so that the financial burden could be properly handled by rich countries.⁸⁸

UNCLOS entered into force on 16 November 1994. China ratified the Convention, including the 1994 Agreement relating to the Implementation of Part XI of the LOSC 18 months later, on 7 June 1996,⁸⁹ about the same time as a group of developed countries – France, Finland, Ireland, Japan, Netherlands, New Zealand, Norway, South Korea, and Sweden.⁹⁰

Between 1993 and 1995, China participated in all six intergovernmental conferences on the negotiation of the 1995 Fish Stocks Agreement. Although China welcomed the 1995 FSA, the Chinese Government was particularly dissatisfied with paragraph 1(f) of Article 22 regarding the legalized ‘use of force’ by inspecting states, when boarding for inspection of fishing vessels flying the flag of another state in the high seas.⁹¹ When signing the 1995 FSA, ‘China was very cautious of any possibility that might undermine its sovereignty in international waters’.⁹² China was of the

⁸¹See UNCLOS, *supra* note 2, Art. 286.

⁸²See Zhao, *supra* note 77, at 154.

⁸³*Ibid.*

⁸⁴The Law of the Sea, *United Nations Treaty Collection*, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

⁸⁵*Ibid.*

⁸⁶Apart from Iceland, which ratified the Convention on 21 June 1985.

⁸⁷E. M. Borgese, A. Chircop and M. Perera, ‘The UN Convention on the Law of the Sea: The Cost of Ratification’, (1989) 8 *Ocean Yearbook* 1, at 5–8.

⁸⁸See Zhao, *supra* note 77, at 155.

⁸⁹China made a declaration on ratification, in relation to innocent passage by warships through the territorial sea, overlapping maritime claims, territorial disputes over islands and dispute settlement, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec. For discussion of these see H. Yu, ‘Remarks on China’s Ratification of the 1982 UN Convention on the Law of the Sea’, (1995) 5 *Asian Yearbook of International Law* 211, at 211–32.

⁹⁰See UNCTC, *supra* note 84.

⁹¹G. Xue, ‘China’s Distant Water Fisheries and its Response to Flag State Responsibilities’, (2006) 30 *Marine Policy* 652.

⁹²N. Liu, ‘The Rise of China and Conservation of Marine Living Resources in the Polar Regions’, (2020) 121 *Marine Policy* 1, at 4.

view that any ‘action of force by the inspectors shall only be taken against those crew members or fishermen committing acts of violence and must never be taken against the vessel as a whole or other crew members or fishermen’.⁹³

At the time of writing, China has neither ratified the 1995 FSA, nor other instruments such as the FAO 1993 Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) or the FAO 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA). Nevertheless, as a major distant water fishing state,⁹⁴ over the years, China has embraced most important Regional Fisheries Management Organizations/Arrangements (RFMO/As) in the world’s oceans, including, for example, International Commission for the Conservation of Atlantic Tunas (ICCAT), the Western and Central Pacific Fisheries Commission (WCPFC), the South Pacific Regional Fisheries Management Organization (SPRFMO), the Inter-American Tropical Tuna Commission (IATTC), the Indian Ocean Tuna Commission (IOTC), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAO Agreement).

In general, the UNCLOS served China’s national interests well in the high seas. China had ratified UNCLOS in 1996 and had embraced the international maritime order during the intervening years. China had significantly built up its domestic legal system to implement the UNCLOS,⁹⁵ while increasingly felt constrained by the international law of the sea, including for example, in respect of fisheries in the EEZs of other countries. The enormous growth in China’s economy had meant that by the early twentieth century China boasts significant interests in the world’s oceans beyond national jurisdiction, including, but not limited to shipping, fisheries, marine scientific research, and potentially deep seabed mining.

4. China in the BBNJ Negotiations

China was hesitant when a BBNJ Working Group was established by the UN General Assembly in 2004.⁹⁶ The Chinese Government cautiously welcomed the BBNJ process in 2005, while stressing the importance of existing regimes in the high seas and deep seabed.⁹⁷ China preferred to develop high seas conservation measures that seek a balance between conservation and sustainable use, rather than prohibitions or restrictions on the use of ocean.⁹⁸ Further, G77+China believes that the principle of common heritage of mankind should also apply to marine genetic resources (MGRs)

⁹³Declarations by China upon signature of 1995 fish stocks agreement, 6 November 1996, available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no;=xxi-7&chapter;=21&clang;=_en#EndDec.

