

AUFsätze

Maritime and Insular Claims of the PRC in the South China Sea under International Law

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Introduction

On October 1, 2001, after the 7 a.m. morning news, the central Chinese news channel CTTV 1 broadcasted a documentary titled "Our heroic soldiers on guard in our Southern Sea". At prime time on National Day morning, this documentary feature unfolded an exotic panorama of tiny specks of cays, reefs and atolls lost in the vast desert of ocean space. A few human beings, some of them in uniforms, moved to and fro on these patches of sand and corals. There were pictures showing, *en détail*, the strange day-by-day conditions of tens of these men confined to minimum space in lowly bunkers and shabby huts, their problems in terms of food, medical care, entertainment etc. But there were also pictures of high-tech scientific and military installations often hidden behind palm trees.

- In short, the documentary displayed quite a kaleidoscope of things typical of this "Robinson" outcast abode, home for six months to each squadron of PRC blue-water navy units deployed in rotation on a few minuscule, extremely secluded, desperately isolated mid-ocean fly-specks amidst the immense expanses of the South China Sea (henceforth SCS). In focus were the Spratly Islands: One feature on the screen must have been Mischief Reef (*Meijijiao*), as I remember the commentator's words, breaking surface like a gleaming science-fiction hybrid composed of elements of aircraft carrier and "yellow submarine"! Such a remarkable timing in

terms of TV program priorities vividly demonstrates the high rank attributed to the topic "SCS maritime and island claims" in the PRC, not only among politicians or intellectuals, but also among ordinary Chinese "men on the street" who are obviously in focus of such holiday TV entertainment.

I. The Regime of Islands under the Convention on the Law of the Sea

Watching these somehow phantasmal pictures, I instantly got electrified, as I had been spending some time, since the early eighties, on research work on international law problems with special regard to these long-standing but intricate sovereignty claims of the Chinese². Now, a rough outline of art. 121 UNCLOS (United Nations Convention on the Law of the Sea) crossed my mind. It might be helpful to quote the complete text of this UNCLOS provision here:

"Part VIII: Regime of islands. Article 121:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

may be found under www.subcontinent.com/sapra/world/w_1999_01_21.html. For a PRC scholarly opinion see: HUANG Delin, "Ping Feilübin dui Nansha qundao bufen daoyu de zhuquan zhuzhang" (A comment on Philippine positions concerning sovereignty over parts of Nansha Archipelago), in: Faxue pinglun (Law Studies Review) no. 6 / 2002, pp. 42-50, 42/43. The present author is indebted to Mr. Björn Ahl, Deputy Director, German-Chinese Institute for Legal Studies at Nanjing University, for providing me with copies of this article as well as of four others of PRC origin, see ZHAO Lihai (1995), GU Dexin (1995), JIAO Yongke (2000) and ZHAO Jianwen (2003) within text and footnotes, infra.

² Michael Strupp, Chinas territoriale Ansprüche: Aktuelle Probleme der Landgrenzen, der Seegrenzen und des Luftraumes, Hamburg: Institut für Asienkunde [IfA = Institute of Asian Affairs], 1982; id., Die VR China und die Reform des Seevölkerrechts, in: Gerd Kaminski [Ed.], Chinas neuer Weg zum Recht (Berichte des Ludwig Boltzmann Instituts für China- u. Südostasienforschung no. 17, Wien: 1982, pp. 156-190; id., Historische, politische u. völkerrechtliche Komponenten der Seerechtsansprüche der VR China, in: Werner Draguhn [Ed.], Umstrittene Seegebiete in Ost- und Südostasien: Das internat. Seerecht u. seine regionale Bedeutung, Hamburg: IfA 1985, pp. 111-188; id., Das Gesetz der VR China über die Ausschließliche Wirtschaftszone und den Festlandssockel vom 26. Juni 1998 im Lichte des Seerechtsübereinkommens der Vereinten Nationen von 1982 [German transl. with comments], in: CHINA aktuell [= C.a.]: IfA Hamburg, June 1998, pp. 626-632; recently: Keyword article „Seerecht“ (Law of the Sea) in: B. Staiger [Ed.], Das große China- Lexikon, Darmstadt: Wissenschaftl. Buchgesellschaft, 2003, pp. 661-662, (bibliography:) 925.

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¹ Between June and December 1994, PRC units had begun, undetected for a while by Philippine authorities claiming this formation as well, to construct a military observation post on Mischief Reef (Chinese: Meijijiao) within the eastern Spratlys. Meijijiao has been defined "a fully submerged feature, not an island" by Greg Austin, "Unwanted Entanglement: The Philippines' Spratly policy as a Case Study in Conflict Enhancement?" in: Security Dialogue 34, no. 1, March 2003, pp. 41-54, 45. An Indian very detailed though not impartial assessment by B. Raman, "Chinese Territorial Assertions: The Case of the Mischief Reef",

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”³

The entire documentary report ought to demonstrate unimpeded visible exercise of de facto jurisdiction and actual control by appropriate own organs of state authority, exercise that is being performed with legally sufficient effectiveness by means of virtually uninterrupted deployment of military units (and civilians ?), i.e. to show that the PRC truly and firmly has occupied the relevant islands, cays, atolls, reefs and shoals, the Spratly group in particular. As an implied message the pictures suggested that prerequisites embodied in UNCLOS provisions concerning the qualification as “islands” are fulfilled. The “master minds” behind this remarkable TV-Show were particularly eager to make clear that the formations in question are indeed above water surface at high tide.

In certain cases there was reason to wonder whether this effect had been brought about almost “by hook or by crook”: That is by virtually puffing up, pepping up, “face-lifting”, in short - by use of any technically feasible means “functionalizing” outcroppings that might have been initially by a more or less close margin beneath sea surface (permanently?), and adding like a “panacea” - in UNCLOS terms at least - whatever sorts of supplementary superstructures composed of natural (like sand and grit) or artificial i.e. synthetic matter (steel, plastics and the like) might be applicable. On the whole, such supplementary trimmings of amazingly sophisticated high-tech standard, e.g. lifted platforms, carrier-like decks and runways, hangars and magazines, heliport and other transport facilities supported by air-traffic controllers’ towers were widely seen, complemented by compounds of all sorts, shelters and barracks apparently for military purposes, electronic equipment, communication devices, sets of scientific instruments and the like. But not everything intentionally created by men was so sophisticated on such reefs and shoals!

One peculiar picture sticks vividly in my mind: A rather seedy wooden barrack looking like a (deserted?) tiny sentinel hut admittedly, but perching on solid metal stilts rammed down well until being lost beneath water surface, presumably fixed onto some submerged (coral?) structures. It was, quite understandably, not revealed by the commentator, whether such man-made structures were added and

fixed prior to ratification by Beijing’s National People’s Congress of the UNCLOS text (15 May 1996) - in view of the caveat relating to “artificial islands” to be read in art. 60 par. 8 not necessarily a trifling question.

But the authors of the TV film must have been on the alert taking into account the risk that perhaps a few attentive foreign international law students might be watching too. With distinct, albeit somewhat subliminal reference to UNCLOS art. 121 par. 3 (controversial issues in interpretation and circumstantial application of terms like reefs, shoals, cays and so on in view of the criterion “rock” vs. “island” notwithstanding), by and by some fairly lush greenhouses and horticultural patches became visible, abounding with plenty of different vegetable plants that are indigenous to a wide range of China mainland provinces and landscapes from Anhui to Yunnan, the names neatly written on the tags of each row. Besides, some domesticated animals came into sight as for instance pigs and chicken that according to the commentator are bred and fed on the spot continuously. In this way the film authors quite sufficiently managed to furnish bases for the assumption that tens of fairly fit personnel can survive for a considerable efflux of time on the formations of the SCS, supported (in an overwhelming number of cases at least) by water supplies⁴.

To sum up the Beijing TV documentary special, one of its aims was to demonstrate positive performance in terms of UNCLOS premises for “island status”, i.e., meeting the requirements stipulated in UNCLOS art. 121 par. 1 especially in the context of par. 3. The implied and more important message, however, was that, having complied with the rest of the provision, the PRC can expect to enjoy all the benefits emanating from the sheer incredibly remunerative par. 2 in art. 121. Brilliant prospects of ac-

⁴ Several authors maintain that only two of the Spratly islands have fresh water of their own (cf. for instance, *Marius Gjetnes*, *The Spratlys: Are They Rocks or Islands?*, in: *Ocean Development and International Law (ODIL)*, vol. 32 (2001), pp. 191-204, 201, with further ref.). In significant contrast to this assessment, *Schier* positively identifies at least five islands as enjoying own fresh water resources, partly “of considerable volume” (i.e. Spratly Island proper = chin. Nanweidao, South West Cay = Nanzidao, Nam Yit Island = Hongxiudao, Itu Aba = Taipingdao and Thi Tu Island = Zhongyedao), see *Peter Schier*, *Die jüngsten militärischen Auseinandersetzungen zwischen China und Vietnam im Südchinesischen Meer und die gegenwärtigen Besitzverhältnisse im Spratly-Archipel*, in: *C. a. July 1988*, pp. 569-586 (575, 579, 583). For the probably most exhaustive analysis of the Spratlys’ natural conditions see *David Hancock* and *Victor Prescott*, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands*, *Maritime Briefing* vol. 1 no. 6, *International Boundaries Research Unit (=IBRU)*, University of Durham, Durham/UK, 1995, pp. 3-30: contains, by the way, a detailed description of Mischief Reef (Meijijiao; cf. my footnote 1, supra) stating, inter alia, with regard to the status of the feature prior to Chinese occupation in 1994: “The reef is awash and dries in patches to 0.6 metres ...”, loc. cit., p. 29.

³ Authorized English, French and German versions of the entire UNCLOS text may be found in: *Bundesgesetzblatt (German Federal Gazette)* II 1994, no. 41, pp. 1799-2018 (for art. 121 see p. 1852).

quiring not merely 12 nautical miles (nm) wide “insular” territorial seas coupled by relevant contiguous zones up to 24 nm, but also of enjoying the benefits of yet incomparably larger EEZ and “insular” shelf maritime zones, benefits that allegedly unfold a veritable bonanza abounding in immense reserves of natural energy resources of all sorts, like oil, gas and minerals (polymetallic nodules, inter alia) that are imputed to exist within the vast expanses of the SCS, and particularly in the entire *Nansha qundao* (Spratly archipelago) region⁵. Even the probably most prominent PRC authority in the field of international law of the sea, *ZHAO Lihai*, Professor at Law Faculty of Beijing University, then Vice-Chairman of the China Law of the Sea Society, and – most important – since August 1996 one of the 21 judges at the International Tribunal for the Law of the Sea (ITLS) in Hamburg⁶, got almost enraptured with those bright perspectives, when writing in 1995: “Solitary and lonely as the Nansha islands admittedly might appear from the viewpoint of territorial sovereignty, the more predominant is their rank of value for our country’s interests in terms of oil deposit abundance”⁷. *ZHAO Lihai* deals, by the way, in some length with quantitative assessments in that respect, citing – inter alia – a figure of “about 22,5 billion tons of oil and gas reserves within the circa 250.000 sq. km surface area of the maritime ba-

sin covered by our traditional ocean domain line (*wu chuantong haijiang xian*)”⁸.

II. The Claims of other Countries

Unfortunately, not only the PRC as de iure government – the case being yet more complicated by the de facto existence of the regime on Taiwan taking in almost all aspects of the present case virtually identical positions relating to international law of the sea⁹ – but also five other countries in the Southeast Asian region are scrambling for this maritime “Eldorado”. Vietnam is perhaps the main competitor due to the fact that, like the Chinese, the Vietnamese lay claim upon *all* SCS archipelagos presumably except Pratas (*Dongsha*)¹⁰. The Philippines claim considerable parts of the Spratly group plus

⁸ *ZHAO Lihai*, op. cit., p. 51. With the term “traditional ocean domain line” he clearly refers to the meanwhile notorious “U-shaped” broken or “dotted” line on SCS maps of usually Chinese origin (but visibly drawn also in various cartographic sources of non-Chinese origin as well), which peculiar line – yet to be examined in greater detail here – is referred to by other PRC international law authors as “continuously perforated and segmented boundary line” (*duanxu guojie xian*). The latter term is used, for instance, by *ZHAO Jianwen* in his 2003 article constantly: See *ZHAO Jianwen*, “Lianheguo haiyangfa gongyue yu Zhongguo zai nanshai de jide quanli” (UNCLOS and China’s vested rights over the Southern Sea), in: *Faxue yanjiu* (Legal Science Studies), 2003 no. 2, pp. 147-160. *ZHAO Lihai* makes use of this term too, but in the slightly different wording “duanduan xuxu de guojie xian” (op. cit., p. 59: the duplication is translated in Chinese-English dictionaries with “intermittent, disjointed”).

