

The purpose of this paper is to examine the interpretation and possible application of Article 121, in particular its third paragraph, to the five selected disputed islands. Following this introductory section, a brief summary of the development of the “Regime of Islands” at the Third United Nations Conference on the Law of the Sea (hereafter referred to as UNCLOS III) [7] will be given in Section II, focusing in particular on those proposals made by the participating delegations to amend or delete entirely Article 121(3) of UNCLOS. In Section III, the views of the law of the sea experts on interpretation and application of Article 121(3) will be examined. In Section IV, several selected examples of state practices with regard to the application or interpretation of Article 121(3) are discussed. This is to be followed by discussing the interpretation and possible application of Article 121(3) to the five disputed islands in Section V. The last section will end the paper by providing several suggestions for possible amendment of Article 121 or policy measures to help deal with the confusion found in Article 121(3).



INTRODUCTION

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The South China Sea, located in south of mainland China and Taiwan, west of the Philippines, north west of Sabah (Malaysia), Sarawak (Malaysia) and Brunei, north of Indonesia, north east of the Malay peninsula (Malaysia) and Singapore, and east of Vietnam, is the largest [marginal sea](#)

in the world. It is a part of the

[Pacific Ocean](#)

, encompassing an area from

[Singapore](#)

to the

[Strait of Taiwan](#)

of around 3.5 million km². The South China Sea has a wide continental shelf to the south, runoff from several large rivers, and a deep basin over 3,000 meter deep. It is subject to physical forcing of the alternating southeastern Asian monsoons, typhoons, strong internal waves, El Niño and Southern Oscillation and sensitive to climate change because of its location.

Hundreds of islands, reefs, shoals, sands, or rocks, collectively known as the Pratas, Paracel, Macclesfield Bank, and Spratly archipelagos, are situated respectively in the northern, western, central, and southern parts of the South China Sea.

Within the sea, there are five islands, namely Yongxing Dao/Dao Phu Lam (Woody Island) [\[1\]](#), Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island)

[\[2\]](#)

, Taiping Dao/Dao Ba Binh/Ligaw Island (Itu Aba, Taiping Island)

[\[3\]](#)

, Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef)

[\[4\]](#)

, and Nanwei Dao/Dao Troung Sa/Lagos (Spratly Island)

[\[5\]](#)

, that are subject to competing claims of sovereignty by China, Malaysia, the Philippines, Taiwan, and Vietnam. While these islands have no permanent human habitation, no supply of natural fresh water (perhaps with the exception of Itu Aba), and no economic life of their own at present, they all have runway and military or coastal guard personnel stationed there. One of the interesting legal questions that can be raised is about the right of these islands to claim a 200 nautical mile exclusive economic zone (EEZ) and continental shelf based on the existing international law. Article 121, paragraph 3 of the United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS)

[\[6\]](#)

provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” Should Yongxing Dao/Dao Phu Lam (Woody Island) be considered “rock”? Does it have the capacity to sustain human habitation or economic life of its own? Does it have the right to claim a 200 nautical mile of EEZ or continental shelf? These questions also go to the other four disputed islands that are situated in the Spratly archipelago in the southern part of the South China Sea.

The purpose of this paper is to examine the interpretation and possible application of Article 121, in particular its third paragraph, to the five selected disputed islands. Following this introductory section, a brief summary of the development of the “Regime of Islands” at the Third United Nations Conference on the Law of the Sea (hereafter referred to as UNCLOS III) [7] will be given in Section II, focusing in particular on those proposals made by the participating delegations to amend or delete entirely Article 121(3) of UNCLOS. In Section III, the views of the law of the sea experts on interpretation and application of Article 121(3) will be examined. In Section IV, several selected examples of state practices with regard to the application or interpretation of Article 121(3) are discussed. This is to be followed by discussing the interpretation and possible application of Article 121(3) to the five disputed islands in Section V. The last section will end the paper by providing several suggestions for possible amendment of Article 121 or policy measures to help deal with the confusion found in Article 121(3).

THE CONSIDERATION OF THE “REGIME OF ISLANDS” AT UNCLOS III

Before UNCLOS III (1973-1982) was held, a number of statements, suggestions, or proposals relating to the issues of establishing a legal regime of islands had already been made or submitted by the delegations that attended the meetings of Sub-Committee II of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (abbreviated and known as the Sea-Bed Committee) between March 1971 and November 1973. These statements, suggestions, or proposals constituted the preliminary groundwork for the work of UNCLOS III on the specific question of the regime of islands. [8]

Being considered “main trends” in the development of a legal regime of islands in the early 1970s, these statements, suggestions, or proposals indicated that: (1) the definition of an island as given in Article 10, paragraph 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone should be retained; (2) the same criteria applicable for the delimitations of the territorial sea and the continental shelf of continental land masses should also be applied to islands; (3) islands, in the same manner as continental land masses, should also generate an EEZ or patrimonial sea of their own; and (4) for the purpose of determining the relevant maritime spaces of islands, a series of criteria should be taken into account, including such as the population, geomorphological structure and configuration, and the capacity requirements in particular concerning habitation and economic life. [9]

UNCLOS III started in 1973. While ten sessions had been held during UNCLOS III, [10] most of the statements, suggestions, or proposals on the regime of islands were made during the second session of UNCLOS III in 1974.

[11]

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Upon the conclusion of the sixth session of UNCLOS III in July 1977, the result of the work of the conference appeared in the Informal Composite Negotiating Text (ICNT), which was informal in character, served purely as a procedural device, and only provided a basis for negotiation without affecting the rights of any delegation to suggest revisions in the search for a consensus.

[\[12\]](#)

The question of the regime of islands was dealt with in Part VIII of the ICNT, which contained only one article, namely article 121.

[\[13\]](#)

Between the seventh and final session of UNCLOS III, held in 1978 and 1982, respectively a number of suggestions and amendments in relation to the regime of islands had been submitted. Several states, including Japan, [\[14\]](#) Greece, [\[15\]](#) France, [\[16\]](#) Venezuela, [\[17\]](#) the United Kingdom,

[\[18\]](#)

Brazil,

[\[19\]](#)

Portugal,

[\[20\]](#)

Iran,

[\[21\]](#)

Ecuador,

[\[22\]](#)

and Australia,

[\[23\]](#)

proposed or gave their support for the deletion of article 121, paragraph 3. At the same time, a number of states expressed their opposition against the proposal to amend or delete article 121 (3), which include Ireland

[\[24\]](#)

, Dominica Republic,

[\[25\]](#)

Singapore,

[\[26\]](#)

Germany,

[\[27\]](#)

U.S.S.R.,

[\[28\]](#)

Algeria,

[\[29\]](#)

Korea,

[\[30\]](#)

Denmark,

[\[31\]](#)

Mongolia,

[\[32\]](#)

Turkey,

[\[33\]](#)

and Colombia.

[\[34\]](#)

Japan gave three reasons to support her position on the deletion of paragraph 3 of article 121. First, "it was not right to make distinction between islands according to their size or according to whether or not they were habitable." Second, the 1958 Convention on the Continental Shelf made no distinction between habitable and uninhabitable islands. Third, many states which declared a 200-nautical-mile EEZ did not make such a distinction either. [\[35\]](#) France supported the Japanese proposal to delete article 121, paragraph 3, but without providing further explanation. The United Kingdom also proposed that article 121, paragraph 3 should be deleted because there was no basis in international law to discriminate between different forms of territory for the purposes of maritime zone and such discrimination would conflict with the rights of states in respect of their territories.

[\[36\]](#)

Brazil gave her support to the British proposal on the ground that there was no logical explanation for paragraph 3 of article 121.

[\[37\]](#)

However, Korea had difficulty in supporting the deletion of 121(3) because it undermined the delicate balance achieved through the long process of negotiations on the regime of islands.

[\[38\]](#)

U.S.S.R. was also opposed to the amendments to article 121 because they would destroy the compromise reached at the previous meetings.

[\[39\]](#)

Romania, the key country in the process of drafting article 121 at UNCLOS III, submitted a proposal to amend article 121 by adding a new paragraph 4, which read as follows:

"[u]nhabited islets should not have any effect on the maritime spaces belonging to the main coasts of the States concerned."