⁹⁴See 2023 White Paper ‘Development of China’s Distant-Water Fisheries’, *supra* note 49.

⁹⁵E.g., 1982 Marine Environmental Protection Law; 1983 Maritime Safety Law; 1986 Fisheries Law; 1992 Law on the Territorial Sea and the Contiguous Zone; 1998 Law on the Exclusive Economic Zone and the Continental Shelf; 2001 Law on the Administration of Sea Areas.

⁹⁶China is highly concerned with issues on the protection and management of marine biodiversity in areas beyond national jurisdiction. However, China believes that at this stage, more research is required, while existing regime of the Area must be fully considered. The Chinese delegation notes that the International Seabed Authority carries comprehensive responsibility for the protection and preservation of marine environment in areas beyond national jurisdiction.’ See Ambassador Zhang Yishan, Deputy Head of Permanent Mission of the People’s Republic of China to the UN, Statement in the 59th Session of the UN General Assembly related to ‘Oceans and the Law of the Sea’, 16 November 2004, available at un.china-mission.gov.cn/zgylhg/flyty/hyfs/200901/t20090106_8356133.htm (in Chinese).

⁹⁷Ambassador Zhang Yishan, Deputy Head of Permanent Mission of the People’s Republic of China to the UN, Statement in the 60th Session of the UN General Assembly related to ‘Oceans and the Law of the Sea’, 28 November 2005, available at un.china-mission.gov.cn/zgylhg/flyty/hyfs/200511/t20051128_8356135.htm (in Chinese).

⁹⁸Ambassador Liu Zhenmin, Deputy Head of Permanent Mission of the People’s Republic of China to the UN, Statement in the 61st Session of the UN General Assembly related to ‘Oceans and the Law of the Sea’, 7 December 2006, available at un.china-mission.gov.cn/zgylhg/flyty/hyfs/200612/t20061207_8356137.htm (in Chinese).

in the high seas, which could potentially generate benefits.⁹⁹ This position was in contradictory with several developed countries, which advocated for a regime facilitating open access.¹⁰⁰ The G77+China and the EU managed to strike a ‘package deal’ in 2011¹⁰¹ to link issues of marine conversation and management with benefit sharing of MGRs.¹⁰² This breakthrough paved the way for the next step of the BBNJ process – to set up the PrepCom in 2015.

The BBNJ negotiations, especially the PrepCom and IGCs, were convened in a very different geopolitical environment than had been UNCLOS III. President Xi Jinping took office in 2012 and launched his signature foreign policy – Belt and Road Initiative (BRI) during visits to Central Asia and Southeast Asia in 2013.¹⁰³ The BRI aims to build a new world order known as – ‘The Community of Shared Future for Mankind’.¹⁰⁴ US-China strategic rivalry has intensified ever since. From the South China Sea arbitration (2013–2016)¹⁰⁵ to President Trump’s ‘Trade War’ in 2018,¹⁰⁶ US-China relations have been very strained over the past decade.¹⁰⁷

At the same time, China and Russia have been moving closer. This is evidenced by the fact that President Putin and President Xi, who share similar worldviews, met each other 38 times in person between 2013 and 2022.¹⁰⁸ In 2019 China and Russia upgraded bilateral relations to a higher level, designated a ‘comprehensive strategic partnership’.¹⁰⁹ The China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance was adopted on 23 March 2021,¹¹⁰ which reaffirmed the Chinese view of the world order by criticizing the US-anchored ‘rules-based international order’, and placing importance on ‘international law underpinned by the United Nations’. Although officially China is not supportive of Russia’s war in Ukraine, there is no doubt that because of its complete isolation from the West, Russia moved closer to China for security and economic reasons following the Ukraine war since 2022. After consolidating his third term in March 2023, President Xi Jinping chose Russia as the first country for his state visit. The two countries publicized another Joint Statement on Deepening the Comprehensive Strategic

⁹⁹See Freestone, *supra* note 7, at 17.

¹⁰⁰*Ibid.*

¹⁰¹*Ibid.* See also M. Zheng, ‘Negotiations on the BBNJ Agreement and China’s Participation’, (2020) 48 *Environmental Protection (Huanjing Baohu)* 70 (in Chinese).