⁹ Cf. *Yann-Huei Song* and *ZOU Keyuan*, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, in: *ODIL*, vol. 31 (2000), pp. 303-345, 334. The two authors note that relevant laws of both sides “take the same position vis-à-vis other countries, particularly on maritime boundary and sovereignty claims over the disputed islands in the East and South China Sea”, and lay emphasis on “Mainland China’s and Taiwan’s respective *historic* [italics added] claims in the South China Sea”, loc. cit. Professor *ZHAO Lihai* explicitly stresses the point, that both PRC and “Taiwan dangju” (Taiwan authorities) are harbouring the “same feelings” towards the questions of “developing the Southern Sea” and of “common defense of territorial sovereignty by voluntary cooperation amongst the Chinese themselves”, i.e. against “aggressive acts and resource exploitation schemes undertaken by foreign countries” (*ZHAO Lihai*, op. cit., pp. 62/63). *SHEN Jianming*, formerly Beijing University Law Faculty, puts it this way: “The claims of the central government of China in Beijing and those of the local authorities in Taiwan to the South China Sea islands are one and the same” (*Jianming Shen*, *Territorial Aspects of the South China Sea Island Disputes*, in: *Myron H. Nordquist* [Ed.], *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, Center for Oceans Law and Policy, The Hague etc.: Nijhoff, 1998, pp. 139-217, 139).

¹⁰ We are dealing here only with the Spratly group supplemented by some aspects of the Macclesfield Bank (*Zhongsha qundao*) issue and James Shoal (named “*Zengmu ansha*” in Chinese as traditionally claimed by China to be its southernmost point of territory). The *Paracels* (*Xisha qundao*), claimed solely by China and Vietnam but firmly controlled by PRC forces (with genuine “settlers” following ?) since 1974, and the *Pratas* (*Dongsha qundao*) being under undisputed Chinese (i.e. Taiwanese) sway since decades, are spared out. For a detailed PRC international law assessment of the China-Vietnam dispute see, e.g., *LIU Wenzong*, *Yuanan de weizheng yu Zhongguo dui Xisha qundao he Nansha qundao zhuquan de lishi he fail yiju* (Vietnam’s false evidence and the historical and legal bases of China with regard to the sovereignty over Xisha Islands and Nansha Islands), in: *Zhongguo guojifa niankan* (China Yearbook of International Law) 1989, Beijing: Falü chubanshe, 1989, pp. 336-359.

⁵ PRC Ministry of Geology and Mineral Resources a few years ago made an estimation of 130 billion barrels of crude oil reserves covering the entire SCS maritime area. One particular Chinese focussing on the “insular continental shelf” of the Spratly region alone calculated no less than 105 billion barrels of crude oil in hidden reserves (cf. *Frank Umbach*, *Geostrategische und geökonomische Aspekte der chinesischen Sicherheits- und Rüstungspolitik zu Beginn des 21. Jahrhunderts: Die Verknüpfung traditioneller Sicherheitspolitik mit Ressourcenfragen im geopolitischen Denken Chinas*, in: *Gunter Schubert* [Ed.], *China: Konturen einer Übergangsgesellschaft auf dem Weg in das 21. Jahrhundert*, Hamburg: IfA, 2001, pp. 341-404 (381/382). On the other hand, a second author puts all such exorbitant figures into doubt, citing various sources which indicate that natural resources imputed to the Spratly’s maritime perimeter could be of minor extent and less important than commonly imagined (*Hans Scheerer*, *Die Gebietsansprüche der Volksrepublik China im Südchinesischen Meer*, in: *Hans Scheerer* and *Patrick Raszelenberg*, *China, Vietnam und die Gebietsansprüche im Südchinesischen Meer*, Hamburg: IfA, 2002, pp. 15-185, esp. 115, 140/141). PRC imports of oil reportedly reached a new peak in autumn 2003 with 2,8 mio. barrels per day, thus duplicating the 2001 average: A forecast for 2004 envisages the PRC overtaking Japan as global Number Two oil importer (“*Süddeutsche Zeitung*”, Munich, 5/6 January 2004, p. 26; 27/28 December 2003, p. 18). Front-page streamers like “China has almost zero strategic oil reserves” (*Far Eastern Economic Review* = FEER 24 October 2002, p. 36) should be treated cautiously, however.

⁶ See “*Guoji haiyang fating shoupi faguan chansheng*” (First group of judges for the International Law of the Sea Tribunal constituted), in: *Fazhi Ribao* (Legal Daily), 03 August 1996, p. 4: Incidentally, the election by the UN General Assembly of this first team of ITLS judges with Professor *ZHAO Lihai* amongst them, on 01 August 1996, occurred barely one month after entering into force of UNCLOS with regard to the PRC (07 July 1996).

⁷ *ZHAO Lihai*, *Guanyu nanshai zhudao de ruogan falü wenti* (On certain legal questions concerning the various islands of the Southern Sea), in: *Fazhi yu shehui fazhan* (Legal system and social development), 1995 no. 4, pp. 50-63, 62.

Macclesfield Bank and some other reefs and features like “Scarborough Shoal” (*Huangyandao*) in the vicinity of its SCS coasts¹¹. Malaysia claims roughly the southern parts of the Spratlys up to its Sarawak shore on Borneo¹². Brunei Darussalam claims only a few formations in the vicinity of its Borneo sea coast¹³. The claims of the Philippines and Malaysia overlap considerably, those of Brunei and Malaysia slightly. And finally, Indonesia is involved, with a peculiar twist in the affair connected with the so-called “Natuna Islands’ maritime area issue”¹⁴.

¹¹ See HUANG Delin, Ping Feilübin ..., op. cit. ZHAO Lihai, op. cit., p. 59, criticizes Philippine standpoint as being “absolutely intolerable”, that due to peculiar configuration of its territorial sea baselines “our Huangyandao and its adjacent sea area” would lie within Philippines’ unilaterally declared EEZ. For a brief description of Manila’s positions see “The Philippines and the Law of the Sea” in: *Choon-ho Park and Jae Kyu Park* (Ed.), *The Law of the Sea: Problems from the East Asian Perspective*, Honolulu: University of Hawaii, 1987, pp. 429-441. Schier, op. cit., p. 573, describes Scarborough Reef (Shoal) as being “ein knapp unter der Wasseroberfläche liegendes Korallenriff, auf dem einige Felsen liegen, die 1 m bis 3 m über den Meeresspiegel hinausragen”. Scheerer, op. cit., p. 53/54, mentions reports that Philippine mariners erected a lighthouse there in 1991, but gives the incorrect Chinese form “Minzhu jiao”. For other problems with regard to Scarborough Shoal see (in Chinese): <http://nansha.html.533.net/daojiao/huangyandao.htm>.

¹² See the comprehensive study of R. *Haller-Trost*, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, London etc.: Kluwer, 1998. PRC author GU Dexin wrote in 1995, that Malaysia has encroached upon an area covering 270,000 sq. km within “our traditional ocean domain line”, but gave no further details, see GU Dexin, *Nanhai zhengduan zhong de haiyangfa shiyong* (Application of the Law of the Sea to the Southern Sea dispute), in: *Zhanlüe yu guanli* (Strategy and Management), no. 6/1995, pp. 96-102, 96.

¹³ PRC author GU Dexin wrote in 1995 that Brunei has encroached upon “3000 sq. km of maritime space within our traditional ocean domain line”, op. cit., p. 96, giving no details in this case either. In contrast, author JIAO Yongke from Research Institute on Ocean Development of PRC “State Ocean Bureau” made particular points in this respect, stating that “Brunei had begun, in October 1988, to raise sovereignty claims with regard to Nantongjiao belonging to our Nansha archipelago, asserting as foundation that the reef mentioned is situated close [linjin] to that state [=Brunei]”, cf. JIAO Yongke, *Nanhai bu cunzai chongxin huijie wenti* (There exists no question of redelimiting boundaries in the Southern Sea), in: *Haiyang kaifa yu guanli* (Ocean Development and Management), vol. 17 no. 2 (2000), pp. 49-52, 51. “Nantongjiao” corresponds to “Louisa Reef” on non-Chinese maps and seems to be disputed not only between Brunei and China, but also - with yet more repercussions for bilateral relations - between Brunei and Malaysia (cf. *Haller-Trost*, op. cit., pp. 225-226).

¹⁴ The notorious “U-shaped” claim line on Chinese maps appears indeed to sweep well through the Indonesian EEZ and continental shelf area encompassing Indonesia’s Natuna Islands at the south-western outskirts of the SCS region, thereby enclosing, as it is established meanwhile, immensely rich natural gas fields in the very vicinity north-east of the biggest Natuna island formation Bunguran; cf. *Bradford Thomas* and *Daniel Dzurek*, *The Spratly Islands Dispute*, in: *Geopolitics and International Boundaries*, vol. I (Winter 1996), pp. 300-326, 309/310; *Haller-Trost*, op. cit., pp. 332, 351 (esp. footnote 354), 357; (in general) *Strupp* 1998. Several PRC authors have voiced concern on alleged “Indonesian pretensions” overlapping the “U-shaped” claim area: For instance, GU Dexin reproaches Indonesia for “encroaching upon 50,000 sq. km of maritime space within our traditional sea domain line”, op. cit., p. 96. JIAO Yongke writes that “prior to 1966 Indonesia had never advanced sovereignty claims with regard to our Nansha Archipelago and surrounding waters. 1966 Indonesia raised foreign capital in order to prospect and develop the Nansha waters, and carved out an ‘Agreed Exploitation Zone’ that encroached upon more than 50,000 sq. km [emphasis added] within the continuously segmented boundary line in our Southern Sea. 27 Oct. 1969 Indonesia and Malaysia signed an Agree-

ment on dividing up the [alleged] continental shelf areas between the two countries, whereby Indonesia’s eastern shelf limit line [affecting the northeastern outskirts of Natuna archipelago - M. S.] encroached upon our boundary”, op. cit., p. 51. For the Indonesia-Malaysia shelf areas delineation see: *Vivian L. Forbes*, *Conflict and Cooperation in Managing Maritime Space in Semi-Enclosed Seas*, Singapore: Singapore University Press, pp. 70, 74-76, showing (p. 75) on a relevant map the outermost shelf delineation point no. 25 situated about 200 nm NNE direction from Natuna main island Bunguran as definitely overlapping with the Chinese “U-shaped” claim line at least in its hypothetical south-westernmost “bulge”. Nevertheless, *Hasjim Djalal*, outstanding Indonesian diplomat and “motor” of the SCS adjacent States “Code-of-Conduct” talks, has confirmed that the “Chinese ... have assured Indonesia that they do not have maritime boundary problems with Indonesia in the South China Sea (*Hasjim Djalal*, *South China Sea Island Disputes*, in: *Nordquist* [Ed.], op. cit., pp. 109-133, 115). Such an official or at least semi-official statement through “diplomatic channels” seems to be only the one side of the coin, PRC traditional conduct of foreign relations taken into account! Meanwhile, Ambassador *Djalal* has made some interesting additional remarks in this affair recently, in an interview with “The Jakarta Post” in July, 2003: In his press statement *Djalal* regretted that “in the South China Sea between Natuna and Peninsula Malaysia, and Natuna and Sarawak there are still no boundaries”, thereby strikingly evading any allusion to ulterior thoughts about “China’s shadow” supposedly looming behind this stalemate! For this interview see http://www.indonesian-embassy.fi/editorial7_2003.htm.

III. The Crucial Legal Questions

If ever an international judicial or arbitral body had to examine this “Gordian knot”, it probably would scrutinize the following four logically consecutive questions under international law:

1. Is the mid-ocean feature in question a genuine “island” to be classified as such in the international legal sense according to art. 121 par. 1 UNCLOS?

ment on dividing up the [alleged] continental shelf areas between the two countries, whereby Indonesia’s eastern shelf limit line [affecting the northeastern outskirts of Natuna archipelago - M. S.] encroached upon our boundary”, op. cit., p. 51. For the Indonesia-Malaysia shelf areas delineation see: *Vivian L. Forbes*, *Conflict and Cooperation in Managing Maritime Space in Semi-Enclosed Seas*, Singapore: Singapore University Press, pp. 70, 74-76, showing (p. 75) on a relevant map the outermost shelf delineation point no. 25 situated about 200 nm NNE direction from Natuna main island Bunguran as definitely overlapping with the Chinese “U-shaped” claim line at least in its hypothetical south-westernmost “bulge”. Nevertheless, *Hasjim Djalal*, outstanding Indonesian diplomat and “motor” of the SCS adjacent States “Code-of-Conduct” talks, has confirmed that the “Chinese ... have assured Indonesia that they do not have maritime boundary problems with Indonesia in the South China Sea (*Hasjim Djalal*, *South China Sea Island Disputes*, in: *Nordquist* [Ed.], op. cit., pp. 109-133, 115). Such an official or at least semi-official statement through “diplomatic channels” seems to be only the one side of the coin, PRC traditional conduct of foreign relations taken into account! Meanwhile, Ambassador *Djalal* has made some interesting additional remarks in this affair recently, in an interview with “The Jakarta Post” in July, 2003: In his press statement *Djalal* regretted that “in the South China Sea between Natuna and Peninsula Malaysia, and Natuna and Sarawak there are still no boundaries”, thereby strikingly evading any allusion to ulterior thoughts about “China’s shadow” supposedly looming behind this stalemate! For this interview see http://www.indonesian-embassy.fi/editorial7_2003.htm.