[\[40\]](#)

Despite the efforts made by some delegations at UNCLOS III, the regime of islands was dealt with in Part VIII of UNCLOS, which follows exactly the language of the previous draft as appeared in Part VIII of the ICNT. On April 30, 1982, the Convention was adopted. The United States was the only Western industrialized country to vote against the final treaty. Venezuela, Turkey and Israel also voted no. The U.S.S.R. and most Soviet bloc countries abstained, as did a few highly industrialized Western nations. Most of the West, including France and Japan, joined the Third World and voted yes. Altogether, 130 nations voted to adopt the treaty and open it for signature. The Convention was opened for signature on December 10, 1982 in Montego Bay, Jamaica. It is worth noting that upon signature of the Convention, Iran placed on the records its understanding in relation to certain provisions of UNCLOS. The main objective

for the Iranian submission was to avoid eventual future interpretation of a number of articles of the Convention in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations of the Islamic Republic of Iran. One of the understandings is related to Article 121 (3), in which Iran stated that

Islets situated in enclosed and semi-enclosed seas which potentially can sustain human habitation or economic life of their own but, due to climatic conditions, resources restriction or other limitations, have not yet been put to development, fall within the provisions of paragraph 2 of Article 121 concerning "Regime of islands", and have, therefore, full effect in boundary delimitation of various maritime zones of the interested coastal States.. [\[41\]](#)

Article 121 of UNCLOS is concerned with the legal regime of islands. The Convention also contains the codification of the then existing customary rules of international law, which include the rights and obligations of the coastal and third states in the territorial sea, contiguous zone, EEZ, and the high seas. But the three paragraphs under Article 121 of UNCLOS do not completely have customary international law properties. Article 121 paragraph 1 and 2 stipulate the definition and regulations that regard islands as having territorial sea and contiguous zones. These two paragraphs should be considered customary law because of the observation of state practice after the adoption of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, in which most nations accepted being bound by these regulations. Thus even non-parties to UNCLOS are bound by Article 121 paragraphs 1 and 2. However, given that paragraph 3 of Article 121 has not evolved into a rule of customary international law, its application is restricted to the parties of UNCLOS. The main reasons for the paragraph not becoming a rule of customary international law are: (1) the lack of state practice; and (2) the lack of opinio juris. [\[42\]](#) While Article 121(3) is not considered a rule of customary international law, it is considered general international law applicable to the entire continental shelf regime. Because the continental shelf regime is also an inherent part of the regime of EEZ, Article 121(3) is binding on states that are not parties to UNCLOS with respect to the EEZ and continental shelf regimes. [\[43\]](#) In the Jan Mayes case (Denmark v. Norway), Judge Evensen, in his separate concurring declaration, explicitly affirmed the status of Article 121(3) as part of general international law.

[\[44\]](#)

OPINIONS OF THE SELECTED INTERNATIONAL LEGAL SCHOLARS REGARDING THE INTERPRETATION OF ARTICLE 121(3)

Jon M. Van Dyke and Robert A. Brooks have explained that Article 121 of UNCLOS should be interpreted according to Article 31 of the 1969 Vienna Convention on the Law of Treaties, which

provides that “[a] treaty shall be interpreted in good faith 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.” [\[45\]](#) Because the purposes for establishing coastal EEZs cannot justify claims to EEZs around uninhabited islands situated far away from their coasts, Van Dyke and Brooks have argued that it is not consistent with the main purpose for adopting UNCLOS for remote rocks or reefs to generate extended maritime zones. Accordingly, only if stable communities of people live on the island and use the surrounding ocean areas, can islands generate ocean space, such as an EEZ or a continental shelf. [\[46\]](#) Van Dyke has argued that from the perspective of history, if a rock or reef cannot sustain human habitation permanently for 50 people, then it cannot claim an EEZ or a continental shelf.

[\[47\]](#)

Other international legal scholars such as Ely,

[\[48\]](#)

Pardo,

[\[49\]](#)

Gidel

[\[50\]](#)

and Hodgson

[\[51\]](#)

hold similar views.

Jonathan I. Charney adopted a broader interpretation towards the issue of whether rocks can enjoy rights to EEZs or continental shelves under Article 121(3). Charney held that rocks or reefs are a kind of island, and if they are not, then there is no need for Article 121(3) to be included in Part VIII of UNCLOS. In addition, because Article 121 (3) uses the word “or” between “human habitation” and “economic life of their own”, it is only necessary to prove that an island or rock can sustain human habitation OR economic activity of its own to be able to claim an EEZ or continental shelf. [\[52\]](#)

After examining the travaux preparatoires of the UNCLOS III, Charney argued that the habitation referred to in the article does not need to be of a permanent nature, and economic activity does not need to be capable of sustaining a human being throughout the year. [\[53\]](#) .In addition, the economic activity referred to in Article 121 (3) can also include industry or exploitation of the living or mineral resources found in the territorial sea of the island or rock in question.

[\[54\]](#)

Moreover, Charney was of the opinion that this economic activity can be a future condition, based on future technological advances. Profits from ocean minerals could support the equipment and staff necessary to extract the resource and to import energy, food and water for a long period of time. Under these circumstances, can a rock claim an EEZ or a continental shelf according to Article 121(3) of UNCLOS?

[\[55\]](#)

Charney suggested that a feature would not be subject to Article 121(3) if it were found to have mineral resources, such as oil or gas, or other resources of value such as newly harvestable fishery species, or even a location for a profitable business (such as casino), whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources. Given the compatibility of the French, English, Spanish and Arabic texts of Article 121(3) as well as the ambiguity of the Russian text and the clarity of the Chinese text, Charney held that Article 121(3) of UNCLOS should be interpreted as permitting the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities. [\[56\]](#) Charney concluded that changes in circumstances may help those features (reefs or rocks) that are subject to the application of Article 121 (3) to obtain the legal status of island and the right to claim EEZs and continental shelves.

[\[57\]](#)

Barbara Kwiatkowska and Alfred H.A. Soons observed that an increasing number of ocean law and policy commentators held the view that a lighthouse or other aid to navigation built on an island gives the island an “economic life of its own” due to its value to shipping. [\[58\]](#) When discussing the issue of when a rock is uninhabitable, E.D. Brown suggests.

The absence of sweet water might provide such a test; but what if supplies reach the rock from the mainland or a desalination plant is installed? . . . [m]ust the rock be able to produce the minimum necessities of life independent of outside supplies before it can be regarded as habitable? Would the presence of a lighthouse keeper, supplied from without, provide evidence of habitability? [\[59\]](#)

Accordingly, Brown commented that “. . . Article 121(3) in its present form appears to be a perfect recipe for confusion and conflict.”. [\[60\]](#)

Barry Hart Dubner cites the following activities in support of the argument that rocks may have an economic life of their own and therefore in accordance with Article 121(3) can generate EEZs and continental shelves: using military forces; occupying and fortifying the rocks where possible; creating structures and markers; creating scientific research stations of sorts; enacting statutes; incorporating the rocks into nearby provinces; publicizing maps showing their respective claims and releasing “historical documents” to back up the territorial claims; allowing tourists and journalists to visit the rocks; granting concessions to oil companies; arresting fishermen; and creating a “tourist resort” complete with hotel and airstrip. [\[61\]](#)

Alex G. Gude Elferink, a senior research associate at the Netherlands Institute of the Law of the Sea, indicates that only islands of a very small size qualify as a rock under Article 121(3) of UNCLOS. While some small island may qualify as such a rock because of their size, they may still be able to sustain human habitation or economic life of their own. In addition, the available arguments indicate that the threshold that has to be met with regard to sustaining human habitation or having economic life of their own is “rather low and almost certainly is lower than the most far-reaching requirement, a stable community.” Accordingly, it is not necessary to meet both the requirements of human habitation and economic life at the same time, which indicates that “even if the former criterion is only met by the presence of a stable community, economic life of a rock without a stable community would result in it having an EEZ and continental shelf.”