¹⁰²‘This process addresses the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology.’ See para. (b) in Annex ‘Recommendations of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction’, in Resolution adopted by the General Assembly on 24 December 2011, Oceans and the Law of the Sea, UN Doc. A/RES/66/231(24 December 2011).

¹⁰³The State Council of the People’s Republic of China, Chronology of China’s Belt and Road Initiative, available at english.www.gov.cn/news/top_news/2015/04/20/content_281475092566326.htm.

¹⁰⁴For legal analysis see, for example, I. De la Rasilla and Y. Hao, ‘The Community of Shared Future for Mankind and China’s Legalist Turn in International Relations’, (2021) 20 *Chinese Journal of International Law* 341.

¹⁰⁵China believes that the US Government is behind the Philippine’s unilateral initiation of UNCLOS Annex VII Arbitration. See, for example, People’s Daily (official newspaper of the Central Committee of the Chinese Communist Party, ‘South China Sea Arbitration: A US-Led Conspiracy behind the Farce’, 12 July 2016, available at en.people.cn/n3/2016/0712/c90000-9085051.html).

¹⁰⁶The Trump Administration unilaterally imposed heavy tariffs on more than \$360bn (£268bn) of Chinese goods. China retaliated with tariffs on more than \$110bn of US products. See ‘A Quick Guide to the US-China Trade War’, *BBC*, 16 January 2020, available at www.bbc.com/news/business-45899310.

¹⁰⁷‘US-China Relations Are Entering a Dangerous Period’, *The Economist*, 30 July 2020.

¹⁰⁸‘Xi to Meet Putin in First Trip Outside China since COVID Began’, *Reuters*, 12 September 2022, available at www.reuters.com/world/china/xi-leaves-china-first-time-since-covid-pandemic-began-meet-putin-2022-09-11/.

¹⁰⁹Joint statement of the People’s Republic of China and the Russian Federation on the Development of a Comprehensive Strategic Partnership for Collaboration in the New Era (full text), *Xinhua*, 6 June 2019.

¹¹⁰China Ministry of Foreign Affairs, ‘China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance’, 23 March 2021, available at www.fmprc.gov.cn/web/zyxw/t1863317.shtml (in Chinese).

Partnership of Coordination for the New Era¹¹¹ on 22 March 2023. The joint declaration reaffirmed that China-Russia bilateral relations are at their ‘best period in history’ and ‘fast growing towards the future’.¹¹² It must be pointed out, however, that in 2021, the Russian economy (calculated by GDP) was only 10 per cent of China’s size according to the World Bank.¹¹³

Unlike the UNCLOS III, amid increasing geopolitical tensions with the US, China refrained itself from using ‘revolutionary’ language to scold the US during the BBNJ negotiations. Moreover, although the Russian delegation was vocal during the BBNJ negotiations, it was rare to see China back up Russian statements and positions directly. On several occasions, the G77+China presented their positions together. This is not only because of the path dependence - China’s alliance with developing countries in the UNCLOS III, but also thanks to one of guiding principles of China’s diplomacy under Xi Jinping – ‘China’s international status as the world’s largest developing country has not changed’ and ‘China always takes developing countries as the foundation of its foreign policy’.¹¹⁴ During the negotiation of the first and most controversial theme of the BBNJ – MGRs, including questions on the sharing of benefits, China was enthusiastically supportive of the application of the principle of the common heritage of mankind/humankind, while Russia, on a very rare occasion, stood with the West to call it a ‘concept’.¹¹⁵ As we have seen, the principle had ‘fallen out of favour’ by the early 1990s,¹¹⁶ but according to De Lucia, it re-emerged in the context of biodiversity.¹¹⁷

Free access to MGRs in the high seas was emphasized by a small group of developed countries, including Japan, the EU, and the United States.¹¹⁸ They maintained that activities such as bioprospecting in the high seas are subject to the freedom of the seas and supported the idea that oversight and, more crucially, benefit-sharing, are required in relation to the extraction of MGRs.¹¹⁹ China made a written submission to the BBNJ Preparatory Committee on 5 December 2016 to ‘reaffirm the view that the principle of common heritage of humankind must underpin the new regime governing marine genetic resources of areas beyond national jurisdiction’.¹²⁰ It also repeatedly expressed support for the principle during BBNJ IGCs. For example, during IGC5.1,

¹¹¹China Ministry of Foreign Affairs, ‘Joint Statement of the People’s Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Coordination for the New Era’, 22 March 2023, available at www.fmprc.gov.cn/zyxw/202303/t20230322_11046188.shtml (in Chinese).