¹⁵ In the meantime, such a document, officially named „Declaration on the Conduct of Parties in the SCS”, has been signed on 04 November 2002 at Phnom Penh by PRC Vice Minister of Foreign Affairs WANG Yi and the respective Foreign Ministers of the 10 ASEAN member states, as printed in ODIL, vol. 34 (2003), pp. 282-285. The said Declaration has - albeit important as a sign of progressive political détente between PRC and ASEAN - no legally binding effect, cf. *Nguyen Hong Thao*, *The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note*, in: ODIL, vol. 34 (2003), pp. 279-282, 281; see also *Ernst-Ulrich Petersmann*, “Codes of Conduct” key-word article in: *Rudolf Bernhardt* (Ed.), *Encyclopedia of Public International Law (=EPIL)* vol. I, Amsterdam etc.: Elsevier, 1992, pp. 627-632, stating that such Codes do not constitute independent formal sources of (international) law (p. 628), given their voluntary and tentative nature (p. 632).

¹⁶ *Hasjim Djalal*, *Indonesia and the South China Sea Initiative*, in: ODIL vol. 32 (2001), pp. 97-103, 97.

2. If answered in the affirmative, does the feature come under the exemption provision contained in art. 121 par. 3 UNCLOS?

3. If answered in the negative (i.e. not being a "rock" or any other feature equivalent to it), which one of the parties to the dispute is the lawful holder of the sovereignty title over this island?

4. Sovereignty title clarified, what impact or effect should be given to this island in determining and delimiting adjacent maritime zones in accordance with art. 121 par. 2 UNCLOS?

Writers from the region in question, i.e., from the ASEAN member states, advocating the various Law of the Sea positions and claims of their respective countries, are often inclined to attribute little value to or even to disregard this logical climax of consecutive methodical steps postulated by international law and particularly by the intrinsic logic of the UNCLOS "consensus" compromise treaty text their countries have subscribed to. Frequently, they tend to go around the question the other way by putting the objective of gaining maximum profit from the new maritime zone regimes of UNCLOS in the first place, and only in the second place, often somewhat perfunctorily, approaching the issues of alleged sovereignty title over the individual "insular formations" within those usually huge maritime claim areas, which sovereign rights might accrue to the relevant country only by virtue of a lawful acquisition title established by international law. In this respect such authors, regrettably, are merely following the patterns of frequent, albeit ill-advised, state practice in the region. The Philippines, for instance, rely heavily on the so-called "contiguity doctrine" and/or "proximity principle" as does, although to a lesser extent, Malaysia¹⁷.

In the words of the two authorities *Robert W. Smith* and *Bradford Thomas* "there is no rule in international law that prescribes sovereignty over

islands on the basis of making a maritime claim"¹⁸. On the contrary, according to established principles of international law, it can well be said that "it is the valid title to land that generates the right to maritime zones and not *vice versa*, since it is from the coast of the *terra firma* that sovereignty extends itself legally seawards"¹⁹.

IV. The Chinese Reservations to the Convention on the Law of the Sea

In these premises we have to consider likewise, as being "systemfremd" ("alien to the system") or simply as not fitting into the pattern of UNCLOS, being a strict "maritime rights and duties codification", the fact that the PRC parliament has specified as item 3 on the list of reservations to the UNCLOS code, raised concurrently with ratification in May 1996, the following:

"The PRC reaffirms the sovereignty over all its archipelagos and islands as listed in Article 2 of the Law of the PRC on the Territorial Sea and Contiguous Zone which was promulgated on 25 February 1992"²⁰.

The "masterminds" behind this formula - presumably the Legal Committee of the Beijing NPC in cooperation with Foreign Ministry and/or international law experts - must have had some *arrière-pensées* while inserting this wording into a pure "UNCLOS reservations" list. There must be an intellectual link to point 1 of the Beijing list, stating that the PRC enjoys, in accordance with UNCLOS, the benefits of a 200 nm EEZ and of the continental shelf. Certainly, the question of "small islands" is looming behind, given the fact that - with the exception of Taiwan - well above 90 percent of the features called "archipelagos" or "islands" in the 1992 law are at best "very small islands" i.e. "islets" or even less (reefs, rocks, cays, shoals): Considering the

¹⁷ Former Philippine President *Estrada* stated in March 1999 bluntly as follows: „As to Mischief Reef [Meijijiao, see my fn. 1], it is ours in reality, because it lies within our Exclusive Economic Zone" (quoted by *HUANG Delin*, op. cit., p. 42). Another case of the same genre is Louisa Reef (Nantongjiao: see my fn. 13), due to considerable gas and oil deposits in its vicinity meanwhile a bone of contention between three countries: China, Brunei Darussalam and Malaysia: The latter argues that Louisa Reef - being a "high-tide elevation" albeit a "mere rock" covered by art. 121 par. 3 - and certain other, similar features in the area are Malaysian territory due to their location on Malaysia's continental shelf. Such lines of argumentation imply adherence to the "contiguity principle" (*linjixing yuanze*) which is criticized sharply as "having never obtained recognition under international law" by *HUANG Delin* (pp. 44/45 with reference to the Palmas arbitration), *ZHAO Lihai* (pp. 55/56 with reference to the Saint Pierre and Miquelon Arbitration 1992), and *GU Dexin* (p. 101): cf. the slightly more cautious opinion of *Santiago Torres Bernárdez*, "Territory, Acquisition" under "3. Contiguity" in *EPIL* IV pp. 831-839, 837.

¹⁸ *Smith* and *Thomas* in: *Nordquist* (Ed.), op. cit., p. 67. It should be emphasized that UNCLOS does not contain any provision in any of its articles that discusses the resolution of sovereignty disputes over any territory like islands etc. - on the contrary, the UNCLOS text meticulously avoids any attempt to deal with issues of this kind as can be clearly seen from the wording of art. 298 par. 1 lit. (a) (i) concerning optional exceptions to applicability of "compulsory procedures entailing binding decisions" contained in part XV (Settlement of Disputes): "... any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or *insular territory* shall be excluded from such submission" (italics added).

¹⁹ *Haller-Trost*, op. cit., p. 324. See also *Beagle Channel Arbitration*, Report and Decision of the Court, February 18, 1977: "[M]aritime jurisdiction' does not exist as a separate concept divorced from dependence on territorial jurisdiction. To draw a boundary between the maritime jurisdiction of States, involves first attributing to them, or recognizing as being theirs, the title over the territories that generate such jurisdiction" (ILM = International Legal Materials, vol. XVII/1978, pp. 634-679, 644).

²⁰ See *Strupp* 1998, p. 628.

estimation that under UNCLOS art. 121 par. 2 a zone of 200 miles around a "small island" satisfying the preconditions of par. 1 and 3 (inverse) can generate about 125,660 square nautical miles of ocean space²¹ - an area almost twice the size of Great Britain - the value of the land in itself often appears to be considerably less than the maritime zones that, under the provisions of UNCLOS, possibly could be claimed from that "small island" or "Archipelago of small islands".

There is, however, a certain quandary in China's case: One of the "archipelagos" explicitly denominated in the 1992 Law is *Zhongsha qundao* (Macclesfield Bank) which is without any doubt a SCS mid-ocean feature submerged beneath sea surface constantly and completely (the highest submarine elevation of which is 9 metres underwater) as even authors of PRC origin at early stages after the proclamation of the PRC conceded²². There are also plenty of constantly submerged features within the perimeter of the *Nansha* (Spratly) ocean area²³. Manifestly, there is an *aporia* due to the fact that features like the Macclesfield Bank and several other formations within the SCS perimeter constitute no islands, with the unpleasant but inescapable consequence that such features are totally irrelevant in terms of UNCLOS provisions, not to mention the regrettable fact that there is no chance at all for reserving to them maritime zones according to art. 121 par. 2. *Prima facie* one might be tempted to imagine - as a hypothetical way out of such imbroglio - that the Beijing NPC Standing Committee ought to have inserted one particular additional reservation formula with a text roughly speaking "PRC is not legally bound by art. 121 par. 1 and par. 2", the *Zhongsha* submerged features' issue, for instance, taken into account. But at this point, of course, the generally acknowledged principle looms behind, that a party cannot claim the benefits of a regulation like this, being art. 121 par. 2 with its bright prospects for resource-rich maritime zones, while simultaneously repudiating

the onerous clauses intrinsically connected with said benefits (par. 1 and par. 3). Paragraph 2 being the rest out of art. 121 would stand - metaphorically - as a solitary isolated "erratic block" in the legal scenery.

And besides that, practically insolvable difficulties considering UNCLOS art. 309 would arise, which provision unequivocally reads: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention". There is also no way out of the dilemma if one presumes that perhaps the interests of Beijing would have been better attended to if the NPC Standing Committee had inserted a formula like that employed in art. 14 of the 26 June 1998 PRC Law on the EEZ and Continental Shelf which says: "Provisions of this Law do not affect historic rights enjoyed by the PRC": Here again art. 309 is the stumbling block.

V. Historic Rights

Perhaps a better solution for China's interests being attended to could possibly have materialized if the UNCLOS conference participants had agreed, by way of consensus, upon inserting specifically and explicitly into art. 121 (maybe as a supplementary par. 4) a kind of proviso clause resembling, *mutatis mutandis*, those which were actually inserted as referring to "historic rights" or "historic titles"²⁴ into art. 10 par. 6²⁵, art. 15²⁶, art. 46 lit. b²⁷, art. 47 par. 6²⁸.

²⁴ The classical authority with regard to the doctrine of "historic titles" is now as before, four decades after first publication of his fundamental study, *Yehuda Blum* (*Yehuda Z. Blum*, *Historic Titles in International Law*, The Hague: Nijhoff, 1965, comprises 360 pages altogether). International law authors of Chinese origin often rely upon his two shorter quintessential definitions of "historic rights" in EPIL II, 1995, pp. 710-715, 710: "The term 'historic rights' denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation" and (loc. cit., p. 711:) "Historic rights are the product of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law" (cited, e.g., by ZHAO Jianwen, op. cit., p. 152; ZOU Keyuan, *Historic Rights in International Law and in China's Practice*, in: ODIL vol. 32 (2001), pp. 149-168, 150). Attention should be paid to the fact, that particularly the notion of "historical consolidation" has been criticized and modified, albeit with application to special circumstances characteristic of the colonial heritage of certain West African states, by the International Court of Justice (ICJ) recently, cf. "Condamnation de la théorie de la 'consolidation historique du titre'", in: *Philippe Weckel*, "Chronique de jurisprudence internationale: Cour Internationale de Justice, Arrêt du 10 octobre 2002 (Fond): Frontière terrestre et maritime (Cameroun c. Nigeria)", in: RGDIP (Revue Générale de Droit International Public), Paris, tome CVII (2003), pp. 161-175, 166/167.

²⁵ „The foregoing provisions [concerning "Bays" - M. S.] do not apply to so-called "historic" bays ..."

²⁶ Concerning delimitation of the territorial sea between States with opposite or adjacent coasts: Delimitation at variance with the general formula "by reason of historic title".

²¹ As calculated by Smith and Thomas, op. cit., p. 64.

²² Cf., for instance, *Shao Hsun-cheng* [=SHAO Xunzheng], Chinese Islands in the South China Sea, in: *People's China* (an English language precursor of the semi-official "Peking Review"), 1956 no. 13 (July 1), pp. 25-27, 25: "The Chungsha Islands are shoals submerged by the sea. China's sovereign rights over them have always been taken as a matter of course". ZHAO Lihai, op. cit., p. 52, confirming this, adds the figure of 9 metres as a characteristic of the shoalest part of the bank, with this figure probably referring to the (even nowadays invaluable) "pioneer" study of the German scholar *Heinzig* (cf. *Dieter Heinzig*, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank*, A Publication of the Institute of Asian Affairs in Hamburg, Wiesbaden: Harrassowitz, 1976, p. 19).

²³ JIAO Yongke, apparently referring to the entire SCS perimeter, counts „612 islands, reefs, shoals, cays and banks, the greater part of which are submerged under the water, [but] 69 of them are lying above water at high tide", op. cit., p. 49 (italics added).

However, the negotiating parties did not insert a comparable clause into art. 121²⁹. If they really had done so, serious doubts would have remained whether the negotiators in this very context of “historic titles” would positively also have meant “features permanently covered by water”.

PRC scholars are almost desperately seeking for escape routes out of the deadlock. Habitually, they evade the aforementioned Philippine and Malaysian mistake of starting with item 4 and then directly proceeding to item 3 of our “adjudication list”. Instead they abide by the logical consecutive order of examining first item 3 and then item 4, but this *nota bene* does not necessarily apply to the items 1 and 2 on the list: Usually they take great pains to evade discussing art. 121 par. 1 and par. 3 at all, its precarious implications for issues like “Macclesfield Bank” taken into account - a noteworthy exception being Professor ZHAO Lihai (*cf. infra*). Maybe the majority of Chinese authors neglect consideration of art. 121 par. 1 (and, by the way, par. 3 concurrently) at all because they are so firmly trapped into the gravitational field of a “planet” named “historic rights” that they feel compelled to ignore other aspects completely. GU Dexin, for instance, seems to be convinced that in the sphere of international law it is not necessarily explicit treaty law that ranks first and really counts: He concedes that after 1945 customary international law of the sea has been “basically codified by treaties” - which UNCLOS, duly signed and ratified by Beijing, is clearly no exception of! - but underlines the notion that certain parts of the international law of the sea “continue to exist in forms of yet unwritten customary principles”³⁰.