[62]

Roger O’Keefe argues that the loose drafting of the regime of islands in UNCLOS may confound the aspirations of many NIEO-inspired delegates at UNCLOS III, because the compromise text of Article 121 allows the appropriation by individual countries of vast swathes of the “common heritage of mankind.” By citing the writings of several international legal scholars, O’Keefe indicates that

[u]nless an unwritten requirement of “natural capacity” were to be imported, Article 121(3) seems to countenance the grant of maritime zones to almost any skerrick of land that is still high and dry when the tides is in. If a country is willing to spend enough money, most islands and even some rocks would be able to support at least token habitation in today’s high-tech world.” [63]

Jonathan L. Hafetz argues that marine conservation can constitute an economic use within the meaning of Article 121(3) because it can bring net economic benefits and sustainable development through devices such as the establishment of marine and coastal protected areas (MACPAs or MPAs). He gives the following example in support of the argument:

... a State that establishes a marine park or protected area around a pristine coral reef should not be penalized by being forced to forego the expansion of its maritime jurisdiction that it would likely have gained from pursuing a more traditional form of economic development. Instead such States should be given an incentive to preserve the marine environment where such preservation is also economically beneficial and thus consistent with the “economic life” criterion of Article 121(3) . [64]

Hafetz is of the opinion that a proposal to establish a marine preserve around a small island can represent an economically beneficial use of the natural resource. The measures taken by the states, which own the small islands, to protect their surrounding marine environment can yield economic benefits in various forms, including increased fishing stocks, tourist spending, products from coral reefs, and health benefits from reduced pollution. Hafetz indicates that such measures can and should satisfy the “economic life of their own” requirement of Article 121(3), therefore enabling a “rock” to achieve the formal legal status of an “island,” and thereby potentially extending a coastal state’s continental shelf and EEZ rights. In addition, Hafetz holds that his interpretation of Article 121(3) is consistent with the text of UNCLOS, the objectives and aims of the Convention, subsequent developments in international law, and the public policy of preserving the marine environment where it is economically beneficial to do so. [65]

SELECTED EXAMPLES OF STATES PRACTICES

The most often cited disputes arising from the legal status of an island and its right to claim a 200-nautical-mile EEZ or a continental shelf is the dispute between the United Kingdom and its neighboring countries over the legal status of Rockall, which is situated in the North Atlantic Ocean, 160 kilometres from the north-west coast of Scotland and is claimed as English territory. In 1976 the United Kingdom passed the Fisheries Limits Act, drawing a 200-nautical-mile maritime zone extending from its baseline as its exclusive fishing zone. Subsequently, the United Kingdom’s maritime maps showed a 200-nautical-mile maritime zone surrounding Rockall, [66] which led to objections being raised by Ireland, Iceland and Denmark. Ireland considered the United Kingdom’s actions to be in violation of Article 121(3) of UNCLOS, which stated that rocks without human habitation or economic life of their own were not entitled to an EEZ or a continental shelf. [67] In 1997, the United Kingdom gave up its claim to a 200-nautical mile EEZ for Rockall when it acceded to UNCLOS.

[68]

French claims of a 200-nautical-mile EEZ for Clipperton Island in the Eastern Pacific Ocean and the application and interpretation of Article 121 (3) UNCLOS are also closely related to the issues studied in this paper. Clipperton Island was named after the English pirate John Clipperton when he escaped to the island to hide. In 1858, France claimed the island. In 1897, Mexico occupied and claimed the island. Subsequently the two countries submitted the dispute to an arbitrator who ruled in favor to France in 1931. [69] In 1979 France proclaimed 200-nautical-mile EEZs around all its islands, including Clipperton Island. This island is an uninhabited coral atoll situated 1,120 kilometers from Mexico and has an area of 6 square kilometers. The only economic activity is tuna fishing in its adjacent waters.

[70]

In 2009, France submitted the preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles of France's Clipperton to the Secretary-General of the United Nations, in which a map shows not only a 200-nautical-mile EEZ surrounding Clipperton, but also two areas of outer continental shelf.

[\[71\]](#)

Another potential dispute can be found in Brazil's claim of an EEZ and a continental shelf for Saint Peter and Paul Rocks, which are made up of 12 small volcanic rocks situated in the South Atlantic Ocean, about 950 kilometers north east of Natal in Pernambuco State, Brazil. The tallest is Southwest Rock, 22.5 meters above the water. Saint Peter and Paul Rocks are distributed in an area at sea that is over 350 meters from north to south, and 200 meters from east to west, with a total size of approximately 10,000 square meters. [\[72\]](#) A lighthouse was built on Northwest Rock in 1930, with a height of six meters. Twenty meters to the south of the lighthouse is a simple shelter for army personnel and researchers. Could these rocks generate an EEZ or a continental shelf according to Article 121 of UNCLOS?

On May 17, 2004, Brazil made a submission through the UN Secretary-General to CLCS in accordance with Article 76, paragraph 8 of UNCLOS, regarding the proposed outer limits of Brazil's continental shelf and its claim of a continental shelf for the Saint Peter and Paul Rocks.

[\[73\]](#)

There are three figures contained in Brazil's Executive Summary of the submission, which show a 200-nautical-mile EEZ and the outer limit of continental shelf surrounding Saint Peter and Paul archipelago.

[\[74\]](#)

No third party notifications had ever been sent to the Secretariat of the United Nations in response to or challenge Brazil's claim for a 200-nautical-mile EEZ and continental shelf for Saint Peter and Paul Rocks in accordance with Article 121(3) of UNCLOS. On August 25, 2004, the United States sent a notification regarding Brazil's submission, which highlighted the issues of sediment thickness and the Vitoria-Trindade feature. The United States asked CLCS to examine Brazil's sediment thickness data carefully and to take a cautious approach with regard to Vitoria-Trindade Feature. There was no mentioning at all about the legal status of Saint Peter and Paul Rocks..

[\[75\]](#)

In April 2007, CLCS adopted the "Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Brazil on 17 May 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles" by a vote of 15 to 2, with no abstentions.

[\[76\]](#)

Australia claims a 200-nautical-mile EEZ for Heard Island and the McDonald Islands, which

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are a volcanic group of barren Antarctic islands located in the Southern Ocean, about two-thirds of the way from Madagascar to Antarctica. There is no permanent human habitation and no indigenous economic activity on these islands. But the Australian government allows limited fishing in the surrounding waters. [77] On 15 November 2004, Australia made a submission to CLCS, which contained the information on the proposed outer limits of the continental shelf of Australia beyond 200-nautical-miles from the baselines from which the breadth of the territorial sea is measured. The claim included the areas of Australia's continental shelf beyond 200-nautical-mile in the Kerguelen Plateau Region, which extended seaward from the baselines of Heard Island and McDonald Islands. [78]

In April 2008, CLCS adopted its recommendations that confirmed the location of the outer limit of Australia's continental shelf in nine distinct marine regions and Australia's entitlement to large areas of shelf beyond 200 nautical miles. [79] Communications were sent to the Secretary-General of the United Nations by eight countries,

[80]

asking CLCS not to take any action with regard to the part of Australia's submission that related to the continental shelf appurtenant to Antarctica in the area covered by the Antarctic Treaty of 1959.

[81]

But no third party notifications had ever been sent by any countries to challenge Australia's claim to a 200-nautical-mile EEZ and continental shelf for the islands that have no permanent human habitation or economic life of their own, such as Heard Island and the McDonald Islands, in accordance with Article 121(3). However, it is worth noting that in the "Volga" case (Russian Federation v. Australia), Judge Budislav Vukas of the International Tribunal for the Law of the Sea dissociated himself from all statements or conclusions in the judgment of the case which are based on Australia's claim to a 200-nautical-mile EEZ around Heard Island and the McDonald Islands.

[82]

Judge Vukas was of the opinion that Heard Island and the McDonald Islands have no right to generate a 200-nautical-mile EEZ in accordance with Article 121(3) of UNCLOS. In his final remarks in the declaration, Judge Vukas wrote:

. . . the establishment of exclusive economic zones around rocks and other small islands serves no useful purpose and that it is contrary to international law.