¹¹²*Ibid.*

¹¹³The World Bank, ‘GDP (current US\$) – China, Russian Federation’, available at data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN-RU.

¹¹⁴Yang Jiechi, former Director of the Chinese Communist Party’s Central Foreign Affairs Commission, 2013–2022), ‘Foreign Affairs Work since the Founding of the Communist Party of China: A Century of Glorious Achievements and a Future of Bright Prospects’, (2021) 10 *Qiu Shi*, available at www.qsttheory.cn/dukan/qs/2021-05/16/c_1127447088.htm (in Chinese, Qiu Shi is the leading official theoretical journal and news magazine of the CCP).

¹¹⁵Notes by the lead author during IGC 4.

¹¹⁶S. Bernstein, *The compromise of liberal environmentalism* (2001), at 89.

¹¹⁷V. D. Lucia, ‘The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas Beyond National Jurisdiction: No End in Sight?’ (2020) 16 *McGill International Journal of Sustainable Development Law and Policy* 140, at 154.

¹¹⁸International Institute for Sustainable Development, ‘Summary of the first session of the Intergovernmental Conference on an Internationally Legally Binding Instrument Under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction’ (2018) 25(179) *Earth Negotiations Bulletin* 1, at 3.

¹¹⁹International Institute for Sustainable Development, ‘Summary report of the 2nd Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction (BBNJ)’, 25 March–5 April 2019, available at enb.iisd.org/events/2nd-session-intergovernmental-conference-igc-conservation-and-sustainable-use-marine/summary.

¹²⁰Group of 77, Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, Group of 77 and China’s Written Submission, 5 December 2016.

the Chinese delegation made a powerful statement that developed countries' suspicion of sharing monetary benefits with developing countries is not a new argument or a technical concern, rather it is a lack of political will.¹²¹ The G77+China did ensure that common heritage of humankind (CHH) is listed as one of guiding principles of the final BBNJ Agreement.¹²² Moreover, G77+China managed to establish both non-monetary benefit sharing and monetary benefit sharing mechanism in the final BBNJ Agreement.¹²³ Nevertheless, given that the CHH principle is to be interpreted as 'is set out in the Convention',¹²⁴ the implementation of the CHH principle by countries is expected to be difficult.

Moreover, China's interests in the Area had shifted significantly over the past four decades from those of a developing country passively seeking benefits shared by developed countries to those of an industrial power, and potential deep seabed commercial mining state.¹²⁵ 'China sees that exploration and exploitation of the resources of the Area should be market oriented, and the exploitation shall take place in accordance with sound commercial principles'.¹²⁶ That is perhaps why China reiterated several times that the BBNJ Agreement shall not undermine 'relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies',¹²⁷ particularly not interfere with the mandate of bodies such as the FAO, RFMO/As, International Maritime Organization (IMO) and ISA.¹²⁸ Furthermore, during the PrepCom, China was actually in favour of non-monetary rather than monetary benefit sharing,¹²⁹ same as the EU and many other developed countries. It only changed its official position to support monetary benefit sharing in the IGCs.

Therefore, in practice, it will be interesting to see how China implements the CHH principle when it comes to benefit sharing of MGRs. China's 2016 Deep Seabed Mining Law does not offer any concrete answer. It merely provides that 'the guiding principles of Chinese activities in the deep seabed are the peaceful use, cooperation, environmental protection, as well as for the "common wellbeing of humankind"'.¹³⁰ This deliberate, vague wording leads some to believe that when it comes to state practice related to CHH principle, China might stay in the middle ground of two camps and adopt a more nuanced approach.¹³¹ China's favourable position on common heritage of humankind was even questioned by mainland Chinese scholars. For example, Yang

¹²¹Notes by the lead author during IGC 5.1.

¹²²In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: the principle of the common heritage of humankind which is set out in the Convention', see BBNJ Agreement, *supra* note 1, Art. 7(b).