²⁷ *Verbatim*: „archipelago“ meaning „a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such“ (emphasis added).

²⁸ Pertaining to „archipelagic baselines“: „... existing rights and all other legitimate interests which the latter [i.e. “immediately adjacent neighbouring State”] has traditionally exercised in such waters ... shall continue and be respected“.

²⁹ Oude Elferink (Netherlands Institute for the Law of the Sea) dealing with SCS “elevations that are never above the level of the sea” like Macclesfield Bank and similar banks within the Spratly area states as follows: “Although no sovereignty can be claimed over these banks and they are not entitled to maritime zones, they may form part of the historic waters of a state or a state may have historic rights over such areas. However, reviewing the available information in the light of the applicable rules of international law does not indicate that any such claims can be upheld” (Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?*, in: ODIL vol. 32 / 2001, pp. 169-190, 177, with further references).

³⁰ GU Dexin, *op. cit.*, p. 97. It must be emphasized that “as far as treaties are concluded and in force, they take precedence between the parties to the treaty over customary norms, except in the case of *jus cogens*” (Rudolf Bernhardt, keyword article “Customary international law”, in: EPIL I pp. 898-905, 899). With special regard to so-called “regional customary law” Bernhardt states that the “possibility of customary law valid only

Perhaps GU Dexin in this respect has in his focus the final passage of the preamble to the UNCLOS text:

“Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law, have agreed as follows ...”

In this context, however, there might be still a certain “qualitative mental jump” from such a general “formula of affirmative invocation” towards so intricate technicalities as exploiting the label “historic rights” as a kind of general “immanent standard rule of interpretation adjustment” to be applied to a fairly large number of provisions incorporated into an international law code (binding upon the party concerned by signature and ratification), i.e., in cases of provisions where this clause “historic rights” is simply lacking in the text, to cleverly attach a “tacit” or “between the lines” auxiliary construct as an interpretation “guidance” that would be teleologically apt for enhancement of benefits to the “national interest” of one or the other individual signatory state.

Another author, Professor ZHAO Jianwen of Zhengzhou University’s Academy of Legal Sciences, incidentally chief-editor and co-author of a recently published very comprehensive textbook on International Law³¹, chooses a still more sophisticated line of argument. In the first place of course, like other Chinese writers, he totally disregards, in his article published 2003, any examination of UNCLOS art. 121 par. 1 and 3 with regard to the “island” definition³². In the outcome, he makes instead the following assertion: “[UNCLOS] while giving new maritime rights and interests to the states, does not break the existing maritime legal order or affect the vested maritime rights of the states [bu sunhai geguo jide de haiyang quanli = italics added] ... [s]tates can extend their sovereign rights only to areas traditionally recognized as open seas and, in doing so, they may not infringe upon the vested territorial sovereignty or sovereign rights of other states. The

for the States of a certain region [East and Southeast Asia? - M.S.] or group [ASEAN member states “plus” or “versus” China? - M.S.] should not be denied. But the normal conditions for the creation of customary norms remain valid: State practice *in the community concerned* [emphasis added] and *opinio juris* are necessary. Regional customary law must not depart from treaty obligations and from *jus cogens*” (loc. cit. p. 902).

³¹ ZHAO Jianwen (Ed.), *Guojifa xin lun* (in Chinese; English parallel title „A New Introduction to International Law“), Beijing: Falü chubanshe, 2000, 637 pp.

³² It may have been an accidental misprinting, that in this textbook in the first line under the chapter headline “Chapter 5: Regime of Islands and Archipelagic States, par. 1: Regime of Islands” we find the statement “Art. 241 of the Convention provides for the regime of islands” (*op. cit.*, p. 320). This is wrong, the relevant article instead being art. 121 of course. Art. 241 reads: “Non-recognition of marine scientific research activities as the legal basis for claims ...”

various historical rights enjoyed by China over the South China Sea are vested rights that had been established long before the entry into force of the Convention"³³. Interestingly enough, ZHAO Jianwen in his very short English summary at the end of that essay does not mention a certain formula that he had stated in yet more concrete terms in Chinese at the beginning: "The various historical rights enjoyed by China over the historical waters within its continuously segmented Southern Sea boundary line are vested rights that had been established long before the entry into force of the Convention" [italics added; in Chinese: Zhongguo dui nanshai duanxu guojie xian nei de lishixing shuiyu xiangyou de gexiang lishixing quanli shi zai 'gongyue' shengxiao yiqian henjiu jiu yijing quelu de jide quanli]³⁴. Should this odd discrepancy mean that the statement in Chinese language ought to get reserved for "domestic use" only?

Be that as it may, in ZHAO Jianwen's pattern of thinking, the formula "vested rights" is to be conceived as the overall calibrating standard virtually immanent in each relevant UNCLOS provision and to be automatically superimposed on all relevant matters regulated within the entire corpus of UNCLOS. He deduces this assertion not only from the articles cited above, where indeed an explicit reference to "historic titles" or "historic rights" was made during the codification process, but also from a range of other articles wherein some more "indirect" allusions to such principles can be traced, as for instance, art. 7 par. 5; art. 8 par. 2; art. 35 lit. c; art. 46 lit. b³⁵. With regard to all other provisions,

³³ ZHAO Jianwen (2003), op. cit., p. 160.

³⁴ ditto, p. 147.

³⁵ In view of limited space the topic „archipelagic state or not“ (in the case of China taken into account far-distance mid-ocean groups of islands like the Spratlys) deserves a separate discussion en détail, cf. in general and somewhat outdated Strupp, 1982 (Hamburg), pp. 28-35 and 100-117; Strupp 1982 (Wien), pp. 175-177, 187-189; Strupp 1985 pp. 118/119, 141-162, 167f., 180f.; Strupp 1998 (comments). At this point only the following: Looking into ZHAO Jianwen's recent considerations with regard to the "archipelagic regime" (ZHAO Jianwen, op. cit., pp. 149/150) one might argue, that by logical deduction based on normal juridical methodology the conclusion must be that one cannot insert the criteria which are explicitly and verbatim written into art. 46 lit. b) solely (i.e. "archipelago means a group of islands ... which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such" - emphasis added) by way of "tacit interpretative adjustment" into the preceding lit. a) as well, given the clear wording readable there in lit. a), i.e. "archipelagic State means a State constituted wholly by one or more archipelagos and may include other islands" (emphasis added). ZHAO Lihai, op. cit., pp. 56/57, takes a more realistic view on the "consensus" reached at the UN Law of the Sea Conference in this particular field by stating frankly "complete application of UNCLOS provisions concerning archipelagos to the [circumstances of our] various Southern Sea islands is not feasible, as Part IV of UNCLOS only applies to 'Archipelagic States' ". GU Dexin states with considerable regret (but this was the price to be paid for reaching a "consensus" compromise text!), that "the Conference evaded complete

ZHAO, presumably, attributes to his concept of "vested rights" the function of an auxiliary instrument for "adjusted" teleological interpretation.

One specific argument of ZHAO Jianwen ought to be taken very seriously after all: There is no getting away from the fact that UNCLOS art. 298 (concerning "optional exceptions to applicability of section 2" i.e. "Compulsory procedures entailing binding decisions" under Part XV = Settlement of disputes") exhibits a certain tendency to "freeze" the actual *status quo* of disputes on maritime issues especially with "historic titles" as background, provided such controversial issues existed at the very moment of UNCLOS entering into force.

According to Article 298 (A signatory State) "may declare in writing that it does not accept any ... of the procedures provided for in section 2 with respect to ... (a) (i) disputes ... involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention [emphasis added] ... accept submission of the matter to conciliation under Annex V, section 2 ..."

This clause indeed appears to indicate a certain shyness on behalf of the signatories to touch upon maritime issues established as a historical "heritage" the substantial elements of which date back to times before entry into force of UNCLOS³⁶. But this cannot be taken as evidence that for instance China had by way of shelving a pre-existent issue in dispute or in contestation gained any procedural advantage: Undoubtedly the Chinese side still bears onus probandi with regard to a valid title, as the crucial issue in reality is "whether there could ever had been acquired a historic waters title" submerged oceanic features like Macclesfield taken into account. And except for that, it would be a

settlement of the archipelagic principle issue and did not create any concrete regulations which are also applicable to [continental] coastal states with mid-ocean archipelagos" (GU Dexin, op. cit., p. 99). On the other hand, there was already in an early stage of the UN Third Law of the Sea Conference a pronounced tendency to reserve privileges of the archipelagic principle to genuine "archipelagic states", cf., e.g., G. G. Šinkareckaja, Pravovoj režim vod arhipelagov (The legal regime of archipelagos), in: Meždunarodno-pravovye problemy mirovogo okeana na sovremennom etape (International legal problems of the global ocean area at the present stage), Moskva: Transport, 1976, pp. 130-133. ³⁶ cf. ZHAO Jianwen, op. cit., p. 157: He points out, that "if disputes having emerged before entering into force of UNCLOS would be admitted for adjudication under UNCLOS, this would be contrary to intertemporal law principles and tantamount to attribute retroactive force to UNCLOS thereby depriving States of vested rights acquired in accordance with the international law prevailing at the time of emergence of said dispute".

dangerous path if UNCLOS were seriously, in an extremely conservative vein, be conceived as a “permanently frozen block of ice”, thereby resisting any organic development and progress in adapting maritime law established at a given constellation in the past and hence continually in danger of becoming more and more obsolete simply due to the mere efflux of time.

VI. Interpretation of Art. 121 of the Convention on the Law of the Sea

In this context, the question can be asked whether article 121 UNCLOS *per se* could be conceived as a naturally evolving complex of notions, criteria and rules that are on the way to become a genuine part of developing *customary international law*, independent of the fact whether the individual contracting party had acceded to the treaty by ratification or not. Some hesitation in this point might be understandable. As ZHAO Lihai expounded in 1995 - one year before ratification by the NPC Standing Committee of UNCLOS - with clear-sighted arguments, the wording of art. 121 par. 1 and par. 3 shows distinct deficiencies consisting of elements of ambiguity, vagueness, evasiveness, and obscurity, sometimes approaching inconsistency. In this instance, it is even difficult to obtain sufficient hints by studying the *travaux préparatoires* concerning art. 121, hence the next alternative would be to seek relief by applying standards like art. 31 par. 1 of the Vienna Convention on the Law of Treaties, reading “a treaty should be interpreted *in good faith*,”³⁷ in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

In my opinion, in order to get rid of such veritable Gordian knot there is no way out other than to seek *adjudication* provided that political treatment on open stage or backstage, i.e., using diplomatic channels discreetly or not discreetly (like “Track One”, “Track Two” and similar tools), and other “soft” or “non-judicial” instruments fails to bear fruit *ad infinitum*. Article 121 UNCLOS is an outstanding example of not only urgent, but almost desperate need for authoritative interpretation and resolution of such deficiencies and obscurities to be undertaken by a globally recognized international judicial body, as for instance the ICJ at The Hague and/or ITLS at

Hamburg. But anyway: *Judex non communicat officium suum nisi imploratus*. Unfortunately, the PRC seems to rate submitting such questions to an international judicial body already as too high a risk in view of considering this the first step to “multilateralization” of the SCS-related disputes, which handling on a multilateral basis in lieu of a bilateral one is, now as ever before, categorically opposed by the PRC. The signing of ASEAN’s bedrock 1976 Treaty of Amity and Cooperation (TAC) at the Bali autumn 2003 ASEAN Summit by PRC Premier WEN Jiabao does not seem, in all probability, to alter this fundamental “nay” constellation³⁸. Meanwhile, the government in Beijing most readily nominated its own recognized international law authorities to sit as judges at such international tribunals, as is the case for ZHAO Lihai (all the more a maritime law specialist of highest repute!) who was sent to Hamburg (ITLS) and for SHI Jiuyong who was sent to The Hague where the latter even has been elected president of the Court (ICJ) in February 2003³⁹.