It is interesting to note that Ambassador Arvid Pardo – the main architect of the contemporary law of the sea – warned the international community of the danger of such a development back in 1971. In the United Nations Seabed Committee he stated:

If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired. [\[83\]](#)

The annexed map showing Australia's exclusive economic zone around Heard Island and the McDonald Islands . . . confirms that Ambassador Pardo's fear has been borne out. [\[84\]](#)

In November 2008, Japan made a submission to the CLCS, which contains the information on the proposed outer limits of the continental shelf of Japan beyond 200-nautical-miles from the baselines from which the breadth of the territorial sea is measured in seven distinct areas. [\[85\]](#) Japan's claim in the Southern Kyushu-Palau Region extends southwards from the insular feature Okinotorishima, which consists of "two eroding protrusions no larger than king-size beds"

[\[86\]](#)

and clearly have no permanent human habitation or economic life of their own.

[\[87\]](#)

As noted earlier, the Japanese claim was challenged in the third party notifications sent to the Secretary-General of the United Nations by China and the Republic of Korea in February 2009 respectively. By citing Article 121(3) of UNCLOS, China and the Republic of Korea argued that Okinotorishima is not entitled to any continental shelf extending to or beyond 200 nautical miles from the baselines because it is a rock.

[\[88\]](#)

The last selected example of state practices is concerned about the legal status of Snake Island (or Serpents Island) that is situated in the north-western part of the Black Sea, approximately 20 nautical miles to the east of the Danube delta. The island is above water at high tide, has a surface area of approximately 0.17 square kilometers, and belongs to Ukraine.

[\[89\]](#)

The status of Snake Island was important for delimitation of

[continental shelf](#)

and

[exclusive economic zones](#)

between Ukraine and Romania. If Snake Island were recognized as an island, but not a rock, Article 121, paragraph 2 of UNCLOS should be applied, which would give Ukraine the right to claim a 200-nautical-mile EEZ and a continental shelf around Snake Island. On the other hand, if Snake Island were not an island, but a rock, then in accordance with Article 121, paragraphs 2 and 3 of the UNCLOS, it does not have the right to draw a 200-nautical-mile EEZ and a continental shelf, but only a 12-nautical-mile territorial sea.

On December 10, 1982, when signing the UNCLOS, Romania made a declaration, the relevant part of which reads as follows:

Romania states that according to the requirement of equity – as it results from articles 74 and 83 of the Convention on the Law of the Sea – the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces to the mainland coasts of the coastal States. [\[90\]](#)

The declaration was confirmed upon Romania's ratification of the Convention on December 17, 1996. [\[91\]](#) On [16 September 2004](#) the Romanian side brought a case against Ukraine to the [International Court of Justice](#) in the dispute concerning the maritime boundary between the two States in the Black Sea. [\[92\]](#)

During the proceedings, the two parties disagreed as to the status of Snake Island and its role played in the delimitation of the continental shelf and EEZs in the Black Sea. Romania claimed that Snake Island is a rock incapable of sustaining human habitation or economic life of its own, and therefore should have no EEZ or continental shelf, as provided in Article (3) of the UNCLOS. According to Romania, Snake Island should be treated as a "rock" because: "it is a rocky formation in the geomorphologic sense; it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna." [\[93\]](#) Romania claimed that "human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities."

[\[94\]](#)

Romania added that "[t]he presence of some individuals, . . . because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained 'human habitation'".

[\[95\]](#)

Ukraine claimed that Snake Island is indisputably an "island" under Article 121, paragraph 2, of UNCLOS, rather than a "rock". Ukraine contended that the evidence shows that Snake Island can readily sustain human habitation and that it is well established that it can have an economic life of its own. It was added that Snake Island has vegetation and a sufficient supply of fresh water, and that Snake Island "is an island with appropriate buildings and accommodation for an active population." [\[96\]](#) Ukraine also argued that Article 121(3) is not relevant to the delimitation of EEZ and continental shelf between Romania and Ukraine because this paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision "that has no practical application with respect to a maritime area that is, in any event, within the 200-mile limit of the exclusive economic zone and continental shelf of a mainland coast."

[\[97\]](#)

On February 3, 2009, the court delivered its judgment, which divided the sea area of the Black Sea along a line which was between the claims of each country. [\[98\]](#) Disappointedly, the court did not consider the need to consider the issues concerning whether or not Snake Island is an island or a rock, and should paragraph 2, or paragraph 3 of Article 121 of UNCLOS should be applied. [\[99\]](#)

THE APPLICATION AND INTERPRETATION OF ARTICLE 121(3) TO THE FIVE DISPUTED ISLANDS IN THE SOUTH CHINA SEA

Jonathan I. Charney considered the following existing disputes over ownership of islands in East Asia have the potential to give rise to the legal problem concerning the status of an island and its right to claim a 200-nautical-mile EEZ or a continental shelf, and therefore the possible application of Article 121 of UNCLOS and its interpretation: the Pratas Islands, the Paracel Islands, Scarborough Shoal and the Spratly Islands in the SCS, the Diao-yu-tai/Senkaku Islands, Danjo Gunto and certain of the Ryukyu Islands in the ECS, and the Dokdo/Takeshima (Liancourt Rocks) Islands in the Sea of Japan/East Sea. [\[100\]](#) In addition, there are other disputed offshore small islands or rocks in East Asia that have the same potential to give rise to the questions concerning the application and interpretation of Article 121(3) of UNCLOS such as Suyan (Socotra Rock), Bach Long Vi Island, and Pedra Branca/Batu Buteh. If any of these features are “rocks” that fail the tests of habitation and economic viability, they will not be entitled to their own 200-nautical-mile EEZ or continental shelf.

Commentators hold different views on the legal status of the said features. Michael Richardson, for example, suggests that of the Spratly Islands in the SCS, perhaps only Itu Aba (Taiping Dao) would meet the definition of being a natural island and therefore can claim a 200-nautical-mile EEZ or a continental shelf. [\[101\]](#) Pan Shiyong argued that Nanwei Dao (Spratly Island in English, and Dao Truong Sa in Vietnamese), one of the islands in the Spratly archipelago in the SCS, will pass the tests contained in Article 121, paragraph 3, of UNCLOS, and therefore can have its own 200-nautical-mile EEZ and a continental shelf.

[\[102\]](#)

By citing the discussion in the writings of Jon M. van Dyke and Dale L. Bennett,

[\[103\]](#)

and Jeanette Greenfield,

[\[104\]](#)

Monique Chemillier-Gendreau stated that “most authors have tended to conclude that these islands [the Paracel and Spratly Islands] might well have a territorial sea but that they do not

provide entitlement to an exclusive economic zone.”

[\[105\]](#)

Detailed information and further examination are needed to consider the legal status of these disputed offshore islands.

In this section, Yongxing Dao/Dao Phu Lam, Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island), Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef), Taiping Dao/Dao Ba Binh (Itu Aba, Taiping Island), and Nanwei Dao/Dao Troung Sa (Spratly Island), are selected for further discussion on the question concerning whether or not they can have their own 200-nautical-mile EEZ or a continental shelf. The positions held by the countries concerned on the status of the disputed offshore islands are also addressed.

Before proceeding to the analysis, it is important to take note of the following two points: (1) even if the selected disputed offshore islands can be considered as having passed the tests contained in Article 121(3) with regard to sustaining human habitation or having economic life of their own, and therefore can generate 200-nautical-mile EEZs and continental shelves, it would not necessarily for these islands to have a full effect on the maritime boundary delimitation between the countries concerned in the Sea of Japan, the ECS, the SCS, or in the Strait of Singapore; (2) as pointed out by Ian Townsend-Gault, a logical approach to maritime boundary delimitation in the SCS would be to ascertain the 200-nautical-mile limit from the continental land mass or archipelagic baselines of the littoral states, and then ask what impact, if any, the islands in the SCS have on such claims. [\[106\]](#) However, it is very difficult to start the process of maritime boundary delimitation before the sovereignty issues are resolved.

Yongxing Dao/Dao Phu Lam (Woody Island) [\[107\]](#)

Woody Island is the largest in the Paracel archipelago in the SCS. It has been occupied by China since 1974, but also claimed by Vietnam and Taiwan. Its size is 2.1 square kilometers, with an artificial harbor, an airfield with a 2,350 meter runway, a bank, post office, small hospital, library, county-level administrative office, and a small number of governmental officials and residents (less than 1,000, but most of them are fishermen). There is a 2,500 tons supply ship (Qiong Sha 3) that sails from Wenchang Harbor of Hainan Province to Woody Island twice a month with supplies such as drinking water, vegetable, fruit, meat, generator, toilet paper, etc., and about 300 visitors per trip. The distance between Wenchang Harbor and Woody Island is approximately 180 nautical miles and takes about 15 hours one way.