¹²³*Ibid.*, Art.14, 52. See also, R. T de la Concepcion, 'Negotiating Fair and Equitable Sharing of Benefits in the BBNJ Agreement: Role of the Group of 77 and China', (2024) 163 *Marine Policy*, 106085.

¹²⁴*Ibid.*

¹²⁵N. Liu and R. Kim, 'China's New Law on Exploration and Exploitation of Resources in the International Seabed Area of 2016', (2016) 31 *International Journal of Marine and Coastal Law* 692, at 693.

¹²⁶Ma Xinming (Director-General of the Department of Treaty and Law, China Ministry of Foreign Affairs), 'China and the UNCLOS: Practices and Policies', (2019) 5 *Chinese Journal of Global Governance* 1, at 2.

¹²⁷'This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.' See BBNJ Agreement, *supra* note 1, Art.5(2). For discussions on 'not undermining' see also E. Beringen, N. Liu and M. Lim, 'Australia and the Pursuit of "Not Undermining" Regional Bodies at the Biodiversity beyond National Jurisdiction Negotiations', (2022) 136 *Marine Policy* 1.

¹²⁸See, for example, Written Submission of the Chinese Government on Elements of a Draft Text of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 20 April 2017, para. 5; China, Art. 4, IGC 5th proposals, 17 August 2022, available at www.un.org/bbnj/igc-5th-proposals.

¹²⁹*Ibid.*, para. 13.

¹³⁰Law of the People's Republic of China on the Exploration and Development of Resources in Deep Seabed Areas (promulgated by Standing Committee of the National People's Congress, February 26, 2016, effective May 1, 2016), Art. 3.

¹³¹J. Li, 'High Seas Treaty: Race for Rights to Ocean's Genetic Resources', *China Dialogue*, 7 August 2019.

Zewei from Wuhan University bluntly suggested that China's current position was based on ideology, rather than real interests, and should be abandoned.¹³²

Another issue where China stood with developing countries during the BBNJ negotiation is capacity-building and the transfer of marine technology (CBTMT). The UNCLOS devotes the Part XIV to development and transfer of marine technology. Together with CHM principle, Part XIV can be seen as part of an alternative worldview – a new international economic order.¹³³ However, Part XIV has not been fully and effectively implemented as yet, partly due to 'ambiguity in elaborating rights and obligations relating to technology transfer and the absence of a dedicated financial mechanism'.¹³⁴ The developing countries therefore saw the BBNJ negotiation as another opportunity to materialize the obligations of developed countries under the UNCLOS. China to large extent echoed G77's positions on CBTMT,¹³⁵ including (i) the BBNJ CBTMT provisions shall be based on relevant provisions of Part XIV of the UNCLOS; (ii) it should take full account of the needs and interests of least developed countries, small islands developing countries, landlocked and geographically disadvantaged states; (iii) new international co-operation platform should be created, while existing mechanisms such as the Intergovernmental Oceanographic Commission (IOC) could be utilized to strengthen international co-operation; and (iv) capacity-building should be meaningful, through approaches such as education, technical training and joint research to improve developing countries' capacity for conservation and sustainable use of BBNJ.¹³⁶ Nevertheless, when it comes to whether the obligation of CBTMT should be made compulsory – a 'binary division'¹³⁷ between developed and developing countries during the BBNJ negotiations,¹³⁸ China prefers voluntary (win-win)¹³⁹ rather than compulsory measures, as do most developed countries. The BBNJ Agreement does strengthen the implementation of the UNCLOS Part XIV in both specificity and scope, through 'establishing the CBTMT Committee, providing monitoring and review, linking CBTMT to finance, and providing for participation of not only States but also Indigenous Peoples and local communities'.¹⁴⁰ It somehow avoids to directly address the question of the nature of CBTMT measures. Rather, the BBNJ Agreement emphasizes that countries, 'within their capabilities', 'shall ensure capacity-building for developing States Parties and shall cooperate to achieve the transfer of marine technology'.¹⁴¹

During negotiations, there were divergent views on two major issues regarding the ABMTs, including MPAs. The first is the relationship between BBNJ and other relevant instruments. The second is about decision-making method and role of coastal states in the establishment of MPAs.¹⁴²

¹³²Z. Yang, 'China and 40 Years of the United Nations Convention on the Law of the Sea: Progress, Impact and Future Prospects', (2022) 36 *Contemporary Law Review (Dang Dai Fa Xue)* 29, at 38 (in Chinese).