1. “Above the Water at High Tide”

ZHAO Lihai, speaking in the present case in his capacity of being a recognized UNCLOS specialist and obviously (in 1995) not as a future ITLS judge, points to the fact that the criterion “above water at high tide” i.e. “high-tide elevation” (*gaochao gaodi*) is far from being clear⁴⁰. He mentions the role of the four seasons during the year which produce the effect that the “high-tide” criterion, i.e. the tidal datum, depends on the date when, during one given single year - and all the more during a whole sequence of years -, an assessment on the spot really takes place. For this reason the South Pacific King-

³⁸ See John McBeth, China: Asean Summit: Taking the Helm, in: FEER 16 October 2003, pp. 38-39. It must be kept in mind that although TAC prescribes a “High Council” mechanism to resolve border conflicts among member states this mechanism has never been used in the past - a fact that is particularly regretted by Indonesia, as former Foreign Minister during the Suharto era Ali Alatas has been quoted: “Since we have it [i.e. the ASEAN TAC “High Council”], let’s make it work ... Up to now we have succeeded in damping down conflicts [like the SCS maritime and islands issue] by shelving them and sweeping them under the carpet - but not solving them” (McBeth, loc. cit.). The crux is that as long as the TAC High Council is downgraded to the level of a pure noncommittal “political” body and not a legal one, “it will lack essential credibility in trying to resolve territorial irritants - perhaps one of the reasons why China felt comfortable about signing the treaty”, as speculated by McBeth (loc. cit.).

³⁹ As reported by John R. Crook, The 2002 Judicial Activity of the International Court of Justice, in: AJIL (American Journal of International Law), vol. 97 (2003), pp. 352-364, 362/363.

⁴⁰ ZHAO Lihai, op. cit., p. 57. Very useful in this context the following IBRU (University of Durham) studies: Clive Symmons, Some Problems Relating to the Definition of “Insular Formations” in International Law: Islands and Low-Tide Elevations, IBRU Maritime Briefing vol. 1 no. 5 (Durham 1995); Nuno Sergio Marques Antunes, The Importance of the Tidal Datum in the Definition of Maritime Limits and Boundaries, IBRU Maritime Briefing vol. 2 no. 7 (Durham 2000).

³⁷ By the way, the PRC international law textbook of 2000 (Ed. ZHAO Jianwen), translates “in good faith” in this context into “shanyi” (op. cit., p. 442): In my opinion “chengshi xinyong” would be more appropriate, being used for translating “Treu und Glauben” in § 242 BGB (German Civil Code) by MEI Zhongxie et al. (Translators) in “Deguo minfa”, (Ed.) Guoli Taiwan Daxue falixue yanjiusuo, Taipei: 1965, p. 306.

dom of Tonga, for instance, in its legislation text uses differentiating wordings in lieu of the original UNCLOS formula⁴¹. This lack of precision in determining tidal data in the course of time has even led to the question of “seasonal” or “occasional” “islands”!⁴² The delicate problem of considerably fluctuating “high tide peaks” has been even dramatically aggrandized - a more recent development not mentioned at all by *ZHAO Lihai* - due to the current climatic changes (acknowledged by all serious experts meanwhile) in connection with the phenomena of “global warming” and “greenhouse effect” that possibly would cause catastrophic consequences for several South Pacific and Indian Ocean “atoll states” (Tuvalu, Kiribati, Maldives et al.). The South China Sea as a semi-enclosed sea basin area, geographically connected with both oceanic regions mentioned, naturally cannot remain unaffected by those phenomena.⁴³

2. Artificial Islands

ZHAO Lihai, dealing in due course also with the issue whether it is allowed in order to establish “insular” status that the feature may “contain any man-made elements” - a plain but extremely ticklish matter at precarious juncture with the topic “artificial islands” - summarily repeats some comments made by *O’Connell* already in 1982, worded “naturally formed (area of land)” is an “ambiguous [term] and may refer either to the materials of construction or to the element of human activity in the process of reclamation”⁴⁴. *ZHAO Lihai* states that “a clear-cut dividing line between naturally formed islands and man-made ones is sometimes very difficult to draw in practice”⁴⁵. In cases when “protective screens and walls” (*pingzhang*) have been constructed within the water area, maritime sands and grit materials might be moved and shifted under the influence of ocean currents and fluctuations, in the end getting accu-

mulated and piled up by natural causes on the constructs, at their rims and in their immediate vicinity, whereby “during the efflux of time an island may be formed”. Here, *ZHAO Lihai* seems to allude to the problem of *accretio* or “gradual aggradation by natural causes”⁴⁶, in general the topic “*alluvium*” which means “soil material, as clay, silt, sand, or gravel, deposited by running water”. Some scholars say that a mere artificial island were produced (with the - in view of maritime zones claimable for them - devastating consequences of art. 60 par. 8 UNCLOS⁴⁷), when natural materials are heaped up by man. This sounds too rigid and “*Manichaeian*”. Such human activities should be stigmatised only when there is a clear intention to target the exorbitantly aggrandized maritime zones’ regime of art. 121 par. 2., and further, *nota bene*, only when activities of such kind take place at spots of ocean water where previously there had been *absolutely nothing* except water. *Fritz Münch* even states that “alluvions, even if provoked or guided by man-made works, are natural islands” (emphasis added)⁴⁸. Of course, there is a risk of “mouldable” intergradation stages in between as to how much of originally existent natural materials being the “basic stock” for such heaping up by man is required.

Evidently, the matter is a slippery unsettled “grey zone” (*Grauzone*) in international maritime law, as can be seen by the fact that the same author, *ZHAO Lihai*, smoothly in his next sentence leads up from the aforementioned topic to a much more delicate one, stating that “on *Yongshu Jiao*⁴⁹ in the *Nansha* group our country has established a marine observation station, and on *Chigua Jiao*⁵⁰, *Huayang Jiao*⁵¹, *Nanxun Jiao*⁵², *Dongmen Jiao*⁵³, *Zhubi Jiao*⁵⁴ we

⁴⁶ See for international law problems relating to „*accretio*” vs. “*avulsio*” (the same phenomena occur also, e.g., to islands and sandbanks studying the Sino-Russian boundary rivers) *Michael Strupp*, *Chinas Grenzen mit Birma und mit der Sowjetunion: Völkerrechtliche Theorie und Praxis der Volksrepublik China*, 2. exp. ed., Hamburg: IfA, 1987, pp. 129, 137, 330-331.

⁴⁷ Art. 60 par. 8 UNCLOS: “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf”.

⁴⁸ *Fritz Münch*, keyword article „Artificial Islands and Installations” in: *EPIL* vol. I, pp. 268-271, 269.

⁴⁹ Non-Chinese maps: *Fiery Cross Reef* (cf. *Haller-Trost* pp. 333, 445; *Schier* p. 580; *Hancox/Prescott* p. 13: each of them with description and comments).

⁵⁰ *Johnson (South) Reef* (cf. *Haller-Trost* pp. 333, 447; *Schier* p. 582; *Hancox/Prescott* pp. 10-11).

⁵¹ *Quarteron Reef* (cf. *Haller-Trost* pp. 333, 443; *Schier* p. 580; *Hancox/Prescott* p. 14: misprinted „*Cauteron*”).

⁵² *Gaven (North) Reef* (cf. *Haller-Trost* pp. 333, 445; *Schier* p. 582; *Hancox/Prescott* pp. 8-9: under “*Tizard Bank and Reefs*”).

⁵³ *Kennan Reef* (cf. *Haller-Trost* pp. 333, 447; *Schier* p. 582 giving no Chinese name; *Hancox/Prescott*, p. 11, say “*Dongmen Jiao*” means not “*McKennan Reef*” but “*Hugh or Hughes Reef*”, which divergence creates confusion about the specific feature allegedly occupied by PRC, loc. cit., nevertheless all agree that it is a part of “*Union Bank and Reefs*”).

⁴¹ Cf. Tonga’s “*Territorial Sea and Exclusive Economic Zone Act*” of 1978 amended 1989: “*Island means a naturally formed area of land that is surrounded by and above water at mean high-water spring tides*” (italics added), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/TONGA.htm>. *Haller-Trost* cites from the Official Records of the Third UN Conference on the Law of the Sea that Tonga reportedly has built up low-tide elevations (see definition in art. 13 UNCLOS: features “above water at low tide but submerged at high tide” - italics added) so as to claim them as “full-fledged” islands under the law of the sea stipulations, subsequently extending its jurisdiction by as much as 150 nm (*Haller-Trost*, op. cit., p. 341 fn. 292).

⁴² See *Clive Symmons*, *When is an “Island” Not an “Island”* in *International Law? The Riddle of Dinkum Sands in the case of US v. Alaska*, *IBRU Maritime Briefing* vol. 2 no. 6 (Durham 1999).

⁴³ See *en détail*: *Ching-Cheng Chang* (Ed.), *Global warming and the Asian Pacific*, Cheltenham: E. Elgar, 2003.

⁴⁴ Such are the exact words to be found in the original text of *Daniel P. O’Connell*, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, vol. I, p. 196.

⁴⁵ *ZHAO Lihai* op. cit., p. 57.

erected houses on high poles [or piles or stilts: *gao-jiaowu*] and garrisoned them [*zhushou*]. All these rocks and/or reefs [*yanjiao*] are existent from time immemorial, they do not constitute man-made islands, hence they ought to have own territorial sea zones and contiguous zones"⁵⁵.

O'Connell, interestingly, mentions that the expression "naturally formed" was "introduced as the outcome of the raising in the International Law Commission in 1954 ... in connection with a discussion of habitations built on piles in the sea" but at that time "did *not* survive the criticism in the Commission that it was *too restrictive*" (italics added by me)⁵⁶. Be that as it may, Münch in his 1989 article under the heading "artificial islands and installations" listed rather restrictively the following items: "Houses constructed in shallow water, *huts resting on poles* [italics added by me], tourist installations and dwellings for the crews of drilling equipment ...", and further "Lighthouses", "Floating airports", "Platforms for exploring, drilling, capturing solar energy and exploiting tidal currents", "Wireless stations", "Anti-aircraft towers", "Research and weather observation (installations)". This list might appear in the year 2004 - taken into account the worldwide inflationist tendency to construct all those sorts of installations everywhere in ocean regions - indeed *too restrictive* in O'Connell's words. The result could be mitigated maybe in that sense that such installations do not constitute an "unnaturally formed area of land" on spots where a substantial basis of natural materials had existed initially, but of course awash or at least oscillating between the low-tide and high-tide water peaks, hereby excluding features that are submerged permanently and beneath average water level at a substantial distance like Macclesfield Bank or James Shoal (= *Zengmu ansha*, i.e. verbatim "Great-Grandmother's hidden sands", which wording even in original Chinese suggests that it is a "hopelessly" submerged feature, 22 metres underwater⁵⁷, which fact is sur-

prisingly enough not seen by the Chinese as an obstacle to claim this formation, under the "historic title" aspect, as the so-called "southernmost point of Chinese territory" - italics added).

Haller-Trost tells us, that after the physical occupation (during the years 1987/88) of at least eight features within the Spratly Islands area - exactly six of which were named by ZHAO Lihai in his 1995 article also - "the PRC began to *modify* [emphasis my own] some of the features"⁵⁸. He adds, that "for instance, Fiery Cross Reef (Yongshu Jiao), which is mostly submerged at high tide, has become an artificial harbour-base for its South China Fleet⁵⁹, although the PRC maintains that it does not station any military forces on any of the Spratly Islands". As to "artificial islands", Haller-Trost wrote that this term ought to be interpreted rather in relation to installations and structures for the purpose of exploring and exploiting natural resources than being connected with the "*manipulation*" - as Haller-Trost puts it - of reefs, rocks and/or low-tide elevations into 'full-fledged' islands by modifying their original formation. He concedes that from the *travaux préparatoires* no unequivocal evidence arises as to whether such altered maritime features also fall into the category of "artificial islands", and he concedes further, that there is no doubt that a country has the right to fortify unstable coastlines of its islands.

But - Haller-Trost raises a really crucial matter here - "the prospect that the alteration of a feature that may originally have been a low-tide elevation into a 'full-fledged' island, able to sustain human habitation or economic life of its own (a process that might be possible with advanced technology), might now qualify to effect not only a territorial sea but also a 200 nm EEZ and a continental shelf, *seems to exceed the intention of the codifiers of UNCLOS III* (i.e. UN Third Conference on the Law of the Sea; italics my own). Should the distinction of classification depend on the degree of modification, problems of verification of the 'before' and 'after' status may arise, especially in the case of remote islands"⁶⁰. At this point, however, Haller-Trost concentrates his deep-rooted suspicions in a somewhat biased line of argumentation unto the Chinese side unmindful of the other regional competitors' machinations, in

⁵⁴ Subi Reef (cf. Haller-Trost pp. 333, 454; Schier p. 582; Hancox/Prescott p. 6).

⁵⁵ ZHAO Lihai, p. 57. Herewith ZHAO Lihai indirectly concedes that art. 121 par. 2 does not apply to these reefs mentioned by him previously, which indicates that he sees them in line with "rocks" (art. 121 par. 3) having "no economic life of their own" at least.

⁵⁶ O'Connell, op. cit., p. 196, with further references.

⁵⁷ This is the figure denoted by Schier, p. 582, for "Zengmu-Riff". Haller-Trost, p. 329, writes as follows: "[T]he configuration [= James Shoal] is not even a low-tide elevation but ... a submerged feature, which lies 12 fm [= fathoms] below the surface" (italics original). Oude Elferink remarks somewhat summarily "construction of structures over these banks [like Macclesfield and certain features located to the southwest of Spratly Island = Nanwei Dao, occupied by Vietnam] would not change their status", "such structures themselves are not entitled to any maritime zones except for a safety zone around them", "no sovereignty can be claimed over these banks", cf. Oude Elferink, op. cit., p. 177.