China issued a declaration on May 15, 1996, declaring straight baselines along parts of its coast, which contains two sets of straight baseline systems. One set of the system encompasses the Paracel Islands, in the northern part of the SCS, with 28 basepoints. [\[108\]](#)

The archipelagic straight baselines established around the Paracel Islands has been challenged as an violation of UNCLOS, which provides that only archipelagic states are entitled the right to establish such baselines. [\[109\]](#) The United States contends that regardless of whose sovereignty the Paracel Islands comes under, straight baselines cannot be drawn in this area. [\[110\]](#)

If the straight baselines cannot be established in the Paracel Islands, certainly China can employ the method of normal baselines for the purpose of measuring the breadth of the territorial sea for Woody Islands. Based on the aforementioned information about the island, it appears that Woody Island can pass the tests contained in Article 121(3) of UNCLOS and therefore can have its 200-nautical-mile EEZ and a continental shelf.

Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island) [\[111\]](#)

Thitu Island, or Pagasa, or Zongye Dao in Chinese, and Dao Thi Tu in Vietnamese, is the second largest island, after Taipin Dao (Itu Aba), in the Spratly archipelago and is one of the nine islands occupied by the Philippines in the SCS. Its size is approximately 0.33 square kilometers and located about 480 kilometers west of Palawan. It has a 1.4 kilometers unconcretized airstrip (named Rancudo Airstrip) which serves both military and commercial air transportation needs. The Philippine Air Force regularly sends fighter jets from Palawan to make reconnaissance missions in Philippine-controlled regions in the Spratly archipelago. The presence of the airstrip in Thitu Island makes such reconnaissance missions easier. There is also a port, called Loneliness Bay. Around 30-50 Filipino soldiers are stationed on the island, together with about 300 civilian people at its height, and nowadays about 55. The Philippine navy vessel sails to Thitu Island once a month to supply the island's daily needs. The island has 20 houses, a community center, a clinic, an eight floor watch tower, desalination plant, several electricity generators, weather station, and mobile launch tower. [\[112\]](#)

The island is claimed by China, Vietnam, Taiwan, and the Philippines. In response to the visit of Taiwan's President Chen Shui Bian to the disputed Taipin Dao (Itu Aba) in the Spratly Islands by C-130 cargo plane in February 2008, the Philippines began to renovate Pagasa airstrip in March 2008, [\[113\]](#) which was followed by the visit of Philippine Air Force Chief Lt Gen Pedrito S Cadungog in May 2008. [\[114\]](#) He and his staff conducted an ocular inspection of the repair and sustained improvements of the Rancudo Airstrip and other minor facilities on the island. In addition, it was reported that the Philippines intended to develop Thitu

Island into a tourist destination.

[\[115\]](#)

Based on the aforementioned information, it appears that Thitu Island can sustain human habitation and an economic life of its own and therefore pass the tests contained in Article 121(3) of UNCLOS. Accordingly whichever country establishes sovereignty over the island can use it as a base point from which a 200-nautical-mile EEZ and a continental shelf are claimed.

Taiping Dao/Dao Ba Binh/Ligaw Island (Itu Aba, Taiping Island) [\[116\]](#)

Itu Aba (Taiping Dao in China, Dao Ba Binh in Vietnam, and Ligaw in the Philippines) is the largest of the Spratly Islands in the SCS, with a total land area of 0.49 square kilometer. Itu Aba, disputed by China, Taiwan, Vietnam, and the Philippines, is controlled by Taiwan. Administratively it is under the jurisdiction of Kaohsiung City. The distance from Taiwan to the island is about 1,600 kilometers. There is a 1,150 meters long runway completed late 2007. In February 2008, Taiwan's former president landed the island by air force C-130 cargo plane to inaugurate the beginning use of the airstrip. At present, more than 200 coastal guard personnel and a number of soldiers from Taiwan's Navy and Air Force are stationed on the island. Taiwan's Navy and Coastal Guard send vessels regularly to the islands three to four times a year. Cargo vessels of private shipping companies also sail to Itu Aba once or two times a month to supply the island's daily needs. In 2007, the City Government of Kaohsiung, in accordance with Article 45 of Taiwan's Fisheries Law, promulgated the establishment of a sea turtle protected area in Itu Aba. In March 2008, it was proposed by the then presidential candidate May Ying-jeou in his ocean policy to establish a marine peace park in Itu Aba.

Itu Aba is the largest and the only island in the Spratly archipelago with fresh water, and has the capacity to sustain human habitation and economic life of its own. Accordingly, it can be established that it is an Article 121(2) island and thus can generate a 200-nautical-mile EEZ and a continental shelf.

Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef) [\[117\]](#)

Swallow Reef, known as Layang-Layang Island in Malaysia, Danwan Jiao in China, Celerio in the Philippines, and Da Hoa Lau in Vietnam, is an oceanic atoll of the Spratly Islands situated in the middle of the SCS, approximately 300 kilometers northwest of Kora Kinabalu, Sabah. It

takes one hour flight from Kota Kinabalu. The total land area of Swallow Reef is approximately 0.1 square kilometer. In 1992, Malaysia began to develop the island into a scuba diving resort. At present, the island is divided into two sections – one is used by the Malaysian navy, and the other is a scuba dive resort. There is a navy base and a 1,000 meters runway on Swallow Reef.

The Layang Layang Island resort complex is made up of 6 blocks of tropical hardwood timber structure housing 86 well furnished guest rooms. All guest rooms are equipped with remote controlled air-conditioner, telephone, television with in-house videos & programmes from regional satellite broadcast, private hot/cold shower and toilet, 2 queen-sized beds and a private balcony. The reception block houses a lounge bar, reception counter, 150 seats restaurant and a fresh water swimming pool. International telephone & fax services are available. As all guests are on full board basis, meals are presented daily in either buffet setting or set menus with a main focus on Asian cuisine intersperse with international favourites. The island scuba diving resort can also cater to seminars, meetings, conferences and incentive group functions. There are adequate conference and banqueting facilities, with the ability to host up to 200 persons.. [\[118\]](#)

The island, claimed by China, Vietnam, Taiwan, and Malaysia, is under Malaysia's control. The Malaysian soldiers are stationed on the island and a number of civilian people, including diving masters and assistants from foreign countries, who are employed to help run the scuba diving resort from March to September, which are considered the most suitable season for scuba diving activities there. Marius Gjetnes argued that Swallow Reef lacks capacity to sustain human habitation or economic life of its own, and therefore must be classified as an Article 121(3) rock. [\[119\]](#) However, based on the selected interpretations that were provided in Section III of this paper, it seems that the scuba diving resort and the people working on the island can be used as proof of a sustainable human habitation and economic life of its own. Accordingly, it can be argued that Swallow Reef can have an EEZ and a continental shelf.

Nanwei Dao/Dao Troung Sa/Lagos (Spratly Island) [\[120\]](#)

Spratly Island (proper), or Nanwei Dao in China, Dao Troung Sa in Vietnam, and Lagos in the Philippines, is one of the islands in the Spratly archipelago situated southwest of the SCS. It is the fourth largest Spratly islands and the largest among Vietnamese occupied Spratly islands. Its land size is approximately 0.15 square kilometer and has a 600 meter runway, radio launch tower, heliport, two wharves, and about 550 soldiers and civilian people. The island is claimed by China, Taiwan, Vietnam and the Philippines. In 2004, a tourist trip was arranged by the Vietnamese government to visit the Vietnamese-occupied Spratly islands, including Nanwei Dao. It was reported that Vietnam has a plan to develop the island into a tourist site. [\[121\]](#)

Based on the available data, it can be argued that Nanwei Dao can pass the tests contained in Article 121(3) and thus can generate a 200-nautical-mile EEZ and a continental shelf in accordance with Article 121(2) of UNCLOS.