¹³³UNGA, Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/3201 (S-VI) (1 May 1974).

¹³⁴For an analysis see, for example, S. Minas, 'Technology Transfer for the High Seas, Potential Modalities for Technology Transfer under the International Legally Binding Instrument', in K. Zou and A. Telesetsky (eds.), *Marine Scientific Research, New Marine Technologies, and the Law of the Sea* (2021), 240.

¹³⁵See Group of 77 and China's Written Submission, *supra* note 120.

¹³⁶See China's Written Submission, *supra* note 128, paras. 27–31.

¹³⁷Statement by the President of the Conference at the Closing of the Fourth Session, Annex II, Report of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc. A/CONF.232/2022/4 (14 April 2022).

¹³⁸E. Mendenhall et al., 'Direction, Not Detail: Progress towards Consensus at the Fourth Intergovernmental Conference on Biodiversity Beyond National Jurisdiction', (2022) 146 *Marine Policy* 1, at 7.

¹³⁹'General Statement of the Chinese Delegation at the BBNJ IGC 2', (2019) *Chinese Yearbook of International Law* 559, at 560 (in Chinese).

¹⁴⁰H. Harden-Davies, et al., 'First to Finish, What Comes Next? Putting Capacity Building and the Transfer of Marine Technology under the BBNJ Agreement to Practice', (2024) 3 *npj Ocean Sustainability* 1, at 2.

¹⁴¹See BBNJ Agreement, *supra* note 1, Art. 42 (1).

¹⁴²W. Duan, 'China's Participation in the Discussion on Marine Protected Areas in the BBNJ Negotiations and Its Implications', (2022) 145 *Marine Policy* 1, at 2–3.

China has repeatedly expressed the view that the BBNJ Agreement cannot undermine the mandate of other relevant regimes.¹⁴³ Further, China believes that consensus is required for the establishment of ABMT in the high seas¹⁴⁴ because ABMTs and MPAs would affect freedom of the seas, such as shipping, fishing, and marine scientific research for all countries.¹⁴⁵ Therefore, a high sea MPA without consensus would become a 'paper park' when it comes to law enforcement. This position is nothing new though. China and Russia have been opposing proposals to establish Southern Ocean MPAs in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)¹⁴⁶ for more than a decade.¹⁴⁷ Learning from the CCAMLR experience, a few countries suggested that the decision-making process for establishing high seas MPAs must not be consensus driven. In the end, the BBNJ Agreement reached a compromise by providing that decisions and recommendations in relation to MPAs shall be taken by consensus 'as a general rule'.¹⁴⁸ Meanwhile,

If no consensus is reached, decisions and recommendations under this Part shall be taken by a three-quarter majority of the Parties present and voting, before which the Conference of the Parties shall decide, by a two-thirds majority of the Parties present and voting that all efforts to reach consensus have been exhausted.¹⁴⁹

This is in line with the practice of the UNCLOS. Rule 37 of the Rules of Procedure of the UNCLOS III provides that:

Before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority specified in para. 1 of rule 39 (two-thirds majority of the representatives present and voting).¹⁵⁰

With respect to environmental impact assessment (EIA), discussions and debates were not as ideological driven as issues such as MGRs and CBTMT.¹⁵¹ It is where China behaved more like a developed, rather than a developing country, given it is now a major industrialized power at sea. For example, many developing countries would prefer to allow a competent international body, e.g., the Scientific and Technical Body (STB) of the BBNJ to define triggers, standards and approve the report of EIAs as a prerequisite to commercial activities in the high seas. On the contrary, China argues for a state-led approach,¹⁵² which is like the position of Japan and the United States. Papastavridis well summarized that the divergence between different views on decision-making:

reflects the fundamental dichotomy between *mare liberum*, ie the default freedom of the individual State to ultimately decide on its activities on the high seas, and the CHM, which dictates that the relevant decisions should only be made through a collective entity.¹⁵³

¹⁴³See China's Written Submission, *supra* note 128.