⁵⁸ Haller-Trost, op. cit., p. 334.

⁵⁹ Here (loc. cit. fn. 247) Haller-Trost refers to Schier, op. cit., p. 580, but his quotation contains a tiny flaw: Schier's original wording is: "Möglicherweise [italics my own - M.S.] wollen die Chinesen hier eine Art Schutzhafen für Einheiten ihrer 'Südchina-Flotte' anlegen ...". Afterwards Haller-Trost confirms ZHAO Lihai's remark, that a marine observation station (in 1991; plus a beacon) has been built on Fiery Cross (his fn. 247).

⁶⁰ Haller-Trost, op. cit., p. 334.

stating that “the PRC has not yet published the coordinates” (of the straight baselines to be drawn around the Spratlys according to the legislative program contained in its 1992 Territorial Sea/Contiguous Zone law), hence “the delay of which seems to be directly connected with the *modification process*” (i.e. targeted on developing features into “full-fledged” islands)⁶¹.

There is no reason to blame the Chinese for such developments exclusively and solely. Not only mini-states with atoll formations acutely endangered in its sheer existence by the global climatic changes almost frantically try to secure and fortify their insular homelands, but also major “players”, global or regional, run races in “fortifying”, “giving solid shape” to their maritime strongholds and toeholds, “face-lifting”, “pepping up” existing oceanic features in order to attain secure insular status. As to the geographic sphere, which is of interest in our context, *Haller-Trost* himself gives some impressive examples for such activities of different non-Chinese “competitors” within and at the rim of this region: Malaysia reportedly spent “an incredible sum of money”⁶² to change at least one of its claimed features, namely *Terumbu* (“reef” in Bahasa Melayu) Layang Layang⁶³, and altering – thus bluntly unmasking its true intentions – the name of said feature – of which previously only a very limited section had been above sea level at high tide – into *Pulau* (“island” in Bahasa Melayu) Layang Layang⁶⁴. Another yet more spectacular example is Japan the appetite of which increasingly concentrates on the SCS region under the pretext of having established “vital interests” there with regard to “strategically and economically indispensable sea lanes crossing the SCS maritime region”⁶⁵. *Haller-Trost* reports that Japan had spent billions of Yen to conserve its southernmost tiny islet of Okinotorishima, showing at high tide only two small outcrops (2 to 6 m above sea level), in order to maintain jurisdiction over 160,000 sq.nm of EEZ⁶⁶. So why should China step aside while other “regional players” or “global players” exhibit state practice like that mentioned previously? Scuffling and racing among the com-

petitors for the “front-runner” position⁶⁷ has of course a somewhat legal-procedural aspect too: The country in firm physical possession or occupation of a given feature, at the juridically critical date, does not have to bear onus probandi, the non-possessing challenger has to bear it.

3. The Chinese Provisions on Sea Islands

Beijing in its current state practice takes scrupulous pains and efforts to conserve and safeguard, “keep in shape” and “develop” its actual *status quo* in terms of physical possession and administrative control with regard to the features it occupies, with a peculiar concern on “keeping uninhabited maritime elevations safely above sea level”. This predominant interest of PRC authorities gets visible and tangible in several provisions of the so-called “Provisions on Administration of Protection and Utilization of Uninhabited Sea Islands”, which were recently enacted under the auspices of no less than three highest level state agencies combined, i.e. State Oceanic Administration, Ministry of Civil Affairs and Headquarters of General Staff of Chinese People’s Liberation Army⁶⁸.

These provisions deal, in the foreground, with ecological and environment protection issues, “safeguarding state ocean areas rights and interests as well as state defence and security”, very detailed and scrupulous “denomination procedures” to be applied in cases of yet nameless features⁶⁹ and – last but not least – with various questions linked to “rational utilization”, i.e., also with development and exploitation for private commercial use of such uninhabited features: Here an ingenious system of “*gongneng quhua he guihua*” applies (administrative classification and planning depending on individual – foremost economic – functionality of each feature). As to the geographical area of application, there is no wonder that besides internal waters and territo-

⁶¹ loc. cit., p. 334/335.

⁶² Former Malaysian Tourism Minister *Sabbaruddin Chik* as quoted by *Haller-Trost*, op. cit., p. 338 fn. 278, with further ref.

⁶³ This must be Swallow Reef, in Chinese: Danwan Jiao (cf. descriptions and comments on Malaysian military and civilian activities by *Haller-Trost* pp. 327/328, 454; *Schier* p. 584; *Hancox/Prescott* p. 20).

⁶⁴ This significant act of „rechristening“ is reported by *Haller-Trost*, p. 338 fn. 278, and confirmed by *Hancox/Prescott* p. 20.

⁶⁵ Cf. *JIAO Yongke*, op. cit., p. 49, speaking of Japan’s (alleged) “*haishang shengming xian*” (maritime lifeline) being the Nanhai (SCS) area.

⁶⁶ *Haller-Trost*, p. 341 fn. 292, with further ref.

⁶⁷ *JIAO Yongke* in the year 2000 makes a calculation as follows: Vietnam, the Philippines and Malaysia occupying “more than 44” features (i.e. full-fledged islands and reefs/rocks indiscriminately), “37 of which” being high-tide elevations; PRC occupies “8 high-tide elevations”, Vietnam “more than 29” of this kind; Philippines “9”; Malaysia “5”; Brunei Darussalam none except verbally claiming Nantong Jiao (Louisa Reef), see *JIAO Yongke*, op. cit., pp. 49/50.

⁶⁸ „*Wujumin haidao baohu yu liyong guanli guiding*” having entered into force 1 July 2003, in: *Zhonghua renmin gongheguo guowuyuan gongbao* (ggb = Gazette of the State Council of the PRC), no. 1096 (10 September 2003), pp. 45-47.

⁶⁹ The legislators seem to be on the *qui vive* especially in this point because of some confusion as to individual feature names in the past, cf. *Schier’s* 1988 study (op. cit., p. 582) in rather plain terms: “Ausserdem konnte sich der Autor bei der Auswertung der in den letzten 10 Jahren erschienenen chinesischen Karten des Eindrucks nicht verwehren, dass die Kartographen der Volksrepublik China das Gebiet, das China beansprucht, nicht sehr genau kennen, da in diesen Karten Namen und Lage der einzelnen Spratlys häufig wechseln” (italics my own).

rial sea (contiguous zone is omitted but probably taken as truism) in focus are also the EEZ and continental shelf areas, herewith presumably not only incorporating relevant provisions of both 1992 and 1998 maritime zone laws in general but also in detail the crucial art. 14 of the 1998 (EEZ and shelf) Law concerning "historic rights unaffected"⁷⁰: This presumption is based upon the fact that in art. 2 of the 2003 Provisions we find the blank formula "... *ji qita guanxia haiyu nei*" ("and [applicable] also within other maritime areas under jurisdiction [of the PRC]"), which evasive expression appears to be only intelligible by referring to those (yet) unspecified "historic rights" or "historic titles". Instinctively, the observer at this instant straightaway thinks of features like Macclesfield Bank or "Great-Grandmother's hidden sands", i.e. - with still more plasticity - of the "maritime areas" surrounding both of them, but in reality hiding them from view.

What interests us most here in terms of "safeguarding high-tide status versus low-tide (or still worse) elevation status", are parts of art. 3 of the 2003 Provisions: "The State ... imposes rigorous restrictions upon engineering works like blasting, trenching, excavating, digging up or digging away sands, stones or grit on and at islands, linking or connecting dams and dykes with islands and all other activities harmful to ecosystems, environment and natural landscape and scenery of uninhabited sea islands" and, perhaps yet more conspicuous, art. 34: "(par.) (2) blasting on and at islands means all activities by ways and methods of human works or engineering that are apt to reduce the height or altitude of islands or reefs and thereby causing islands or islets not to protrude above water at high tide anymore or causing low-tide elevations not to protrude above water at low tide anymore". Understandably, any activities in the opposite direction are not ostracised or stigmatised, i. e. "lifting up a little bit" existing structures or formations that are, unfortunately, at present not yet awash, or narrowly graze or miss, be it at hair's breadth, the relevant high-tide or low-tide mark. Another point of concern is art. 33 par. 2 of the Provisions, reading: "In case of imperative need to change the status of an uninhabited sea island into that of an inhabited island the relevant matter is, besides being subject to these provisions' approval procedure, to be submitted through the consecutive authorized channels up to State Oceanic Administration, Ministry of Civil Affairs and Headquarters of General Staff of Chinese People's Liberation Army". In view of possible

collision risks may I parenthesise, that the "Provisions" were enacted approximately eight months after signing by ASEAN member states and PRC foreign ministers of the SCS "Code of Conduct" (*not* legally binding) which provided, *inter alia*, in item 5:

"The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the *presently uninhabited islands, reefs, shoals, cays, and other features* and to handle their differences in a constructive manner" (italics added)⁷¹.

4. Rocks

ZHAO Lihai in due course discusses also the extremely unfortunate and misleading term "rock" (*yanjiao*) inserted into UNCLOS art. 121 par. 3. He seems to be mouse-trapped by the subliminal connotation of this term which sticks to one's mind by optical patterns i.e. the false notion that this term ought to have something to do with size, proportions or geological configuration of such an individual feature. As Norwegian specialist *Gjetnes* has outlined convincingly and in considerable detail⁷², the notion just mentioned is practically irrelevant in that sense that any formation, regardless of its size, which meets the requirements of art. 121 par. 1 is automatically stripped of the benefits of par. 2 when one of the two criteria written into par. 3 applies to it: either "cannot sustain habitation" or "[cannot sustain] economic life of their own". If the term "rock" in par. 3 would *not* be treated as a mere *exemplary* subcategory of par. 1, the utterly absurd consequence would be that any tiny barren feature at hair's breadth protruding above water at high tide, evidently lacking the two criteria incorporated in par. 3 would automatically qualify for maritime zones outlined in par. 2. As to these two criteria of par. 3 - the drafting history of this formula offering little help - there is difference in scholarly opinion (duly underlined by ZHAO Lihai also) whether the word "or" (in the French version "ou", in the German version "oder") has to be interpreted as being conjunctive or disjunctive. ZHAO Lihai prefers the latter, which assessment conforms to the majority of authors⁷³ and evidently corresponds to the normal feeling for language also when the French and German version are taken into account: In the words of

⁷¹ See ODIL vol. 34 (2003), p. 283.

⁷² cf. *Gjetnes*, op. cit. (my footnote 4), pp. 193/194, concentrating on a judgment of Supreme Court of Norway 1996 and the ICJ ruling in the Jan Mayen Case.

⁷³ In this direction, e.g., *Oude Elferink*, op. cit., p. 173/174; *Gjetnes*, op. cit. p. 194/195.

⁷⁰ Reading „Provisions of this Law do not affect historic rights enjoyed by the PRC“.

Gjetnes who studied the *travaux préparatoires* to art. 121 *in extenso*⁷⁴ a feature does not need to sustain human habitation if it can have an economic life of its own without such habitation – the same must apply of course *vice versa*: A feature does not need to have an economic life of its own if it can sustain human habitation, which latter formula by the way – taking the true sense of the term “can(not) sustain” into account – does not require permanent habitation nor actual habitation taking place or having taken place at a given moment during the efflux of time.

As in the present study sufficient space is lacking for a thorough examination of the two criteria in art. 121 par. 3 UNCLOS with special regard to their ticklish interrelation problems, I may pick out at random one peculiar issue obviously crucial to some features shown in the Beijing TV program of 1 October 2001: *Gjetnes*, summing up relevant authors and *travaux préparatoires*, asserts that the “human habitation” formula requires at least the possibility of a permanent *civilian* population and that *soldiers* and lighthouse keepers are not sufficient⁷⁵ (italics my own). I would add, the “*Grauzone*” (“gray zone”) in between these two poles appears to be somewhat “swampy”! Be that as it may, one thing is important: *ZHAO Lihai* himself concedes that “the overwhelming majority of law scholars admit the formula, that art. 121 UNCLOS requires a stable residence of organised groups of human beings using the surrounding ocean area for life support”.⁷⁶

Unfortunately, *ZHAO Lihai* deviates from these realistic and sober assessments with regard to art. 121 UNCLOS when turning to the issues of “submerged features”: May we take as examples of this category only two which are probably the most famous of them: *Zhongsha qundao* (Macclesfield Bank) and *Zengmu ansha* (“Great-Grandmother’s hidden sands” = James Shoal). In both cases *ZHAO Lihai* as one of the leading international law scholars of the PRC understandably could not avoid to come into line with the traditional Chinese territorial sovereignty dogma which is based upon long-standing

“national interest” and corroborated by a practically uninterrupted cartographic tradition of Chinese origin maps – the meanwhile well-known “U-shaped” or more officially “continuously segmented boundary line” – dating back to the forties of last century, reading as follows in the case of Macclesfield Bank, for instance (in *ZHAO Lihai*’s own words): “*Zhongsha qundao* is part of our country’s *territory* since ancient times” (italics added), the same *mantra* naturally applies to “*Zengmu ansha*”⁷⁷.