Findings and suggestions

In order to answer as close as possible the question concerning whether or not the five disputed offshore features in the South China Sea are entitled to a 200-nautical-mile EEZ and a continental shelf under international law, relevant data has been collected and examined in accordance with the requirements provided for in Article 121, paragraph 3, of UNCLOS and other factors such as size, contiguity to the principal territory, and geological formation. As shown in Table 1, while the size of Yongxing Dao/Dao Phu Lam (the largest in the Paracel Islands), Taiping Dao/Dao Ba Binh/Itu Aba (the largest in the Spratly Islands), Zhongye Dao/Dao Thi tu/Pagasa/Thitu Island, and Nanwei Dao/Dao Troung Sa (Spratly Island) is smaller than 1 square kilometer, they all have airstrips, soldiers, some with civilian residents, post office, clinic, bank, library, or community center, and the potential to be developed into marine economic tourist sites, and thus do not appear fall with Article 121(3). As far as Swallow Reef is concerned, while its size is less than 1 square kilometer, and the scuba diving resort on the island was developed as an a result of artificial construction works done by Malaysia since 1992, it seems that it could have its own 200-nautical-mile EEZ and a continental shelf because of the capability to sustain human habitation and economic life of its own.

CONCLUDING REMARKS

At UNCLOS III, a number of states proposed or gave their support for the entire deletion of Article 121, paragraph 3, of the draft law of the sea convention, that include Japan, Brazil, and France. The main reason for submitting the proposal or giving the support was the concern about the possible maritime space extended from their small uninhabitable offshore islands. As stated by ITLOS Judge Choon-ho Park, because of the geographical circumstances of islands throughout the world are different, ambiguities had to be allowed, in particular, in Article 121(3) of UNCLOS. [\[122\]](#) Brazil, France, and Japan ratified UNCLOS on December 22, 1988, April 11, 1996, and June 20, 1996 respectively, and bear the treaty obligation to abide by all of the provisions of the convention, including Article 121(3). However, mainly because the article lacks precision and there exists no official or authoritative clarification of the article, state practices are not consistent. The submissions made to the Commission on the Limits of the Continental Shelf (CLCS) by Japan, Brazil, Australia, and France, and the recommendations adopted by the

Commission to confirm the outer limit of the continental shelves of the states concerned have made it become more confusing with regard to the application and interpretation of Article 121(3). The decision made by the International Court of Justice in Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) in February 2009 not to consider the issue regarding whether or not Snake Island is an island or a rock also has left “some stones unturned”, borrowing the words of Judge Choon-ho Park. [\[123\]](#)

If Japan, Brazil, and France, are able to claim a 200-nautical-mile EEZ and a continental shelf for the Okinotorishima, Sanit Peter and Paul Rocks, and Clipperton Island, respectively, it is difficulty to prevent other countries from not making similar claims. Judging from the recent developments in the Sea of Okhotsk, the Sea of Japan/East Sea, the ECS, the SCS, and the Strait of Singapore, it can be expected to see an increase of maritime disputes in the South China Sea and East Asian seas. Most, if not all, of these disputes will involve the application and interpretation of Article 121(3) of UNCLOS. The sovereignty issues will make it become more complex and difficult to manage the disputes. In particular, China’s EEZ and continental shelf claim in the East China Sea and South China Sea will have great potential to influence maritime international relations in East Asia.

Since there exists no official or authoritative clarification with regard to the application and interpretation of Article 121, paragraph 3, of UCNLSO, and there are no institutional apparatus established for reviewing, monitoring, and supervising how well state parties observe their duties under the Convention, coastal states are exercising extensive powers to claim larger sea areas by applying or interpreting Article 121(3) in accordance with their national maritime interests. While there does exist the regular Meeting of the State Parties to the Law of the Sea Convention (SPLOS), it is geared toward administrative and financial matters. In addition, there is also an annual review of ocean issues and the law of the sea by the UN General Assembly, which relies on the report prepared by the Secretary-General of the United Nations as well as the recommendations of the Open-Ended Informal Consultative Process of Oceans and Law of the Sea. The General Assembly’s annual review occasionally pays attention to national ocean policies and developments related to UNCLOS, but it does not perform the multitude of tasks carried out by the compliance bodies that are established to assist states to meet the letter and spirit of the Convention’s wording. [\[124\]](#) Accordingly, Timo Koivurova suggested that “[i]f UNCLOS had provided an institutional apparatus similar to that of modern conventions, national ocean policies and laws probably would have developed more uniformly and have been more closely related to the wording and expectations of the UNCLOS”.

[\[125\]](#)

It is hoped that this paper has successfully demonstrated the need to develop an agreeable objective test so as to remove all doubt as to which rocks would be affected by Article 121(3). In addition, before Article 121 is amended, the states in the South China Sea area might want to

consider the possibility of establishing a special regional organ, such as an institutional ocean space institutions that were proposed by Malta in 1971, [\[126\]](#) or conclude a regional agreement, such as a Regional Code of Conduct in the SCS that is being discussed between China and the members of ASEAN, in which the application and interpretation of Article 121(3) is clarified. The coastal states in the region are also encouraged to deal with their maritime disputes by adopting the concept of “common heritage of mankind” or by taking policy measures to preserve the marine environment through devices like the establishment of marine protected areas or marine peace park. Last but not least, as suggested by Judge Choon-ho Park 18 years ago, the coastal states neighboring the South China Sea can also learn from the Canadian and American wisdom in dealing with their disputes over the ownership of Machias Seal Island that is situated about 10 miles off the northeast coast of Maine, U.S.A.

[\[127\]](#)

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Yann-huei Song received his undergraduate degree from National Chengchi University, Taipei, Taiwan, a Master's degree in Political Science from Indiana State University, Indiana, USA, a LL.M. degree from the University of California School of Law (Boalt Hall), Berkeley, California, USA, a doctoral degree in International Relations from Kent State University, Kent, Ohio, USA, and a JSD degree from the University of California School of Law. Following graduation from Kent State University, Dr. Song taught at Department of Political Science, Indiana State University as Assistant Professor in 1988. He then returned to his country and

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Asian Survey

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Marine Policy

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Chinese Yearbook of International Law and Affairs

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Issues and Studies, The American Asian Review

,
Ocean Development and International Law

,
EurAmerica

,
Ecology Law Review, the International Journal of Coastal and Marine Law, The Indonesian Quarterly
and others.

[1] For information about the island, visit *Wikipedia*, the free encyclopedia at:
<http://en.wikipedia.org/wiki/Yongxing>

[2] For information about the island, visit *Wikipedia*, the free encyclopedia at:
http://en.wikipedia.org/wiki/thitu_Island

[3] For information about the island, visit *Wikipedia*, the free encyclopedia at:
http://en.wikipedia.org/wiki/ltu_Aba_Island

[4] For information about the island, visit *Wikipedia*, the free encyclopedia at:

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http://en.wikipedia.org/wiki/Swallow_Reef

[5] For information about the island, visit *Wikipedia*, the free encyclopedia at:
[http://en.wikipedia.org/wiki/Spratly_Island_\(proper\)](http://en.wikipedia.org/wiki/Spratly_Island_(proper))

[6] The convention, adopted April 30, 1982, opened for signature December 10, 1982, and entered into force on November 16, 1994. As of November 4, 2009, the convention had 159 parties. For a historical perspective of the convention, visit the web site of the United Nations at:

http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective. For chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, visit
http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm For the text of the convention with annexed and the agreement to implement Part XI of the convention, visit http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

[7] The Third United Nations Conference on the Law of the Sea was held between 1973 and 1982 with 11 sessions in total that took place in New York, Caracas, Geneva, and Montego Bay. The first session of UNCLOS III was held in New York, 3-15 December 1973, which was devoted to procedural matters such as the election of officers and the adoption of the rules of procedure. The second session was held in Caracas, 20 June – 29 August 1974; the third session in Geneva, 17 March – 9 May 1975; the fourth session in New York, 15 March – 7 May 1976; the fifth session in New York, 2 August – 17 September 1976; the seventh session in Geneva, 28 March – 19 May 1978 and resumed seventh session in New York, 21 August – 15 September 1978; the eighth session in Geneva, 19 March – 27 April 1979; and resumed eighth session in New York in New York, 19 July – 24 August 1979; the ninth session in New York, 3 March – 4 April 1980; and resumed ninth session in Geneva, 28 July – 29 August 1980; the tenth session in New York, 9 March – 16 April 1981 and resumed tenth session in Geneva, 3-28 August 1981; the eleventh session in New York, 8 March – 30 April 1982; resumed session in New York, 22 and 24 September 1982; and final session in Montego Bay, Jamaica, 6-10 December 1982. For more information about UNCLOS III, visit the web site of the United Nations at:

<http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>

[8] For details about these statements, suggestions, or proposals, see *The Law of the Sea, Regime of Islands, Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* a
, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1988, pp. 6-21.