¹⁴⁴The Chinese Delegation reiterated this point in the statement made upon the adoption of the BBNJ Agreement. See The Statement of Chinese Delegation on the Adoption of BBNJ Agreement, 19 June 2023.

¹⁴⁵China, Article 19 Decision Making, IGC 5th proposals, 18 August 2022, available at www.un.org/bbnj/igc-5th-proposals.

¹⁴⁶Art. XII (1) of the CAMLR Convention provides that 'decisions of the Commission on matters of substance shall be taken by consensus'.

¹⁴⁷See Liu, *supra* note 92; N. Liu and C. M. Brooks, 'China's Changing Position towards Marine Protected Areas in the Southern Ocean: Implications for Future Antarctic Governance', (2018) 94 *Marine Policy* 189.

¹⁴⁸See BBNJ Agreement, *supra* note 1, Art. 23(1).

¹⁴⁹*Ibid.*, Art. 23(2).

¹⁵⁰Rules of Procedure of the Third United Nations Conference on the Law of the Sea Conference, UN Doc. A/CONF.62/30/Rev.3 (1981).

¹⁵¹See Mendenhall et al., *supra* note 138, at 6.

¹⁵²See 'General Statement of Chinese Delegation at BBNJ IGC 2', *supra* note 139.

¹⁵³See Papastavridis, *supra* note 7, at 597.

Eventually, although the BBNJ Agreement ensured the obligation of countries to conduct EIAs for ‘activities that may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction’,¹⁵⁴ it embraced a state-based approach,¹⁵⁵ where the STB could merely provide comments on the draft EIA report.¹⁵⁶

In addition to the above matters, China fought hard for excluding disputed sea areas, such as the South China Sea, from the scope of the BBNJ Agreement. This is one of China’s key interests in the BBNJ negotiations,¹⁵⁷ which covers negotiations across issues of ABMT, decision-making process and dispute settlement. During the IGC 5, the Chinese delegation submitted four written proposals. Regarding the identification of ABMTs, China suggested that a proposal ‘shall not be involved in any kind of land or maritime disputes’.¹⁵⁸ In case there is a dispute regarding whether or not an area is beyond national jurisdiction, such area shall not be identified as an ABMT.¹⁵⁹ These suggestions were not directly accepted in the final text of the BBNJ Agreement due to opposition by a few countries led by the EU.¹⁶⁰ Nevertheless, comparing to other organizations, such as the Council of the European Union (55 per cent of the EU countries, representing 60 per cent of the total EU population vote in favour),¹⁶¹ China did manage to push for a high bar for resorting to qualified majority voting to establish a high seas MPA.¹⁶² China was also very sceptical about applying the UNCLOS dispute settlement mechanism *mutandis mutatis* to the BBNJ Agreement.¹⁶³ This is because of China’s strong criticism of the South China Sea Arbitration under Annex VII of the UNCLOS.¹⁶⁴ It is also consistent with China’s position during the UNCLOS III that sovereignty issues cannot be subject to compulsory dispute settlement. China was in favour of building a different dispute settlement mechanism that put state-consent at its heart.¹⁶⁵ China did not manage to gain enough support for establishing a new dispute settlement mechanism for the BBNJ. However, it did secure the guarantee to prevent jurisdiction over any sovereignty dispute. Article 60(9) of the BBNJ Agreement provides that:

Nothing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement, provided that nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Part XV, Section 2, of the Convention.¹⁶⁶

Although it appears to be a yesterday once more scene (North-South cleavage¹⁶⁷ in the UNCLOS III) from time to time during the BBNJ negotiations, China is clearly different from the same country

¹⁵⁴See BBNJ Agreement, *supra* note 1, Art. 28(2).

¹⁵⁵*Ibid.*, Art. 34(1). ‘A Party under whose jurisdiction or control a planned activity falls shall be responsible for determining if it may proceed.’

¹⁵⁶*Ibid.*, Art. 33(4).

¹⁵⁷Y. Shi, ‘A Step to Victory: Main Divergences and Prospects for Intergovernmental Negotiation on Marine Biological Diversity of Areas beyond National Jurisdiction’, (2023) 151 *Asia-Pacific Security and Maritime Affairs* 36, at 42 (in Chinese).

¹⁵⁸China, Article 17 Proposals, IGC 5th proposals, 18 August 2022, available at www.un.org/bbnj/igc-5th-proposals.