As to the geological and biological facts: Both formations are coral structures permanently underwater, in the first case in at least 9 metres distance to the ocean surface, in the latter case ca. 22 metres or 12 fathoms. Even a Chinese-born international law authority like *QIU Hongda* (Hungdah Chiu), an outstanding Taiwan-based international law scholar and politician, conceded in 1975: “... with respect to the submerged Macclesfield Bank, it is *questionable* whether what lies *underwater* may be *owned*” (italics added)⁷⁸. There are, interestingly, indications that some circles and scholars during the former Guomintang era and even in the PRC occasionally harboured faint hopes that sometime in the future those coral banks would, by way of continuous growth process, touch the ocean surface at last, or even rise beyond that level (emerging as “low-tide” or even “high-tide” elevations finally), due to the natural viability and expansion of corals being anthozoan polyps with reef-building capacity: One particular PRC author even calculated that as the present underwater “peak” of the Macclesfield Bank lies approximately 10 meters below surface, taken into account the average growth rate of the local anthozoa species amounting to 10 centimetres *per annum*, the formation in question would be awash in about 100 years!⁷⁹ “Reveries” of that genre came

⁷⁷ *ZHAO Lihai*, op. cit., p. 52 and 53ff. It must not be left out that he adds “no other state has ever raised objection to this”, a point of course that deserves meticulous examination under international law as it touches so sensitive questions like “acquiescence”, “estoppel”, “map claims” etc. etc. In the case of “Great-Grandmother’s hidden sands”, by the way, *ZHAO Lihai* has made some interesting remarks pertaining to the “resources’ issue”: “In detail, the Zengmu ansha basin has an area of 300,000 sq.km, oil and gas deposits reach about 4000-8000 cubic metres, the reserves to be around 15 billions of tons” (loc. cit., p. 51). In another context *ZHAO Lihai* admits that Zengmu ansha being only 50 nm away from Malaysia’s Sarawak sea coast on Borneo is encompassed, like a few other submerged features in the vicinity (Mengyi ansha = Friendship Shoal, Beikang ansha = North Luconia Shoals, Nankang ansha = South Luconia Shoals et al.), well within the 200 m depth continental shelf line of Malaysia, “hence there is a problem with Malaysia unless it accepts our claims” (loc. cit., p. 59).

⁷⁸ *Hungdah Chiu* and *Choon-Ho Park*, Legal Status of the Parcel and Spratly Islands, in: ODIL vol. 3 (1975), pp. 1-28, 5.

⁷⁹ *Chen Dongkang*, Woguo de nanhai qundao (Archipelagos in our country’s Southern Sea), Beijing: Zhongguo qingnian chubanshe, 1964, pp. 31-32. For similar statements during the Guomintang era cf. *Strupp* 1985 pp. 146, 182/183; *Strupp* 1982 (Wien), p. 188 (fn. 83, with special reference to the term “*shangwei*” in key-word article „*Zhongsha qun-*

⁷⁴ *Gjetnes*’ painstaking thesis „The Legal Regime of Islands in the South China Sea” is available at www.sum.uio.no/southchinasea.

⁷⁵ *Gjetnes* (2001), p. 195. *Gjetnes* adds: „The UNCLOS III *travaux préparatoires* seem also to support the interpretation that personnel stationed on an island for preservation and scientific purposes should not be taken into account”, loc. cit.

⁷⁶ *ZHAO Lihai*, op. cit., p. 57, apparently referring (fn. 21 at p. 63) to *Jon M. Van Dyke* and *Robert A. Brooks*, Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources, in: ODIL vol. 12 (1983), pp. 265-300, 288 and *passim*. See also: *Jon Van Dyke*, *Joseph Morgan*, and *Jonathan Gurish*, The Exclusive Economic Zone of the Hawaiian Islands: When do Uninhabited Islands Generate an EEZ?, in: San Diego Law Review vol. 25 (1988), pp. 425ff.

definitely to an end with the devastating consequences of global and regional climatic changes - inter alia, dramatic rates of coral shrinking instead of growing and concurrently rising sea levels - looming up with dangerous increment during the last few decades⁸⁰.

Unfortunately, the insertion of the extremely momentous art. 14, concerning "historic rights remaining unaffected", into Beijing's 1998 EEZ and Shelf Law⁸¹ had the impact of still further refuelling the debate on the practical importance, even at the beginning of the 21st century marked by progressive political and economic rapprochement between PRC and ASEAN member states, of the ominous cartographical "U-shaped" claim. While reading the passage concerning "historic rights remaining unaffected, one has the irresistible impression that these must be "residual" rights or titles of some not yet defined kind, carefully kept up the sleeve maybe as a "bargaining chip"⁸²

VII. The Chinese Claim to the Entire South China Sea

As to possible "intertemporal law" doctrine considerations: The notion of the entire South China Sea, i.e., the whole perimeter of this maritime region with virtually all ocean surface encompassed, plus eventually the water-column superjacent to the seabed, the sea-bed itself and its subsoil, as having been acquired per "territory" title by Chinese ancestors' is really difficult even to conceive, especially for "Westerners": As well-known German law of the sea authority *Graf Vitzthum* recently pointed out, "[d]ass ein Staat der vorklassischen Antike jemals Teile des Meeres als zum Staatsgebiet gehörig erachtet hat, ist nicht nachgewiesen"⁸³. Notions like marine "Aquitorium"⁸⁴ or "mare nostrum"⁸⁵ of the Roman law era also had nothing to do with any

conception of such kind of exorbitant domain claims, which, according to our admittedly "eurocentric" and not "sinocentric" sense of law, maritime law and law of the sea included, could easily be put into the drawer "moon claim".

There could be of course the - not necessarily eccentric - idea of conceiving "tianxia" (all under heaven) as a "fundament" of Sinocentrism aiming in this context at the conception of the Chinese Emperor's traditional realm and empire with the entire ocean sphere of the globe included: But as Professor of Sinology at Munich University *Roderich Ptak*, a specialist in interactions and interrelations between China proper and the southern Asian sphere, has outlined in an excellent study on the topic: *Gewiß, sie [i.e. the historic denominations *shitang*, *changsha* etc. used in Chinese sources of the past for the entire SCS area or parts of it in an inextricably interchanged mode] waren ein Teil der Welt, ein Stück t'ien-hsia [=tianxia], aber sie blieben größtenteils undefinierbare Gebilde, voller Gefahren, bisweilen in die Gefilde der Phantasie entrückt ... Eine eindeutige Zuordnung zu jenen Regionen, die Chinas "Grenzraum" bildeten, ist kaum möglich ... Ebenso schwer fällt die Gleichsetzung mit einem Meer (hai, yang) oder einem Meeresteil. Die Südgrenze des Ch'i-chou-yang [= Qizhouyang] blieb stets vage definiert (wenn sie überhaupt je richtig definiert war), die räumliche Ausdehnung des Inselgebietes war unbekannt"⁸⁶.*

It is well known that the "U-shaped" line on Chinese maps⁸⁷ was extensively exploited, particularly by Soviet Russian authors, as a propagandistic topic for polemic exchanges being part of ideological trench warfare during the times of the "Moscow-Peking schism": The Soviet writer *Stepanov*, for instance, stated in his book published 1980 in Moscow that the PRC aims at expanding its sovereignty over the "entire body of water" (in Russian: vsja akvatorija) encompassed by the South China Sea, i.e. over virtually the High Sea as a whole in this region⁸⁸.

The former Soviet Union has considered virtually all Siberian seas, i.e. the Kara Sea, Laptev Sea,

dao" in the popular Chinese encyclopaedia "Cihai", Shanghai 1979, p. 3232).

⁸⁰ See *Lauretta Marie Burke, Elizabeth Selig, and Mark Spalding*, Reefs at risk in Southeast Asia, Washington D.C.: World Resources Institute, 2002; cf. also *Haller-Trost*, op. cit. p. 341, and yet more recently *Tom Nass*, Dangers to the Environment, in: *Timo Kivimäki* (Ed.), War or Peace in the South China Sea?, Copenhagen: NIAS Press, 2002, pp. 43-53, 44 ("29% of coral reefs are in a good condition ... 46% are in a poor condition and 14% in a critical condition", with further ref.).

⁸¹ As *ZOU Keyuan* of Singapore National University underlined, the draft law contained no stipulation on historic rights, art. 14 was inserted in the final stage of adoption at the NPC - however, there was no explanation (*ZOU Keyuan*, op. cit. = my fn. 24 *supra*, p. 167 his fn. 90).

⁸² A funny, but fairly apt expression employed by *Scheerer*, op. cit., p. 41 and *passim*.

⁸³ *Wolfgang Graf Vitzthum*, Seerechtsfrühgeschichte - Von der vorklassischen Antike bis zur hellenistisch-römischen Epoche, in: „Ins Wasser geworfen und Ozeane durchquert“: Festschrift für *Knut Wolfgang Nörr*, Hrsg. *Mario Ascheri*, Köln etc.: Böhlau, 2003, pp. 1031-1056, 1037.

⁸⁴ *Vitzthum*, p. 1041.

⁸⁵ *Vitzthum*, pp. 1047.

⁸⁶ *Roderich Ptak*, Die Paracel- und Spratly-Inseln in Sung-, Yuan- und frühen Ming-Texten: Ein maritimes Grenzgebiet?, in: *Sabine Dabringhaus und Roderich Ptak* (Ed.), China and Her Neighbours: Borders, Visions of the Other, Foreign Policy 10th to 19th Century, Wiesbaden: Harrassowitz, 1997, pp. 159-179, 179.

⁸⁷ See for a general outline of the historical evolution of the issue *Li Jinning* and *Li Dexia*, The Dotted Line on the Chinese Map of the South China Sea: A Note, in: *ODIL* vol. 34 (2003), pp. 287-295.

⁸⁸ *Eugenij D. Stepanov*, Ekspansija Kitaja na more (China's Expansion on the Sea), Moskva: Izdatel'stvo Meždunarodnye otnošeniya, 1980, chapter "Pritjazanija Pekina na suverenitet nad otkrytym morem" (Peking's pretensions on sovereignty over the High Sea), pp. 76-87, 81/82.

East Siberian Sea and Chukotsk Sea as “Soviet internal waters”⁸⁹. Like their former Soviet counterpart (with regard to the Arctic seas), Chinese authors are invoking intensely the international law doctrine associated with the notion of “acquiescence”. In this context, however, there are some serious obstacles for admitting such a line of argumentation. As particularly Indonesian outstanding SCS specialist and ASEAN/China “Code of Conduct” indefatigable promoter Ambassador *Hasjim Djalal* pointed out: “China ... has based its claim on a map produced in 1947 by the Republic of China, indicating nine undefined, discontinued and dotted lines ... There was no definition of those dotted lines, nor were their coordinates stated. Therefore the legality and the precise locations indicated by those lines are not clear. It is presumed, however, that what China claims, is at least enclosed by those nine undefined-dotted lines. It is inconceivable that in 1947, when general international law still recognized only a three mile territorial sea limit, that China would claim the entire South China Sea. A careful reading of its February 25, 1992 Law strengthens this assumption, despite the fact that some of the recent Chinese writers seem also to imply that China also claims the “adjacent sea” of the islands and rocks. Again, the concept of “adjacent sea” has not been clearly defined and therefore it is difficult to understand its legal meaning. In fact, this concept (“adjacent seas”) does not occur in the Law of the Sea Convention of 1982 since the convention only stipulates internal waters, archipelagic waters, territorial seas, contiguous zones, exclusive economic zones, continental shelves and high seas, and that the measurements of those waters or zones should start from base points on land, or appropriate baselines, connecting legitimate points, and not by arbitrarily drawing them at sea”⁹⁰. It should be noted that the legally dubious denomination “adjacent waters” (*fujin haiyu*), stigmatised so distinctly by *Hasjim Djalal*, was employed also by PRC law of the sea *doyen* ZHAO Lihai in one of his publications in 1996 (as quoted by *LI Jinming* and *LI Dexia*): “[T]he nine-dotted line indicates clearly Chinese territory and sovereignty of the

four islands [groups] in the South China Sea and confirm China’s maritime boundary of the South China Sea Islands that have been included in Chinese domain at least since the 15th century. All the islands *and their adjacent waters* within the boundary line should be under the jurisdiction and control of China”⁹¹ (italics i.e. emphasis added by me). Perhaps in connection with the term “adjacent waters” mentioned by *Djalal* as being non-existent in the UNCLOS text, PRC author *JIAO Yongke* has considerably modified this concept towards a sort of “Exclusive Economic Zone” *sui generis*, when he writes:

“The water areas within China’s Southern Sea boundary line constitute water areas over which China has a historic proprietary title, they constitute China’s *specific exclusive economic zone* [teshu zhuan shu jingji qu – italics added], or *historic exclusive economic zone* [lishixing zhuan shu jingji qu – italics added], hence it ought to have the same status as the EEZ under UNCLOS provisions”⁹².