[9] Paragraph 23, *ibid.*, p. 21.

[10] Supranote 7.

[11] For details about the statements, suggestions, or proposals presented during the second session (20 June – 29 August 1974), see *The Law of the Sea, Regime of Islands, Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, (new York: United Nations Publication, 1988), Sales No. E.87.V.II., pp. 23-81.

[12] Document A/CONF.62/WP.10/Add.1, see *Official Records of the Third United Nations Convention on the Law of the Sea*, Vol. VIII
(United Nations Publication, Sales No. E.78. v.4).

[13] The article reads:

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 the present Convention applicable to other land territories.

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

[14] *Supra note 8*, p. 89 and p. 105.

[15] . *Supra note 8*, p. 90 and p. 105.

[16] *Supra note 8*, p. 91 and p. 95.

[17] *Supra note 8*, p. 97 and p. 103.

[18] *Supra note 8*, p. 105.

[19] *Supra note 8*, p. 107.

[20] *Supra note 8*, p. 107.

[21] *Supra note 8*, p. 108.

[22] *Supra note 8*, p. 108.

[23] *Supra note 8*, p. 108.

[24] *Supra note 8*, p. 91.

[\[25\]](#) *Supra note 8*, p. 98.

[\[26\]](#) *Supra note 8*, p. 105.

[\[27\]](#) *Supra note 8*, p. 106.

[\[28\]](#) *Supra note 8*, p. 106.

[\[29\]](#) *Supra note 8*, p. 107.

[\[30\]](#) *Supra note 8*, p. 107.

[\[31\]](#) *Supra note 8*, p. 107.

[\[32\]](#) *Supra note 8*, p. 108.

[\[33\]](#) *Supra note 8*, p. 109.

[\[34\]](#) *Supra note 8*, p. 109.

[\[35\]](#) *Supra note 8*, p. 90.

[36] *Supra note 8*, p. 105.

[37] *Supra note 8*, p. 107.

[38] *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XVI (United Nations Publication, Sales No. E.84.V.2), summary records of meeting, plenary meeting, 171

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Meeting, Para. 4.

[39] *Ibid.*, summary records of meetings, plenary meetings, 170th meeting, para. 27.

[40] *Supra note 8*, p. 104.

[41] For the declarations made on signature by Iran, see Declarations and Statements, UNCLOS, in the web site of Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea at:

http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran%20Upon%20signature (Accessed on August 1, 2009)

[42] R.R. Churchill and A.V. Lowe, *The Law of the Sea*, third edition (Manchester: Manchester University Press, 1999), p. 164.; Jonathan I. Charney, "Note and Comment: Rocks That Cannot Sustain Human Habitation," *American Journal of International Law*, Vol. 93, 1999, p. 872.

[43] Jonathan I. Charney, *ibid*, p. 872.

[44] Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), the International Court of Justice, 1993, Declaration of Judge Evensen, available at:

<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=8911a2102b58edce17272a12ca8ea521&case=78&code=gjm&p3=4>, p. 84 (Accessed on August 4, 2009)

1. A treaty shall be interpreted in good faith 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[45] The 1969 Vienna Convention on the Law of Treaties, done at Vienna on May 23, 1969, entered into force on January 27, 1980, United Nations, Treaty series, Vol. 1155, p. 331, available at:

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Article 31 of the Convention provides:

[46] See Jon M. Van Dyke and Robert A. Brooks, "Uninhabited Islands: their Impact on the Ownership of the Oceans' Resources," *Ocean Development and International Law*, Vol. 12, 1983, p. 286.

[47] Jon Van Dyke and Dale Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea," *Ocean Yearbook*, Vol. 10, 1993, p. 79.

[48] Ely stated that "If an island is too small or insignificant to have attracted its owner's national resources, in terms of population and investments, it is too small to serve as a baseline." Northcut Ely, "Seabed Boundaries Between Coastal States: The effect to be Given Islets as 'Special Circumstances,'" *6 Int'l Law* 219 (1972), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

[49] Ambassador Pardo argued that the "equity and reasonableness" that justify the allocation of ocean resources to a coastal state simply do not apply where "no population exists." Arvid Pardo, "An International Regime for the Deep Sea-Bed: Developing Law or Developing Anarchy?" *5 Tex. Int'l L.F.* 205 (1970), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

[50] Gibel tried to define "habitability" more precisely than others had by stating that to be an "island" a land formation had to have "natural conditions" that permitted "stable residence of organized groups of human beings." B. Gidel, *3 Le droit international public de la mer* 684 (1934), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46, p. 287.

[51] Hodgson stated specifically that he felt the word "rocks" in Article 121(3) should be

defined in terms of whether a land formation is habitable. Robert D. Hodgson, "Islands, Normal and Special Circumstances," in *Law of the Sea: The Emerging Regime of the Oceans*, edited by John King Gaimble and Pontecorve (1973) and Robert D. Hodgson and Robert W. Smith, "The Informal Single Negotiation Text (Committee II): A Geographical Perspective," *Ocean Development and International Law*, Vol. 3, 1976, p. 225, cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

[52] Charney, *supra* note 42, p. 868.

[53] *Ibid.*

[54] *Ibid.*, p. 869.

[55] *Ibid.*, p. 870.

[56] *Ibid.*, p. 871.

[57] *Ibid.*, p. 876.

[58] Barbara Kwiatkowska and Alfred H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human habitation or Economic Life of Their Own," *Netherlands Yearbook of International Law*, Vol. 21, 1999, pp. 167-168, cited in Robert Beckman and Clive Schofield, "Moving Beyond Disputes Over Islands Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait," *Ocean Development and International Law*, Vol. 40, 2009, p. 10.

[59] E.D. Brown, *The International Law of the Sea: Volume 1: Introductory Manual* (Aldershot, England and Vermont, USA: Dartmouth Publishing Company, 1994), p. 150.

[60] *Ibid.*, p. 151.

[61] Barry Hart Dubner, "The Spratly 'Rocks' Dispute – A 'Rockapelago' Defies Norms of International Law," *Temple International and Comparative Law Journal*, Fall 1995, pp. 304-305.

[62] 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," *Ocean Development and International Law*, Vol. 32, 2001, p. 174.

[63] Roger O'Keefe, "Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea," *International and Comparative Law Quarterly*, Vol. 45, April 1996, p. 412.

[64] Jonathan L. Hafetz, "Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention," *American University International Law Review*, 2000, pp. 626-627.

[65] *Ibid.*, p. 627.

[66] Clive Symmons, *The Maritime Zones of Islands In International Law* (The Hague: Martinus Nijhoff, 1979), p.261.

[67] *Ibid.*, p. 126.

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[68] Robin Churchill, "United Kingdom accession to the UN Convention on the Law of the Sea," *International Journal of Marine and Coastal Law*, Vol. 13, 1998, pp. 271-273.

[69] See Background on Clipperton Island, *The CIA World Fact Book*, available at: <http://www.cia.gov/cia/publications/factbook/geos/ip.html>

[70] *Ibid.*

[71] For the preliminary information, visit

http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/fra2009infos_preliminaires_clipperton.pdf

[72] See http://en.wikipedia.org/wiki/St_Paul's_Rocks

[73] For the Brazilian submission, visit the web site of the UN at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm

[74] For the figures, see Executive Summary of the submission by Brazil, 17 May 2004, pp. 6-8. For [Figure 1](#) – Chart of the outer limit of the Continental Shelf, visit the web site of the UN at: http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_outer_limit.pdf; for [Figure 2](#) – Chart of lines and limits, visit http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_lines_limits.pdf; for [Figure 3](#) – Map with the fixed points at a distance no greater than 60M from each other, visit http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/brafix_points.pdf (Accessed on August 5, 2009).