¹⁵⁹China, Article 17bis Identification of areas, IGC 5 proposals, 18 August 2022, available at www.un.org/bbnj/igc-5th-proposals.

¹⁶⁰See Shi, *supra* note 157, at 44.

¹⁶¹Qualified Majority, EUR-Lex, available at eur-lex.europa.eu/EN/legal-content/glossary/qualified-majority.html.

¹⁶²See BBNJ Agreement, *supra* note 1, Art. 23(2).

¹⁶³Y. Shi, ‘Settlement of Disputes in a BBNJ Agreement: Options and Analysis’, (2020) 122 *Marine Policy* 104156.

¹⁶⁴Chinese Society of International Law, ‘The South China Sea Arbitration Awards: A Critical Study’, (2018) 17(2) *Chinese Journal of International Law* 207, Ch. 2: Jurisdiction, paras. 48–374.

¹⁶⁵See Shi, *supra* note 163, at 4–5.

¹⁶⁶See BBNJ Agreement, *supra* note 1, Art. 60(9).

¹⁶⁷B. Larschan and B. C. Brennan, ‘The Common Heritage of Mankind Principle in International Law’, (1983) 21 *Columbia Journal of Transnational Law* 305, at 305.

decades ago. China has been a strong supporter of the CHM principle during both sets of negotiations. It would have been difficult for China to openly abandon the CHM principle, given its firm support for the G77 inclusion of the CHM principle during the UNCLOS III. In this sense, China still behaves and sees itself as part of the Global South, if not a leader of the developing world. However, China's interests have in many aspects moved towards those of the North, for example, when it prefers to voluntary CBTMT and state-based EIA during the BBNJ negotiations. The shift is inevitable given China's strong interests in the high seas as the world's second largest economy with relatively advanced marine technology. Moreover, China actively participated in the BBNJ negotiations to make sure this new regulatory framework for the high seas would not jeopardize China's own national interests. This is especially the case when it comes to both ABMTs, which might put restrictions of China's use of high seas resources; and dispute settlement mechanism, which might force China to accept the jurisdiction of an international court or tribunal to deal with sovereignty disputes.

5. Concluding remarks

Chinese diplomacy in the UNCLOS III reflected an exciting era of decolonization – romantic, revolutionary, and ideological. In those days, China was certainly a developing country. China's main interests at sea were nearshore, rather than in faraway, deep oceans. The Group of 77 played a pivotal role in bringing the People's Republic of China into the fora of the United Nations. In turn, China wholeheartedly participated in the calls of the G77 for a new international economic order. In contrast, 40 years later, China came to the BBNJ negotiations as a major industrial power. In the middle of a geopolitical tension between the US and China, the Chinese delegation calmly engaged with the BBNJ negotiations without using politicized language. China still sees itself as a developing country, and supported G77's positions on the incorporation of CHH principle into the BBNJ Agreement. Nevertheless, when it comes to issues such as EIA, China has shifted its positions away from the Global South. Clearly, China aspires to minimize any legal constraint on their activities in the high seas.

What might a rising China bring to the international legal maritime order in the foreseeable future? China's role in the future of the law of the sea will likely be multi-faceted and more complex, with positions taken on an issue-specific basis. For some observers in the West, the PRC has been increasingly regarded as a serious challenge to the US anchored rules-based international order. However, both China and the United States can be viewed as endeavouring to strongly safeguard their national interests during the BBNJ negotiations. The US remains outside the UNCLOS, while China is determined to stay, with focus on trying to shape the existing system.

Therefore, in a new era, while China is singing 'Oh Freedom!'¹⁶⁸ in the high seas, the US could, in contrast, be in favour of a return to 'Yesterday Once More',¹⁶⁹ where the US was the only post-Cold War superpower at sea. Meanwhile, many developing countries may be left to ask: 'Will you (China) still love me tomorrow?'¹⁷⁰

¹⁶⁸Odetta, Album *Odetta Sings Ballads and Blues*, 1956 by Tradition Records.

¹⁶⁹The Carpenters, Album *Now & Then*, 1973 by A&M Studios.

¹⁷⁰The Shirelles, Album *Tonight's the Night*, 1960 by Bell Sound Studios.