Unfortunately, such denotations as invented by *JIAO Yongke* cannot be found in the entire UNCLOS treaty text signed and ratified by the PRC. *ZOU Keyuan* argues, nevertheless, with particular reference to the ICJ Tunisia/Libya Continental Shelf Case:

“As the ICJ once stated, general international law does not provide for a single ‘regime’ of historic waters or historic bays, but only for a particular regime for each of several specific, generally recognized cases of historic waters or historic bays. From this point of view, China’s claim can be regarded as one of these particular cases, which may stand up in international law as doctrine evolves over time”⁹³.

In this very context *ZOU Keyuan* does not forget to demand “that the formulation of the concept of historic waters requires an adjustment of the generally accepted law of the sea regimes ... [t]here is a

⁸⁹ S. A. *Vyšnepol’skij*, K probleme pravovogo režima arktičeskoj oblasti (Concerning the problem of the legal regime of the Arctic region), in: *Sovetskoe gosudarstvo i pravo* (Soviet State and Law), no. 7/1952, pp. 36-45, 38, 45. Using practically the same pattern as it is the case with China, the USSR argued, with regard to the Kara Sea for instance, that the (historic) “right of Russia, and by virtue of succession, that of the USSR to establish autonomously any legal regime of navigation in the Kara Sea, a right exercised for centuries, was never subject to any protest on the part of foreign states and must be recognised as an ‘uninterrupted and indisputable custom’ [nepreryvnyy i neospornyj obyčajem]”, loc. cit., p. 45.

⁹⁰ *Hasjim Djalal*, South China Sea Island Disputes, in: *Nordquist* (Ed.), op. cit., pp. 109-133, 113/114.

⁹¹ ZHAO Lihai, *Haiyangfa wenti yanjiu* (Studies on the Law of the Sea), Beijing: Beijing daxue chubanshe, 1996, p. 37 (as I was not able to see this publication, I must cite from *LI* and *LI*, op. cit., pp. 291 and 294 fn. 7).

⁹² *JIAO Yongke*, op. cit., p. 52. It should be added that the PRC appears to harbour very rigid interpretations (in favour of own “national interest” aspects of course, especially as it relates to security concerns) interpretations concerning several characteristics of the EEZ regime of UNCLOS Part V, art. 55-75: See for instance the handling of the “Bowditch” affair (treated under aspects of PRC international law doctrine by *DING Chengyao*, *Cong guojifa jiaodu kan Meiguo celiang chuan chuangu Zhongguo zhuan shu jingji qu shijian* = On Event of American Survey Vessel Intruding into China’s EEZ from the Aspect of International Law, in: *Huadong zhengfa xue yuan xuebao* = Journal of the East China University of Politics and Law, March 2003 = no. 27, pp. 79-82; see for this incident also FEER 10 October 2002 p. 28, with the nerves-soothing message “Both sides indicated that neither planned to make the incident a major issue”.

⁹³ *ZOU Keyuan*, op. cit., p. 163 (with further ref. to ICJ Tunisia/Libya Shelf Case).

trend toward the application and assertion of historic claims whether to bays, waters or rights in spite of the establishment of new legal concepts such as the EEZ and continental shelf in the law of the sea⁹⁴. Going back to the thirties and forties of last century, when the curious “U-shaped” line really took shape in the brains of Chinese politicians and cartographers and was fixed afterwards on Chinese origin maps⁹⁵, it should be kept in mind that the notion of the “High Seas” and, more in detail, the topic “Freedom of the High Seas”, were of almost absolute and paramount importance in the international law of the sea sphere during that era⁹⁶. From this point of view a dotted line on maps like the “U-shaped” one practised by Chinese cartographers must have left in sheer everybody’s mind (outside China) when studying such maps the ineluctable impression that this was virtually nothing more than a “moon claim”. Admittedly, the argument put forward by JIAO Yongke, for instance⁹⁷, cannot be brushed aside completely that prior to the first serious reports concerning immense natural resources

(oil and gas, polymetallic nodules etc.) to be dated into the late sixties and beginning seventies, nobody cared about this “U-shaped line” – new national states, having thrown off the colonial yoke, around the South East Asian ocean space perimeter and periphery included.

But this strange U-shape claim was so abnormal and so exorbitantly outside reality during the decades 30 to 60 that it is not conceivable that by way of “acquiescence with regard to map claims” a (tacit) recognition by the foreign states community of those “extremely irregular” pretensions, by application of rule *qui tacet consentire videtur si loqui debuisset ac potuisset* or else, could seriously come under examination⁹⁸.

Haller-Trost⁹⁹ quotes me from my 1982 Hamburg (Institute of Asian Affairs) publication¹⁰⁰ while discussing the possibility that “one interpretation might be that this ‘U-Line’ was originally nothing more than a line to delimit the extent of the territorial claims to the island groups lying within this perimeter”. Relevant faint signals sent out by Beijing authors during the last few years are confusing, inconsistent and even contradictory. Surprisingly realistic in the sense that there is in some scholarly circles considerable shifting to the “islands” question separately and exclusively appears to be an assessment made by Professor GAO Zhiguo, director of the Institute for Marine Development Strategy, State Oceanic Administration in Beijing, and, concurrently, Member of the Editorial Board of the leading Law of the Sea science organ “Ocean Development and International Law” (Philadelphia/USA), who considered, already in 1994, the nine-dotted line on Chinese maps as delineating ownership of islands

⁹⁴ ZOU Keyuan, op. cit., pp. 163-164, citing for this assessment one somewhat ephemeral literary reference from two decades ago, namely Francesco Francioni, The Status of the Gulf of Sirte in International Law, in: Syr. (=Syracuse) Journal of International Law & Com., vol. 11 (1984), p. 325 (not seen by the present author, hence quoted after ZOU Keyuan, p. 168): “The number and frequency of coastal states’ claims in this regard shows that the old concept of an historic bay is currently evolving into a more flexible notion whose crucial elements are the bona fide assertion of State interests and the recognition of and acquiescence of third states, rather than immemorial usage and the long passage of time”.

⁹⁵ See the relevant informations given by ZHAO Lihai, pp. 59-60, LI and LI (2003), pp. 287-290. It should be noted that initially China’s so-called “Land and Water Maps Inspection Committee” was not so oversolicitous in pressing the U-shape cartographic claim: As LI and LI reported, on 12 March 1935 the Committee stipulated that “except on the large-scale national administrative maps of China that should delineate the Pratas Islands, the Paracel Islands, the Macclesfield Bank and the Spratly Islands, other maps need not mark or note these islands if the locations of the islands were beyond the extent of the maps”, cf. LI and LI, p. 289, with further ref. The wording in this 1935 instruction of an official Chinese State Committee corroborates, by the way, the impression that the paramount accent lay, from the very beginning, not so much on the *water* area claim than positively on the *island* claim!

⁹⁶ Even such an outstanding apologist of Nazi and Fascist “Grossraum” phantasmagorias (Japanese militarists’ scheme of “Greater East Asian Co-Prosperty Sphere” = Dai To-A kyooeiken included!) during the 30s/40s, as was in fact Carl Schmitt, conceded in peculiar connection with the notions “High Seas” and “Freedom of the High Seas” in 1941 as follows: “Der Erdrum ist entweder festes Land (und dann wiederum entweder bereits wirkliches Staatsgebiet oder herrenloses, dem Erwerb durch Okkupation seitens einer Staatsgewalt zugängliches, also potentielles Staatsgebiet) oder aber freies Meer, wobei die Freiheit des Meeres wesentlich darin besteht, dass das Meer, die hohe See, weder wirkliches noch mögliches Staatsgebiet ist” (italics added), see Carl Schmitt, Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte: ein Beitrag zum Reichsbegriff im Völkerrecht, reprint (Berlin: Duncker & Humblot, 1991) of 4th exp. ed. Berlin, Leipzig: Deutscher Rechtsverlag, 1941, p. 66) and furthermore as follows: „Das Meer ist frei im Sinne von staatsfrei, d.h. frei von der einzigen Raumordnungsvorstellung des staatsbezogenen Rechtsdenkens” (op. cit., p. 82). For the notion „High Seas” in general cf. also Tullio Treves, key-word article in: EPIL vol. II, 1995, pp. 705-710.

⁹⁷ JIAO Yongke, op. cit., p. 49.

⁹⁸ Blum (1965), op. cit., p. 150, stated that “recent instances of protests lodged against ‘map claims’ seem to indicate that States do, in fact, ‘keep a vigilant watch over the maps published by the civilized nations”, contrary to what had been asserted on behalf of Great Britain in the course of the deliberations in the *Alaskan Boundary Dispute*. On the whole, it seems to emerge that States will be imputed with knowledge of each other’s domestic legislative activities and other acts done under their authority, and that the plea of ignorance will be accepted only in the most exceptional circumstances. States desirous of reserving their rights will therefore be well advised to follow with a substantial amount of self-interested awareness the official acts of other States and to raise an objection to them - through the legitimate means recognized by international law - should they feel that their rights have been affected, or are likely to be affected, by such acts”. In this context Blum refers, naturally, to the ICJ Temple of Preah Vihear Case (pp. 150/151; see also the relevant key-word article by Ann Rustemeyer in EPIL vol. IV, 2000, pp. 808-810; Strupp 1987, pp. 103, 236, 483 = „map claims and acquiescence”). In the utterly eccentric “moon claim”-like circumstances of the SCS “U-shaped line” evidently exists no rational basis at all for such enormously high degree of “hyper-sensitivity” on behalf of states confronted with adverse map claims in terms of “acquiescence”.

⁹⁹ Haller-Trost, op. cit., p. 330.

¹⁰⁰ p. 30 therein. The original wording was of course in German.

rather than being a maritime boundary. He conceded verbatim, in his 1994 article, the following:

“A careful study of Chinese documents reveals that China never has claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line. Thus the boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense”¹⁰¹.

On the other hand, there still remains a Chinese “multivoiced choir”¹⁰² as to the actual meaning, practical importance and future perspective of the topic “U-shaped Line”. *Haller-Trost* correctly underlines, that the central “crux” of the issue lies in the fact that the PRC Government “has found it ‘convenient’ not to commit itself openly to the status of the waters contained therein in order [to] show flexibility in renouncing this presumed historic water claim in later negotiations”, but this scheme in *Haller-Trost’s* eyes is “nothing more than a particular stratagem” of the Chinese¹⁰³!

¹⁰¹ *Zhiguo Gao*, *The South China Sea: From Conflict to Cooperation?*, in *ODIL* vol. 25 (1994), pp. 345-359, 346. Unfortunately there, once again, is the ominous blank formula “surrounding waters” = “adjacent waters”.

¹⁰² As can be demonstrated by relevant passages and quotations contained in: *LI* and *LI*, op. cit., pp. 291-294. *ZOU Keyuan* himself being not free from ambiguities in his pertinent statements wrote fittingly: “On the one hand, it seems that China does not claim everything within the line as can be seen from its diplomatic notes, relevant laws and public statements. What China claims are the islands and their adjacent waters within the line ... On the other hand, a number of factors may give people the impression that China regards the line as its maritime boundary line” (quoted by *LI* and *LI*, pp. 291 and 294 = fn. 9 as further reference).

¹⁰³ *Haller-Trost*, op. cit., p. 330.

VIII. Conclusion

May I conclude with the remark, that - in my opinion - the question of the ownership, the legal acquisition title with regard to the individual islands within the SCS perimeter, is a thoroughly different matter. But this is another story. At this place only one last estimation of mine: None of the four other competitors, i.e. Vietnam, Philippines, Malaysia and Brunei (Indonesia’s Natuna issue neglected), has such an impressive record of evidence under international law relating to sovereignty acquisition titles over the truly “full-fledged” insular formations i.e. “islands” in obvious accordance with art. 121 UNCLOS - at least back to the beginnings of the Ming Dynasty (ca. 1400 and after) - as it is the case with China¹⁰⁴.

¹⁰⁴ The arguments put forward by *Dana R. Dillon* cannot be accepted, because it is not China’s fault that the other competitors are not able to submit as yet, in an even by far comparable extent, such ample, detailed and in history (at least up from the Ming) firmly rooted evidence with a tangibly and juridically sufficient quality living up to international legal adjudication standards, as it is the case with China. *Dillon* wrote in his article “How the Bush Administration Should Handle China and South China Sea Maritime Territorial Disputes” dated Sept. 5, 2001 (available at <http://www.heritage.org/Research/AsiaandthePacific/BG1470.cfm>) as follows: “Finally, ancient Chinese records do not nullify the rights of the indigenous Philippine, Malaysian, and Bruneian peoples. The ancestors of today’s Filipinos, Malaysians, and Bruneians arrived on those archipelagos long before written Chinese history. They did not walk to those islands, so they must have sailed or paddled through both the Spratly and Paracel Islands to arrive where they are living today. Although the Spratly and Paracel Islands were too small for habitation, these people settled close to these islands and reefs and must be assumed to have fished and economically exploited them at least as much as the Chinese did”.