[75] United States of America: Notification regarding the submission made by Brazil to the

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Commission of the Limits of the Continental Shelf, CLCS.02.2004. LOS/USA, 9 September 2004, available at:

http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_los_usatext.pdf
(Accessed on August 5, 2009)

[76] See CLCS/54, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of work in the Commission – Nineteenth session, New York, 5 March – 13 April 2007, p. 6, para. 22.

[77] For information about the islands, visit *Wikipedia*, the free encyclopedia at: http://en.wikipedia.org/wiki/Heard_Island_and_McDonald_Islands (Accessed on August 4, 2009)

[78] See Executive Summary of the submission by Australia, November 15, 2004, p. 12, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm (Accessed on August 6, 2009)

[79] For summary of the recommendations of CLCS in regard to Australia's submission, visit http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf (Accessed on August 6, 2008)

[80] They are: the United States, Russian Federation, Japan, Democratic Republic of Timor-Leste, France, the Netherlands, Germany, and India.

[81] For the communications delivered by the eight countries in response to Australia's submission, visit: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm (Accessed on August 6, 2009)

[82] *The "Volga" Case (Russian Federation v. Australia)*, Prompt Release, Judgment, December 23, 2002, Declaration of Vice-President Vukas, ITLOS Reports 2002, available at: http://www.itlos.org/start2_en.html (Accessed on August 6, 2009)

[83] UN Sea-Bed Committee, Doc. A/AC.138/SR.57, p. 167.

[84] Declaration of Vice-President Vukas, *op cit.*, para. 10.

[85] They are: the Southern Kyushu-Palau Ridge Region, the Minami-Io To Island Region, the Minami-Tori Shima Island Region, the Mogi Seamount Region, the Ogasawara Plateau Region, the Southern Oki-Daito Ridge Region, and the Shikoku Basin Region.

[86] Jon Van Dyke, "Speck in the Ocean Meets Law of the Sea," Letter to the Editor, *The New York Times*, January 21, 1988, p. A26

[87] For Japan's submission to the CLCS, visit the UN website at: http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (Accessed on July 27, 2009).

[88] For China's and Korea's reaction to Japan's submission, see *supra* notes 26 and 27

[89] For more information, visit *Wikipedia*, the free encyclopedia at: [http://en.wikipedia.org/wiki/Snake_Island_\(Black_Sea\)](http://en.wikipedia.org/wiki/Snake_Island_(Black_Sea))

[90] For Romania's declaration, visit the web site of the United Nations at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (Accessed on August 7, 2009)

[91] *Ibid.*

[92] International Court of Justice, *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, February 3, 2009.

[93] Paragraph 180, *ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*, para. 184.

[97] *Ibid.*, paragraph 184.

[98] *Ibid.*, para. 219.

[99] *Ibid.*, para. 187.

[100] Jonathan I. Charney, *supra* note 42, p. 863.

[101] Michael Richardson, Energy & Geopolitics in the South China Sea: Implication for ASEAN & its Dialogue Partners, April 2009, Discussion Forum, **Institute of Southeast Asian Studies (ISEAS), Singapore**, available in: <http://www.iseas.edu.sg/aseanstudiescentre/ascdf2.htm> (Accessed on August 7, 2009)

[102] Pan Shiyong, *The Petropolitics of the Nansha Islands – China's Indisputable legal Case*

, Economic Information & Agency, July 1996, p. 162.

[103] Jon M. van dyke and Dale L. Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, March 13, 1989, mimeographed paper, p. 41.

[104] Jeanette Greenfield, *China's Practice in the Law of the Sea* (OxfordL clarendon Press, 1992), p. 164.

[105] Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (The Hague/London/Boston: Kluwer Law International, 2000), p. 25.

[106] Ian Townsend-Gault, "Preventive Diplomacy and Pro-Activity in the South China Sea," *Contemporary Southeast Asia*, Volume 20, Number 2, August 1998, p. 179.

[107] For the information about the island, visit *Wikipedia*, the free encyclopedia at: <http://en.wikipedia.org/wiki/Yongxing>

[108] Limits in the Seas, No. 117, July 9, 1996, China: *Straight Baseline Claims*, The Geographer, Office of the Geographer, Bureau of Intelligence and Research, available at: <http://www.law.fsu.edu/library/collection/LimitsinSeas/ls117.pdf> (Accessed on August 10, 2009)

[109] See Articles 46 and 47 of UNCLOS.

[110] *Op.cit.*, p. 8.

[111] For information about the island, visit *Wikipedia*, the free encyclopedia at:

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http://en.wikipedia.org/wiki/thitu_Island

[112] “The Philippines Plans aggressively to occupy Huangyen Dao,” *Xinhuanet*, March 3, 2009, available at: http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/world/2009-03/03/content_10933164.htm (in Chinese, assessed on July 26, 2009); see also John M. Glionna, “Squatters in paradise say it’s job from hell,” *Los Angeles Times*, July 26, 2009, available at: <http://www.latimes.com/news/nationworld/world/la-fg-paradise-prison26-2009jul26,0,3103335,full.story> (accessed on August 11, 2009)

[113] Teresa Cerojano, “Philippines to Fortify Airstrip, Troop Quarters in Spratlys,” *The Irrawaddt*, March 28, 2008, available at: http://www.irrawaddy.org/article.php?art_id=11154 (Assessed on August 11, 2009)

[114] PAF Press and Broadcast Release, Public Information Office, Headquarters Philippine Air Force, May 1, 2008, p. 30.

[115] “Spratly islands prepped to be Philippine tourist spot,” *eTurbonNews*, April 5, 2008, <http://www.eturbonews.com/2012/spratly-islands-prepped-be-philippine-tourist>

[116] For information about the island, visit *Wikipedia*, the free encyclopedia at: http://en.wikipedia.org/wiki/ltu_Aba_Island

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[118] For information about the resort, :Layang Layang Island: The Best Dives in Asia,” available at: <http://www.avillionlayanglayang.com/faq.html>

[119] Marius Gjetnes, *The Legal Regime of Islands in the South China Sea*, Masters Thesis of Law, Fall 2000, Department of Public and International Law, University of Oslo, p. 81.

[120] For the information about the island, visit *Wikipedia*, the free encyclopedia at: [http://en.wikipedia.org/wiki/Spratly_Island_\(proper\)](http://en.wikipedia.org/wiki/Spratly_Island_(proper))

[121] For more information, visit http://www.fyjs.cn/bba/htm_data-169/0712/118466.html

[122] See ITLOS Judge Choon-ho Park's paper entitled "The Changeable Legal Status of Islands and 'Non-Islands' in the Law of the Sea: Some Instances in the Asia-Pacific Region," was included and published in *Bringing New Law to Ocean Waters*, edited by David D. Caron and Harry N. Scheiber (Leiden, Netherlands: Martinus Nijhoff Publishers, 2004), Ch. 21, pp. 490-491.

[123] *Ibid.*

[124] Timo Koivurova, "A Note on the European Union's Integrated Maritime Policy," *Ocean Development and International Law*, Vol. 40, 2009, p. 172.

[125] *Ibid.*

[126] In 1971, a draft ocean space treaty was submitted by Malta, in which it was proposed to establish the International Ocean Space Institutions. The institutions may accept from any state the transfer to their administration of reefs, sandbanks, or islands less than 10,000 permanent inhabitants. Reefs, sandbanks, or islands transferred to the administration of the Institutions shall be used by the Institutions only for international community purposes, such as scientific stations, nature parks or preserves, etc. *The Law of the Sea: Regime of Islands*, *Supra note 8*, pp. 7-8, para. 14(c).

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[127] Judge Park wrote: “Both Canada and the United States claim the ownership of the famous bird sanctuary. Canada has run the lighthouse since 1832, and the United States traces its claims back to the time of the American Revolution. The American and Canadian bird-watching businesses share the trade by landing bird-watching tourists on the disputed island by turns and paying taxes to their respective governments. This is no settlement of the dispute. If the present generation is not wise enough to settle territorial disputes as Chinese leader Deng Xiao-ping wisely noted on the occasion of his visit to Tokyo in October 1978, we in East Asia can learn from the Canadian and American wisdom.” See Choon-ho Park, “Territorial Disputes Over Uninhabited Islands: The Case of South China Sea,” paper presented at the South China Sea Meeting held in Hong Kong, May 25-30, 1991, p. 6.